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September 15, 2011

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

Re: Narrative Statement by County of Santa Clara In Rebuttal to San Francisco Bay Regional Water Quality Control Board's and Department of Finance's Responses to Test Claim No. 10-TC-03 Municipal Regional Stormwater Permit – Santa Clara County

Dear Mr. Bohan:

This letter is respectfully submitted on behalf of the County of Santa Clara (Test Claim No. 10-TC-03) in rebuttal to the responses of the San Francisco Regional Water Quality Control Board and the California Department of Finance. Enclosed you will find the Narrative Statement and supporting documentation. Interested parties are being served through the CSM Drop Box at the Commission on State Mandates' website.

Very truly yours,

MIGUEL MÁRQUEZ
County Counsel

ELIZABETH G. PIANCA
Deputy County Counsel

Encl.

c: Sylvia Gallegos, Deputy County Executive
Jody Hall Esser, Director, Department of Planning and Development
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State Mandates

Narrative Statement in to San Francisco Bay Regional Water Quality Control Board's and the California Department of Finance's Response to Test Claim 10-TC-03 Municipal Regional Stormwater Permit—

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Received
September 15, 2011
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State Mandates

Table of Contents

Received
September 15, 2011
Commission on
State Mandates

I. INTRODUCTION

Test Claim No. 10-TC-03 ("Test Claim") was submitted on behalf of the County of Santa Clara (hereinafter "County"). The County participates in the Santa Clara Valley Urban Runoff Pollution Prevention Program ("SCVURPPP)[1] and the requirements of the MRP imposed on the County are also imposed on the other members of SCVURPPP.

These rebuttal comments respond to arguments asserted by the San Francisco Regional Water Quality Control Board (hereinafter "Regional Board") and the California Department of Finance.[2] These comments are nearly identical arguments the Commission has twice rejected in test claims brought by Los Angeles County and San Diego County agencies regarding their storm water permits. Although the County acknowledges the Los Angeles County Superior Court's recent decision to overturn the Commission's decision for a similar test claim brought by Los Angeles County, this decision lacks precedential value and the factual situation in the Los Angeles County test claim is distinguishable from the factual situation established in the County's Test Claim.[3] Therefore, the Commission should not rely on this decision to evaluate and decide on the Test Claim and should apply the same analysis it has before and find that the Municipal Regional Municipal Regional Stormwater Permit, Order No. R2-2009-0074 ("MRP") provisions raised in the County's Test Claim are reimbursable state mandates.

The Regional Board's comments fall into two broad categories: legal arguments that the obligations of the MRP are allegedly federal mandates rather than state mandates, and factual arguments that the MRP provisions at issue allegedly are not new programs or higher levels of service. As the Commission has previously, and correctly, determined, the MRP provisions are not federal mandates because: 1) they exceed the requirements of the Clean Water Act and the United States Environmental Protection Agency's ("EPA's") regulations, and 2) the Regional Board freely chose to impose the requirements and exercised its true discretion in determining the implementation of federal law.

The second category of Regional Board comments is factual contentions that the MRP requirements do not constitute new programs or higher levels of service in comparison to the prior permits. These arguments fail because, as explained in detail below, the MRP provisions at issue in the Test Claim do mandate new programs that were never required before and higher levels of service than previously required. The Regional Board's citation to prior permit

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[1] The participating members of SCVURPPP include Campbell, Cupertino, Los Alto, Los Altos Hills, Los Gatos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, Sunnyvale, and the Santa Clara Valley Water District.

[2] All of the comments asserted by the Department of Finance were also asserted in much greater detail by the Regional Board. These rebuttal comments refer for convenience and clarity only to the Regional Board's comment letter, but the County intends that this rebuttal apply equally to the Department of Finance's arguments.

[3] *State of California Department of Finance,* et al *v. County of Los Angeles,* et al, Los Angeles County Superior Court No. BS130730 (August 15, 2011).

Received
September 15, 2011
Commission on
State Mandates

provisions, management plans and workplans relating to the same subject matter do not alter that fact.

The Commission and all Californians recognize that public entities in California are enduring financial hardships. Essential public services are being cut, and employees are being laid off and furloughed. Yet even while enduring these economic difficulties, local governments must still serve the public and protect the environment. Like the Regional Board, the County is committed to protecting water quality, but unlike the Regional Board, the County bears most of the financial burden of implementation and compliance. The County initiated the Test Claim regarding new programs and higher levels of service imposed by the Regional Board's MRP to obtain subvention that will enable the County to fulfill the new financial obligations imposed by the MRP.

II. THE CLEAN WATER ACT LEAVES THE MANNER OF IMPLEMENTATION OF THE NPDES PROGRAM TO THE TRUE DISCRETION OF THE REGIONAL BOARD

A. MS4 Requirements Are Flexible and Allow The Regional Board Discretion in Determining Specific Permit Provisions

In its comment letter, the Regional Board provides a lengthy explanation of how it interprets the Clean Water Act to apply to the issues in the Test Claim, and similar test claims filed by San Mateo County, Alameda County, and the City of San Jose. On the one hand, the Regional Board attempts to portray the Clean Water Act's requirements as imposing specific, mandatory obligations on state permitting agencies like the Regional Board.[4] On the other hand, and in an implicit acknowledgment that the Commission has twice found that provisions like those at issue in the Test Claim are not specifically required, or even mentioned, in EPA's regulations, the Regional Board also argues that:

> 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.[5]

There is no legal support for the Regional Board's position that Congress or the NPDES permitting regulations "mandates" (as opposed to enables) a State permitting agency to exercise

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[4] *See, e.g.*, Regional Board Response, pp. 9-10 (citing C.F.R. provisions); 20 ("the CWA as implemented by U.S. E.P.A.'s regulations creates a comprehensive regulatory strategy including very specific permit requirements that apply directly to local agencies' storm sewer discharges." Underlining added.).

[5] Regional Board Response, p. 9 (underlining added).

discretion in the manner the Regional Board did here or choose the specific controls and BMPs that are the subject of the Test Claim.

Rather, federal authority establishes that the Regional Board has wide latitude in determining what provisions should be included in these permits and California's courts likewise have previously acknowledged that their particular requirements may be driven by federal *or* state law.[6]

In *Natural Resources Defense Council (NRDC) v. County of Los Angeles,* et al., decided this summer, the Ninth Circuit considered cross-motions for summary judgment in a citizen suit action brought by environmental groups against MS4[7] operators for alleged permit violations.[8] While ultimately rejecting the permittees' argument regarding compliance determinations for MS4 permits, the court highlighted the vast discretion granted to the Regional Board under the Clean Water Act:

> Congress recognized that permit requirements for municipal separate storm sewer systems should be developed in a flexible manner to allow site-specific permit conditions to reflect the wide range of impacts that can be associated with these discharges. [Citation.][9]

The Ninth Circuit's decision in *NRDC v. County of Los Angeles* is the latest pronouncements from the federal judiciary about the broad discretion of storm water permitting agencies under the Clean Water Act. In 1999, the Ninth Circuit rejected arguments from environmental groups and permittee groups, respectively, that the Clean Water Act either

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[6] *Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613.

[7] MS4 means "municipal separate storm sewer system" under 40 C.F.R. § 122.26(b)(19). Municipal separate storm sewer system is defined by 40 C.F.R. § 122.26(b)(8) as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works as defined at 40 CFR 122.2.

[8] ___ F.3d ___ (9th Cir. 2011) 2011 U.S. App. WL 2712963.

[9] *Id.,* at 12 (citing 55 Fed.Reg. 48,038, underlining added).

Received
September 15, 2011
Commission on
State Mandates

requires MS4 permits to include strict numerical effluent limitations or prohibits the use of such limitations.[10] Instead, the court held that the permitting agency has broad discretion: "the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards."[11] In sum, the defining characteristic of the MS4 permitting program under the Clean Water Act is flexibility for the permit writer.

While admitting that Clean Water Act MS4 permitting rules are flexible and generic, the Regional Board nevertheless contends that federal law mandates all requirements of the MRP. In essence, the Regional Board argues that any and all requirement it includes in an NPDES permit are, by definition, required by federal law. The Commission has previously rejected this argument,[12] and it is not supported under the law.

As mentioned briefly above, California courts have recognized that NPDES permits issued by Regional Boards implement both state and federal law.[13] Moreover, in *Burbank v. State Water Resources Control Board*, the Supreme Court pointedly declined to assume that all requirements in the NPDES permit at issue were required by federal law, and remanded the case to the superior court to determine whether the permit imposed effluent limitations more stringent than required by federal law.[14] Specifically, the Court noted "[w]hat is not clear from the record before us is whether, in limiting the chemical pollutant content of wastewater to be discharged by the Tillman, Los Angeles-Glendale, and Burbank wastewater treatment facilities, the Los Angeles Regional Board acted only to implement requirements of the federal Clean Water Act or instead imposed pollutant limitations that exceeded the federal requirements."[15]

Therefore, it has been established by both the federal and state judiciaries that everything in the MRP is not required by the Clean Water Act just because, as the Regional Board suggests, the permit was issued generally under the NPDES program's MS4 provisions.

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[10] *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159 (EPA was the permitting agency).

[11] *Id.* at 1166.

[12] San Diego Test Claim Decision, p. 49 ("Under the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service. The Commission does not read the federal Clean Water Act so broadly.")

[13] *Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 619-21.

[14] *Id.* at 628.

[15] *Id.*

Received
September 15, 2011
Commission on
State Mandates

B. The Maximum Extent Practicable Standard Itself Is Flexible and Dependent on Discretionary Determinations

Under Clean Water Act section 402(p), NPDES permits issued to MS4 operators must "require controls to reduce the discharge of pollutants to the maximum extent practicable."[16] The Regional Board contends that each and every provision of the MRP challenged in the Test Claim is mandated by federal law because all the permit provisions at issue are required to implement this "MEP" standard. This broad assertion has not been supported by an evidentiary showing here and, as set forth above, has been rejected by the courts.[17] Furthermore, it is another example of how the Regional Board considers itself exempt from Section 6 of Article XIIIB of the California Constitution. The Regional Board's own description of MEP is ambiguous, claiming expansive discretion for the State permit writer: according to the Regional Board, MEP "is an ever evolving, flexible, and advancing concept. . . ."[18]

While the County does not agree with the Regional Board that it has close to boundless discretion to declare any and every permit term to be within the MEP standard, case law does acknowledge that MEP is "a highly flexible concept" that involves "balancing numerous factors."[19] However, given that none of the specific permit provisions challenged in the Test Claim are expressly required under the Clean Water Act or EPA's regulations and the lack of evidence, as opposed to argument, in the record that they were necessary to avoid an EPA disapproval of the State's permitting action, it is apparent that the Regional Board "freely chose" to implement these particular requirements.[20]

The Regional Board argues that "[s]uccessive permits issued to the stormwater dischargers . . . require greater levels of specificity over time in defining what constitutes MEP," and that this "iterative process" constitutes a federal requirement to increase the stringency of NPDES.[21] This position is incorrect. While federal *guidance* supports an iterative approach, there is no statutory provision or Clean Water Act regulation that commands it. In addition, the Regional Board could have employed the iterative process by drafting the MRP to reflect the programs and procedures the County developed over the last permit term to refine the County's

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[16] 33 U.S.C. § 1342(p)(3)(B)(iii).

[17] The Commission's previous views on this issue have been contrary to those of the Regional Board and consistent with those of the courts. *See* San Diego Test Claim Decision, p. 49.

[18] Regional Board Response, p. 10.

[19] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 889.

[20] San Diego Test Claim Decision, p. 55 (citing *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-94).

[21] Regional Board Response, p. 10.

storm water control programs based on its then available resources, which are now under more pressure to be reduced due to fiscal pressures facing the County. There is no evidence in the record that such an incremental approach would have fallen short of federal requirements. In other words, if the Regional Board had proceeded in this manner, the Test Claim might not have been presented to the Commission.

In addition to its arguments about what is embraced within MEP, the Regional Board also contends that the Clean Water Act section 402(p)(3)(B)(iii) "requires that the San Francisco Bay Water Board, when appropriate, include provisions that go beyond MEP."[22] This is a misstatement of the law; the Clean Water Act allows or authorizes the Regional Board to include provisions that go beyond MEP, but does not require it to go beyond MEP. As explained above, under *Defenders of Wildlife*, it is clear that while the Clean Water Act does not prohibit the Regional Board from requiring strict compliance with water quality standards, it also has the discretion to not require strict compliance.[23] *Building Industry Association*, cited by the Regional Board, does not hold to the contrary. As in *Defenders of Wildlife*, the court in *Building Industry Association* did not hold that the Regional Board is required to impose permit provisions more stringent than MEP. That was not the issue. Rather, petitioners in *Building Industry Association* argued that section 402(p)(3)(B)(iii) prohibits the Regional Board from imposing permit provisions more stringent than MEP.[24] That contention was rejected, and the *Building Industry Association* court held that "in identifying a maximum extent practicable standard Congress did not intend to substantively bar the EPA/state agency from imposing a more stringent water quality standard. . . ."[25] The County acknowledges this conclusion, but does disagree with the Regional Board's conclusion that federal law requires, rather than enables, the state permitting agency to go beyond federal law, when appropriate. Instead, federal law allows the state permitting agency to impose requirements more stringent that federal law in appropriate situations, whereby the requirements become state mandates.

Throughout its response, the Regional Board insists that the MRP provisions at issue are required under federal law to control the discharge of pollutants to MEP. However, no actual

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[22] Regional Board Response, p. 11.

[23] *Supra*, 191 F.3d at p. 1166.

[24] *Building Industry Association, supra*, 124 Cal.App.4th at 880 ("Building Industry contends that under federal law the 'maximum extent practicable' standard is the 'exclusive' measure that may be applied to municipal storm sewer discharges and a regulatory agency may not require a Municipality to comply with a state water quality standard if the required controls exceed a 'maximum extent practicable' standard.").

[25] *Id.* at 884; *see also City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, 1429 ("In *BIA*, this court similarly held that 33 United States Code section 1342(p)(3)(B)(iii) does not divest a regional board's discretion to impose an NPDES permit condition requiring compliance with state water quality standards more stringent than the maximum-extent-practicable standard.").

evidence has been presented in support of this argument. Other than asserting that MEP is "flexible, evolving and advancing," neither the Regional Board's Response nor the MRP itself provide a meaningful explanation of what MEP means for the County in this permit. The Regional Board, in effect, asks everyone – the Commission, the County and co-permittees, the public – to trust that it has correctly applied the MEP standard and not exercised its discretion to go beyond it. In fulfilling its statutory obligation to decide test claims, the Commission must critically evaluate the Regional Board's assertions, as it has capably done before.

The Regional Board goes so far as to claim that *Building Industry Association* "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."[26] The Court in *Building Industry Association* made no such determination regarding the meaning of MEP. Unlike the MRP, which defines MEP by repeating the language of section 402(p)(3)(B)(iii),[27] *Building Industry Association* in the San Diego Regional Board's permit attempted to provide a definition of MEP:

> The federal maximum extent practicable standard is not defined in the Clean Water Act or applicable regulations, and thus the Regional Water Board properly included a detailed description of the term in the Permit's definitions section. (See ante, fn. 7.) As broadly defined in the Permit, the maximum extent practicable standard is a highly flexible concept that depends on balancing numerous factors, including the particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness. This definition conveys that the Permit's maximum extent practicable standard is a term of art, and is not a phrase that can be interpreted solely by reference to its everyday or dictionary meaning.[28]

This passage is significant for several reasons. First, it demonstrates that "highly flexible" description of MEP came from the definition "in the Permit," not from EPA or the Clean Water Act. Second, and assuming arguendo that the Regional Board is correct that the definition of MEP from a different permit is applicable to the MRP, the Regional Board's response fails to explain how the very large costs associated with the MRP provisions at issue in the Test Claim – cost estimates for which there is no competing evidence in the record-- are "practicable."

Even the Regional Board's own quotation of *Building Industry Association* acknowledges that cost is a consideration to be balanced in determining MEP standard. Similarly, the Regional Board's Response also includes a citation to statements from EPA in the Federal Register.[29]

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[26] Regional Board Response, p. 11.

[27] MRP, p. 122.

[28] 124 Cal.App.4th at 889.

[29] Regional Board Response, p. 10, quoting Letter from Alexis Strauss to Tam Doduc and

EPA listed many factors to be considered in determining MEP, including "current ability to finance the program."[30] Thus, the Regional Board's authority recognizes that at some point, costs can rise to a level such that the pollution controls under consideration exceed the MEP. The costs imposed by the MRP provisions at issue in the Test Claim have eclipsed that point. For the trash load reduction provisions alone, the combined 2010 and 2011costs imposed by the MRP is approximately **$1,788,583** for the County jurisdiction and approximately **$30,235,241** for all co-permittees in Santa Clara County.[31] At the same time the County (as well as the other co-permittees) is being forced to bear these costs, when the County and California are undergoing historic financial hardships. The fact that the County's "current ability to finance the program" is significantly diminished as a result cannot be disputed and should be subject to administrative notice. In light of these authorities and facts, it is apparent the MRP imposes obligations that exceed MEP.

Furthermore, it is clear that the trash control provisions were developed without any regard to practicability. Rather, the trash control provisions are designed to reduce trash loads from the MS4 by 100% by 2022.[32] The 40% trash reduction at issue in the Test Claim is simply an arbitrary step in phased reductions toward that ultimate 100% reduction goal. Any suggestion that the MRP's trash control provisions were developed to implement the MEP is belied by the plain language of MRP Provision C.10. Rather, the trash control provisions were developed to achieve the Regional Board's water quality policy objectives that go beyond MEP and federally-imposed requirements.

C. The Clean Water Act Does Not Require California To Issue NPDES Permits Or Dictate Exactly What Its Permits Should Contain

The Regional Board argues that the use of the word "shall" in Clean Water Act section 402(p)(3)(B)(iii) and Code of Federal Regulations, title 40, section 122.44(d)(1)(vii)(B), "mandate that the permitting agency comply with all of those mandates."[33] This point is unavailing for the purpose of the Test Claim for several reasons. First, as the Commission has previously found, California has voluntarily chosen to administer the NPDES program; therefore, it clearly has a choice as to whether any permit condition should be imposed, and the

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Dorothy Rice, April 10, 2008 (quotation from letter includes partial quotation of a different portion of the same passage in the Federal Register).

[30] 64 Fed. Reg. 67722, 68754 (Dec. 8, 1999).

[31] The Santa Clara County co-permittees include Campbell, Cupertino, Los Alto, Los Altos Hills, Los Gatos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Santa Clara County, Saratoga, the Santa Clara Valley Water District, and Sunnyvale.

[32] MRP Provision C.10, p. 84.

[33] Regional Board Response, p. 10.

State is not subject to a federal mandate.[34] Second, the "shall" referred to in each case simply tells the permit writer to comply with general and non-specific permit requirements, such as the requirement to include controls to reduce the discharge of pollutants to MEP. The Clean Water Act does not require a specific provision to be included in NPDES permits. Rather, the Clean Water Act allows the permitting agency to include specific provisions. Accordingly, the Regional Board is not required to include any particular controls; it exercises its discretion in how to implement the federal program and also exercises its discretion under state law to go beyond it. Those provisions that go beyond the actual requirements of the Clean Water Act, even if consistent with federal guidance, are reimbursable state mandates.

D. Most of the Test Claims Are Unrelated to the TMDL Program, Which Also Allows Considerable Flexibility to the Regional Board In Determining Implementation

In its response, the Regional Board provides considerable discussion of the Total Maximum Daily Load (TMDL) program,[35] primarily in relation to the applicability of Code of Federal Regulations, title 40, part 122.44(d)(1)(vii)(B).[36] It is important to note that TMDLs directly relates only to a small number of the MRP provisions at issue in this Test Claim, specifically, those provisions relating to Mercury and PCB diversion studies under MRP Provisions C.11.f and C.12.f.

Section 122.44(d)(1)(vii)(B) does not require that MS4 permits include Mercury and PCB diversion studies as set forth in MRP Provisions C.11.f and C.12.f. Rather, that regulation provides only generally that water quality-based effluent limitations in a permit must be "consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA." Developing permit conditions that are consistent with wasteload allocations (a component of TMDLs) is but another exercise of discretion by the Regional Board. There are many different permit conditions that could be developed, all of which could be consistent with a wasteload allocation.

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[34] San Diego Test Claim Decision, p. 40 ("Based on this statute (Wat. Code, § 13370), in which California voluntarily adopts the permitting program, and on the federal statutes quoted above that authorize but do not expressly require states to have this program, the state has freely chosen to effect the stormwater permit program." (citing *Hayes*, *supra*, 11 Cal.App.4th at 1193-94, footnote omitted)).

[35] "A TMDL defines the specified maximum amount of a pollutant which can be discharged or 'loaded' into the waters at issue from all combined sources." *City of Arcadia*, *supra*, 135 Cal.App.4th at 1404 (quoting *Dioxin/Organochlorine Center v. Clarke* (9th Cir. 1995) 57 F.3d 1517, 1520). A TMDL is defined as the sum of "wasteload allocations" for point sources of pollution, "load allocations" for non-point sources of pollution and natural background sources of pollution. 40 C.F.R. § 130.2(g),(h), & (i).

[36] Regional Board Response, pp. 10, 12-15.

Further, the MRP diversion studies for Mercury and PCBs are contemplated by implementation plans for the various TMDLs, not the wasteload allocations themselves. Implementation plans for TMDLs are developed under state law (Cal. Wat. Code, § 13242) and not federal law. Neither Clean Water Act section 303(d)[37] nor Code of Federal Regulation, title 40, part 130.2, require TMDL implementation plans. By contrast, TMDLs adopted by EPA itself do not include implementation plans. EPA previously expressly declined to require that TMDLs include implementation plans or that implementation plans for TMDLs be subject to EPA approval.[38] Therefore, none of the TMDL-related issues in the Test Claim (Mercury and PCBs) can properly be characterized as federal mandates.

III. THE CHALLENGED PROVISIONS IMPOSE NEW PROGRAMS AND/OR HIGHER LEVELS OF EXISTING SERVICE

As stated in the County's narrative statement, the MRP provisions at issue impose new programs and/or higher levels of service not mandated under the Clean Water Act. The Regional Board asserts that "[m]any 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."[39] However, "very similar" is not the standard. Although some (but certainly not most) of the challenged permit provisions may relate to prior requirements or fall within the same general category of them, they are not close to being the same and the Regional Board ultimately admitted this point.[40]

In this regard, it is highly significant that the Regional Board does not address the evidence the County submitted, or offer any contrary evidence, regarding the estimated costs required to comply with the new programs and higher levels of service at issue. The issue before the Commission is not to decide whether two permits are vaguely similar. Rather, the Commission must decide whether the new permit imposes a new program or higher level of service that requires the test claimant to expend more than $1,000.00 than was previously required.[41]

As the undisputed evidence submitted with the Test Claim establishes, the MRP requires the County, and co-permittees within the County of Santa Clara, to expend considerably more money for the new programs and higher levels of service at issue. The County provided

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[37] 33 U.S.C. § 1313(d).

[38] *See* Withdrawal of Revisions to the Water Quality Planning and Management Regulation, 68 Fed. Reg. 13608 (Mar. 19, 2003).

[39] Regional Board Response, p. 16.

[40] *Id.* The term similar implies that the two permits are not identical.

[41] Cal. Govt. Code § 17564(a) (requiring claims exceeding $1,000.00 before they can be submitted to the Commission for reimbursement).

evidence to the Commission showing that in order to comply with the MRP provisions at issue in the Test Claim an additional **$852,832** for FY 2010-2011 and **$1,040,001** for FY 2011-2012 will be required to be pay.

IV. THE MRP PROVISIONS AT ISSUE IN THE TEST CLAIM ARE NOT VOLUNTARY PROGRAMS

The Regional Board correctly states that the Commission, in reliance on *Department of Finance v. Commission of State Mandates* (*Kern High School Dist.*), previously decided that because the claimants were required to apply for an NPDES permit under state law, *Kern High School District* did not apply, and therefore the challenged permit provisions were reimbursable state mandates.[42] The Regional Board now requests the Commission overrule its previous decision, arguing that because federal and state law do not "requires that parties discharge to waters of the Unites States," the County can therefore voluntarily discharge stormwater.[43] The Regional Board's argument is problematic, as it misconstrues the nature of the Test Claim, the law and the underlying facts.

Kern High School District discussed whether two statutes which required school site councils or advisory committees to provide notice and agenda requirements for meetings concerning voluntary programs.[44] The California Supreme Court decided that the new requirements were not state mandates even though the new requirements were a new program or higher level of service. It reasoned that because the underlying program that required the stated mandated notice and agenda requirements were voluntary, the new requirements pertaining to the voluntary programs could not be considered reimbursable state mandates because the schools could avoid the new program or higher level of service by simply not participating in the voluntary program to begin with.

The *Kern High School District* reasoning does not apply to the Test Claim. The Regional Board's suggestion that the County voluntarily chose to let precipitation run off streets and sidewalks is not based on reality and should not be responded to. The Regional Board's suggestion that the County "have the discretion to require on-site containment of stormwater runoff or to convey their stormwater runoff to a publicly owned treatment works"[45] is a factual contention with potentially far-reaching consequences, without any evidentiary support in the record for this broad assertion. The Regional Board has made no showing that such alternatives are even remotely possible. In *Kern High School District,* the schools had an option whereby no funds would need to be expended; they could simply decide not to participate in the program and

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[42] Regional Board Response, p. 16 (citing San Diego Decision, p. 34.)

[43] *Id.* at 17.

[44] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 730-31.

[45] Regional Board Response, p. 17, fn. 83.

thus not comply with the notice requirements.[46] However, the County does not have a similar options.

V. THE PERMIT IMPOSES REQUIREMENTS UNIQUE TO LOCAL AGENCIES AND MANDATES PECULIAR TO GOVERNMENT

The Regional Board states that the challenged MS4 permit provisions are not state mandates because the MRP allegedly does not impose requirements unique to local governments.[47] Specifically, the Regional Board asserts that the NPDES permit program, and the requirements the program imposes, is not peculiar to local government because the program is also imposed upon industrial and construction facilities.[48]

The Regional Board is again factually incorrect and it misinterprets the law it cites. To support its position, the Regional Board relies on *City of Richmond v. Commission on State Mandates*.[49] However, in that case, the court specifically stated "the issue is whether costs unrelated to the provisions of public service are nonetheless reimbursable costs of government, because they are imposed on local governments 'unique[ly],' and not merely as an incident of compliance with general laws."[50] Unlike *City of Richmond*, the specific requirements at issue here, such as POTW diversion and trash requirements, are not the same as and are very different from those imposed on businesses through the State's construction and general industrial stormwater permit.

City of Richmond concerned a state mandated workers' compensation provision.[51] The Commission originally denied the test claim, stating that workers' compensation laws are laws of general application, and therefore are not subject to the provisions of section 6 of article XIII B of the California Constitution.[52] In agreeing with the Commission's decision regarding the mandate, the court noted that

> State and local governments... had previously enjoyed a special *exemption* from requirements imposed on most other employers in the state and

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[46] *Department of Finance*, 30 Cal.4th at 753.

[47] Regional Board Response, p. 24.

[48] *Id.*

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

[50] *Id.* at 1197-98.

[51] *Id.* at 1193.

[52] *Id.* at 1194.

> nation… By doing so, it may have imposed a requirement 'new' to local agencies, but that requirement was not 'unique.'[53]

Accordingly, as the workers' compensation mandate was federal, and because it applied not only to public employers, but rather to all employers, a reimbursable state mandate was not created.[54] Lifting the exemption did not make the law a reimbursable state mandate.[55]

The Regional Board also suggests that the MRP is not a reimbursable state mandate because NPDES stormwater rules are allegedly laws of general application.[56] The MRP clearly is not a "general law." Instead, the County contends, and the Commission in the past has agreed, that the MRP applies only to the entities bound by it.

The Commission addressed this argument in both of its prior stormwater test claim decisions.[57] Specifically, the Commission noted that the challenged provisions of the MS4 permit apply only to the local agencies named in the permit:

> The permit lists no private entities as 'permittees.' Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in Los Angeles County… Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.[58]

Accordingly, the Commission has previously heard, and rejected, the argument put forth by the Regional Board that the MRP is a law of general application. Instead, the MRP applies only to the public agencies named as permittees.

The Ninth Circuit recognized that MS4s are regulated differently from industrial discharges in *Defenders of Wildlife*.[59] The Court opined that although it is apparent that "Congress expressly required industrial storm-water discharges to comply with the requirements

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[53] *Id.* at 1198.

[54] *Id.* at 1199.

[55] *Id.*

[56] Regional Board Response, p. 24.

[57] Los Angeles Test Claim Decision, p. 48-50; San Diego Test Claim Decision, p. 35-37.

[58] Los Angeles Test Claim Decision, p. 48.

[59] *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d. 1159.

of 33 USC § 1131...Congress chose not to include a similar provision for municipal storm-sewer discharges."[60]

VI. THE MRP PROVISIONS AT ISSUE EXCEED FEDERAL LAW AND THE REGIONAL BOARD HAS SHIFTED THE BURDEN ONTO THE LOCAL GOVERNMENTS

The Regional Board contends that the central issues before the Commission is whether the challenged permit provisions exceed the federal mandate for NPDES permits.[61] The County agrees that this is a central issue. Reduced to its most basic formulation, the Regional Board's argument is that the MRP is a federal mandate because the Clean Water Act requires the MS4 permits to reduce the discharge of pollutants to the MEP. The Regional Board contends – without providing any evidence – that the MRP is necessary to achieve MEP, so, in its view, any and all provisions in the MRP are federal mandates and not state mandates.[62] For reasons already discussed, and more fully explained below, this position is misplaced.

The Regional Board acknowledges that the Commission has recently decided two other test claims relating to NPDES permits in Los Angeles and San Diego Counties, and that in both cases NPDES permit provisions were found to have imposed unfunded state mandates.[63] The Regional Board does not suggest the Clean Water Act and its regulations has changed since the Commission decided the Los Angeles and San Diego test claims. Instead, the Regional Board asks the Commission to reconsider its approach and in effect to decide that it erred in deciding the Los Angeles and San Diego test claims.[64] Specifically, the Regional Board asks the Commission to "reconsider its approach"[65] to *Long Beach Unified School District v. State of California*[66] and *Hayes v. Commission on State Mandates*.[67]

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[60] *Id.* at 1164-65 (underlining included).

[61] Regional Board Response, p. 17.

[62] *Id.* at 18.

[63] Statement of Decisions, In Re Test Claim on Los Angeles Regional Quality Control Board Order No. 01-182, Case Nos. 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21 (July 31, 2009); Statement of Decision; In Re Test Claim On San Diego Regional Quality Control Board Order No. R9-2007-0001, Case No. 07-TC-09 (March 26, 2010).

[64] Regional Board Response, p. 19.

[65] *Ibid.*

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

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

The Regional Board works to distinguish *Long Beach*, but cannot avoid the fact that the case actually supports the County's position. In *Long Beach*, the plaintiff school district sought subvention for additional costs it incurred to comply with regulations issued by the Department of Education.[68] Because the regulations were found to go beyond what was required by constitutional and case law requirements, and though the regulations were consistent with "suggestions" in case law, the court found there was a state mandated higher level of service.[69] As is the issue before the Commission, the distinction between federal requirements and guidance was key: "Where courts have suggested that certain steps and approaches may be helpful, the [regulations] and guidelines require specific actions."[70]

In an attempt to distinguish this holding, the Regional Board argues that unlike the general obligations in *Long Beach*, the Clean Water Act and EPA regulations include "very specific permit requirements that apply directly to local agencies' storm sewer discharges."[71] However, this is not accurate relative to the requirements the County has put at issue and, accordingly, the Regional Board offers no support for its position. It is clear that there are no "very specific requirements" in the Clean Water Act or EPA's regulations that require the MRP provisions at issue in the Test Claim. In sum, *Long Beach* is and remains controlling authority, directly on point: when the Regional Board exercised its discretion under the Clean Water Act to translate general federal obligations and suggestions into specific state-imposed requirements, it went beyond what federal law requires and imposed state mandates.

Long Beach also undermines the Regional Board's assertion that by applying EPA guidance, and accepting the support of EPA staff in comment letters, it imposed only a federal mandate. It is indisputable that EPA guidance, not adopted in rulemaking proceedings, and letters from EPA staff, do not have the force of law.[72] Hence, they are at best suggestions. As stated by the Court in *Long Beach*, "the point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts. These requirements constitute a higher level of service."[73]

The Regional Board next tries to discredit the Commission's previous approach by stating the Commission "[applied the] *Long Beach* holding to the wrong federal mandate."[74] The

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[68] 225 Cal.App.3d at 173-74.

[69] *Id.*

[70] *Id.* at 173 (italics in original).

[71] Regional Board Response, p. 20.

[72] *See, e.g., City of Arcadia, supra*, 135 Cal.App.4th at 1429-30 (EPA guidance on TMDLs and NPDES permitting not binding).

[73] 225 Cal.App.3d at 173.

[74] Regional Board Response, p. at 20.

Regional Board argues that the fact that the EPA allowed the State of California to become involved in the permitting process does not alter the federal nature of the NPDES permit requirements.[75] Instead, the Regional Board contends the only federal mandate that could be at issue is the mandate to obtain the NPDES permit.[76] The contention lacks merit. Federal law does not require the Regional Board to administer the NPDES permit; the State of California took that burden upon itself voluntarily. The Regional Board reasons that "the federal court decisions (in *Long Beach*) required no additional state involvement in order to" apply to the school districts. That is true, and exactly like the NPDES program. The NPDES program requires no additional state involvement to apply to the County, but because the state voluntarily chose to administer the program, exercising discretion in the implementation and imposing requirements beyond what is required by the Clean Water Act, a state mandate has resulted in terms of the requirements at issue.

The Regional Board also erroneously asserts that the Commission's past decisions misapplied the holding in *Hayes*.[77] In *Hayes*, the plaintiff school districts and county offices sought reimbursement for providing full and formal due process procedures and hearings to pupils and parents regarding special education assessment, placement and education of special needs children.[78]

The Third District Court of Appeal[79] decided that the issue of reimbursement revolved on whether implementation of the federal program was in the state's discretion.[80] The court in *Hayes* opined that:

> 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 the local agencies' taxing and spending limitations. This should be true even though the state has adopted an implementing statute or regulation pursuant to the federal mandate so long as the state has no "true choice" in the manner of implementation of the federal mandate. [¶] This reasoning would not hold true where the manner of implementation of the federal program was

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[75] *Id.* at 20-21.

[76] *Id.* at 20.

[77] *Id.* at 21.

[78] *Hayes, supra,* 11 Cal.App.4th at 1574.

[79] *Hayes* was decided by the Third District Court of Appeal and not the California Supreme Court. See Regional Board Response, p. 22.

[80] *Hayes, supra,* 11 Cal.App.4th at 1593.

> left to the true discretion of the state. . . . . If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless of whether the costs were imposed upon the state by the federal government.[81]

As the Commission has correctly recognized previously, since California voluntarily decided to implement the NPDES program itself, the manner of implementation of the NPDES program was left to the true discretion of the state and it freely chose to impose the costs at issue in the Test Claim through the MRP. In addition, even if this was not the case, as set forth above, the requirements that are the subject of the Test Claim here substantively exceed those imposed under the Clean Water Act and its implementing regulations and reflect free choices made by the Regional Board using its state law-based authorities.

VII. THE COUNTY HAS EXHAUSTED ITS ADMINISTRATIVE REMEDIES

The Regional Board claims that the County has not exhausted its administrative remedies, and therefore cannot collaterally attack the validity of the permit through the Commission proceeding.[82] In support of this position, the Regional Board cites *Farmers Ins. Exchange v. Superior Court*.[83] However, *Farmers* is neither on point, nor supports the position of the Regional Board.

Farmers concerned an action brought by an insurer before the Superior Court of California.[84] The insurer believed that under the doctrine of "primary jurisdiction" an action could only be heard in a court proceeding after the issue was ruled upon by the administrative agency, which in *Farmers* was the Department of Insurance.[85] The Commission is not a court, and the legislature accorded it primary jurisdiction to address unfunded mandates.

The Commission was legislatively granted the power to determine if the permit is a state mandate, and therefore the Test Claim is being heard in the proper forum. Indeed, under Government Code section 17552, the Test Claim proceedings "shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIIIB of the California Constitution." The Regional Board and State Water Resources Control Board do not have statutory power to determine if a permit provision is a state mandate or not.

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[81] *Id.* at 1593-94, underlining added.

[82] Regional Board Response, p. 25.

[83] *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377.

[84] *Id.* at 381-82.

[85] *Id.* at 390.

Received
September 15, 2011
Commission on
State Mandates

Indeed, the Commission's enabling legislation indicates that it is vested with jurisdiction to resolve all issues presented in the Test Claim. The purpose of the Commission is to determine whether a statute imposes a state-mandated cost on a local agency that falls within the meaning of Section 6 of Article XIIIB of the California Constitution. Accordingly, the County has exhausted its administrative remedies by bringing forth the Test Claim in front of the Commission on State Mandates.

VIII. THE CHALLENGED PERMIT PROVISIONS FINANCIAL OBLIGATIONS ARE NOT DE MINIMUS

The Regional Board asserts that even if the challenged provisions are found to be state mandates, that they are not reimbursable because they are allegedly costs incidental to implementing the NPDES permit, and as such are de minimus.[86] However, the Regional Board offers no evidence to establish that the MRP provisions at issue impose only minor (let alone less than $1,000) costs or dispute the additional cost figures that have been identified by the County to comply with the MRP provisions at issue. Instead, the Regional Board cites *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859 in a conclusory manner.[87] *San Diego Unified School District* discussed whether costs associated with constitutional due process hearings were considered state mandates. California had enacted requirements for all school expulsion hearings, and further required expulsion hearings for certain actions taken by students, such as bringing a firearm to school grounds. Although the *San Diego Unified School District* court did not discuss its reasoning, it stated that because the expulsion requirements "were merely incidental to the federal rights codified by the statute, and their 'financial impact" was de minimus," the costs were not reimbursable state mandates.[88]

In fact, *San Diego Unified School District* included a footnote, which is highly pertinent here:

> We do not foreclose the possibility that a local government might, under appropriate facts, demonstrate that a state law, though codifying federal requirements in part, also imposes more than "incidental" or "de minimis" expenses in excess of those demanded by federal law, and thus gives rise to a reimbursable state mandate to that extent.[89]

The large undisputed expenditures at issue in the Test Claim comprise the facts contemplated by the court's footnote. The figures cited by the County support this proposition. The court in *San Diego Unified School District* never discussed the amount of the costs, which the County has demonstrated as being significantly over the Commission $1,000.00 threshold.

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[86] Regional Board Response, p. 25.

[87] *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859.

[88] *Id.* at 889.

[89] *Id.* at 890, fn. 24.

Received
September 15, 2011
Commission on
State Mandates

Under California Code of Regulations, title 2, section 1184.10, costs over $1,000.00 cannot be de minimus. Since the County has easily surpassed this amount, and there is no evidence in the record to the contrary, the Regional Board's argument should be rejected.

IX. THE COUNTY DOES NOT HAVE AUTHORITY TO LEVY SERVICE CHARGES, FEES OR ASSESSMENTS TO PAY FOR THE PROGRAMS AT ISSUE IN THE TEST CLAIM

The Regional Board takes the untenable position 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."[90] In addition to being conclusory and unsubstantiated, this position is directly contrary to the Commission's San Diego decision. The San Diego decision analyzes the various requirements imposed on local governments by Proposition 218, and in particular the majority-protest and voter-approval requirements for "property related fees." The Commission properly concluded that an agency does not have "sufficient fee authority" if its fee authority is contingent upon either voter approval or the result of a property owner protest.[91] In its discussion of fee authority, the Regional Board fails to acknowledge the San Diego decision. Further, the Regional Board apparently finds itself unable to directly acknowledge Proposition 218's existence, despite its place in the County's initial filing, noting only that "there may be limitations concerning the percent of voters or property owners who must approve assessments under California law."[92]

The Regional Board fails to rebut the County's explanation that the County lacks fee authority to pay for each of the mandated programs. The County's Narrative Statement explains that most conceivable fees to fund stormwater programs would be considered "property related fees" and therefore subject to Proposition 218's majority protest and voter-approval requirements and identifies a narrow class of targeted regulatory fees that would possibly not be subject to Proposition 218's requirement.[93] The Narrative then goes on to evaluate the potential to impose fees that might be imposed to fund each of the MRP's requirements.[94] In each case, the Narrative concludes that only a fee subject to Proposition 218 would be adequate to pay for the programs required by the provisions.

In an apparent attempt to respond to these assertions, the Regional Board states that the claimants, including the County, have the authority "to charge businesses to cover inspection

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[90] Regional Board Response, p. 24.

[91] San Diego Decision, pp. 106, 115.

[92] Regional Board Response, p. 24.

[93] County Narrative Statement, pp. 9–12.

[94] *See* County of Santa Clara Narrative, pp. 25-26 (Provision C.8), 33-34 (Provision C.10), 36 (Provisions C.11.f and C.12.f).

costs" and that local agencies "can and do assess fees on residents and businesses to fund their storm water programs."[95] The County acknowledges both of these points, but neither means that the County has the authority to levy fees to pay for the particular mandates at issue here. None of the mandates in the Test Claim involve or relate to funding for the inspection of businesses; such mandates have not been challenged. Similarly, the County has not challenged requirements, such as those applying to new development that can be funded by fees that are not subject to Proposition 218. The assertion that some local agencies fund stormwater programs with fees on residents and businesses is not supported by any evidence and does not relate to issues raised in the Test Claim. In any event, if true, it would prove little since such fees could predate Proposition 218's enactment in 1996 and since the programs funded by such fees are not necessarily the same as those at issue in the Test Claim.

Finally, the limitations on fee authority discussed in the San Diego decision and the Narrative have increased since the filing of the Test Claim. At the November 2010 General Election, the voters approved Proposition 26. By amending the definition of "tax" in Article XIII C of the California Constitution, it subjects any local government "levy, charge, or exaction of any kind" to voter approval unless it meets one of the seven listed exceptions.[96] The listed exceptions include assessments and property related fees imposed under Proposition 218. The other relevant exceptions further narrow the fee authority of local governments.[97] Thus, it is even more certain now than it was when the Test Claim was filed that the County would not have adequate authority to impose a levy to pay for the mandated programs.

X. REBUTTAL TO COMMENTS REGARDING SPECIFIC PERMIT PROVISIONS

A. Provision C.8 is a Program That Requires a Higher Level of Service

MRP Provision C.8 implements water quality monitoring programs. The County does not dispute the importance of these monitoring programs in general. However, the mere importance of monitoring programs does not permit the Regional Board to supplement by making more specific the federally required monitoring program requirement, and then claim these additions are not state mandates.

The Regional Board argues that comparing the previous MS4 permits to the MRP is not the correct approach to identify reimbursable mandates, and readily admits that the MRP "may in some instances require higher levels of service."[98] Nevertheless, the Regional Board's primary argument is that prior MS4 permits allegedly included the same monitoring requirements as the MRP.

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[95] Regional Board Response, p. 24.

[96] *See* Cal. Const., art. XIII C, § 1, subd. (e).

[97] *See id.*, art. XIII C, § 1, subds. (e)(1)–(e)(3).

[98] Regional Board Response, p.28.

The Regional Board cites authorities that reinforce the importance of monitoring provisions in NPDES permits.[99] These cases reinforce the federal requirement that NPDES permits include a monitoring program, as opposed to not having a monitoring program at all. Again, this point is not in dispute. The County agrees the MRP should have a monitoring program provided it does not exceed beyond those previously implemented. Ultimately, the cases cited by the Regional Board do nothing to support its contention that the particular monitoring provisions at issue here are required by federal law.

Accordingly, the County, along with the Regional Board, recognize the higher level of service required by the MRP's monitoring requirements, the contested aspects of MRP Provision C.8 are new programs or concerns higher level of service, and requirements imposed by the State in its discretion.

1. C.8.b – San Francisco Estuary Receiving Water Monitoring

MRP Provision C.8.b requires the County to 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"), and requires the County to pay its "fair-share" of the costs of the monitoring program.

The Regional Board argues the new requirement is equivalent to the prior permit, and accordingly was intended to require the same level of monitoring. However, the Regional Board's argument is not supported by the facts.

Over the past two years, the RMP has begun a Master Planning process, which involves stronger Steering Committee direction on special studies as well as revises the ongoing Status and Trends program that is subject to MRP Provision C.8.b. As a result, over 10 subgroups and strategy teams have been added to the original RMP oversight structure of two committees and four workgroups. This has resulted in additional needs for representation and participation by stormwater program staff, and the County, together with co-permittees, must expend additional funds in order to comply.

For example, to comply with the prior permit Santa Clara Valley Urban Runoff Pollution Prevention Program ("SCVURPPP") staff (on behalf of the County and other co-permittees) attended at most 4 RMP working meetings per year. However, SCVURPPP staff is now actively participating in two committees (each having four meetings per year), three workgroups (each having 1-2 all day meetings per year), and two strategy teams (2-4 meetings per year), plus time required to review documents and participate in telephone conferences. A reasonable estimate of these increases in costs was included in the declarations of the Test Claim.

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[99] Regional Board Response, p. 28-29 (citing *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011) 636 F.3d 1235 (prior opinion, but not substantively different on this point), *Sierra Club v. Union Oil Co.* (9th Cir. 1987) 813 F.2d 1480, and *Environmental Defense Center v. EPA* (9th Cir. 2003) 344 F.3d 832).

The Regional Board attempts to respond to the County's statement that they must comply with the increased burden of the RMP program by arguing that the County is not in fact required to comply with the RMP program, but rather can comply with an alternative program that is equivalent to the RMP. Although the Regional Board is correct that the MRP allows the County, and co-permittees, to develop an alternative to the RMP, this argument misses the point. Complying with either the new RMP or an equivalent program would require the County to incur substantially increased costs and develop new programs to comply with the higher level of service required by the State through the MRP. Because any alternative program would have to be "at a minimum equivalent" to the RMP, the burden of complying with an alternative program would necessarily increase "at a minimum" by the same amount as the increased burdens associated with the RMP.

Thus, it is irrelevant, as the Regional Board contends, that provision C.8.b "is intended to maintain the same level of monitoring that Permittees have been addressing" under prior permits because intent is not the test and, in any event, the level being required is not the same. Accordingly, the County continues to submit that MRP Provision C.8.b is a new program or higher level of service.

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

MRP Provision C.8.c requires the County to conduct annual status monitoring in local receiving waters using sampling site frequencies and methodologies set forth in the MRP.

The Regional Board argues that MRP Provision C.8.c does not require a higher level of service. In support, the Regional Board states the prior permit required the County to "assess beneficial uses using appropriate physical, chemical and biological parameters in representative receiving waters," although the term "status monitoring" was not specifically used.

However, beyond this sweeping generalization, the Regional Board provides no evidence to support its contention and the devil is in the details. The County has demonstrated that the prior permits required a much lower level of effort and were not equivalent to the MRP, either in number of sites or in level of effort per site.[100] Specifically, the County must take many more field samples and analysis for more parameters than the monitoring conducted under the prior permits. For example, compared to monitoring conducted under the SCVURPPP FY 2003-04 through FY 2007-08 annual work plans cited by the Regional Board in its response to the Test Claim,[101] monitoring required by provision C.8.c of the MRP imposes significant increases in annual: (1) algal bioassessments (20 additional sites), (2) nutrients and similar parameters (7 additional sites), (3) stream surveys (6 additional sites), and other parameters. Additionally, the MRP requires the use of expanded Surface Ambient Monitoring Program (SWAMP) protocols. Using the old SWAMP protocols, a two-person team typically sampled four to six sites per day,

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[100] See MRP Table 8.1 and associated footnotes.

[101] Regional Board Response, p. 33, fn 179.

while the expanded protocols require at least four to six hours for a three to four person team to complete one site.[102]

The cost estimates provided in the Test Claim declaration of Chris Sommers represents the projected *increase in costs* that the County, and co-permittees, will incur due to the increased level of effort required to implement the monitoring specified in detail in Provision C.8.c. These estimates take into account the increased costs for field crews and associated field equipment and increased analytical laboratory.[103] It is undisputed that the County must also supply additional staff in order to take the additional samples required by the MRP and manage the additional data. This requires additional funding needs in the County's budget. Accordingly, it is apparent that MRP Provision C.8.c does not merely add more specificity – it also substantively imposes a new program and requirements for higher levels of service.

3. C.8.d – Monitoring Projects

Provision C.8.d requires the County to conduct three categories of monitoring projects: stressor/source identification actions; BMP effectiveness investigation; and geomorphic projects. In referring to the stressor/source identification projects of MRP Provision C.8.d.i, the Regional Board incorrectly argues that these monitoring projects are required under the MRP as monitoring results indicate that a permittee's discharge exceeds a "trigger." This is inaccurate. The monitoring triggers at issue do not necessarily pertain to the permittee's discharge, but rather to monitoring of receiving water conditions. More accurately, both the status monitoring under C.8.c and the projects under C.8.d are designed to: 1) determine if water quality objectives in local receiving waters are being met; and 2) if not, to determine <u>if</u> MS4 discharges are having an impact. In short, pressed for resources to do its own job, the Regional Board is effectively shifting these tasks to the County and using its discretion under the Clean Water Act and state law to do so.

It is not surprising, therefore, that the Regional Board fails to address the additional expenditures required by the County to comply with the new provisions. Moreover, relative to the specific evidence of the associated costs in the record, it is undisputed that the County to expend these additional funds because the requirements of MRP Provision C.8.d were not required under the prior permits. Accordingly, the County asserts MRP Provision C.8.d is also a new program or higher levels of service.

(a) C.8.d.i – Stressor/Source Identification

The Regional Board admits that MRP Provision C.8.d.i sets forth more detail about the requirements than were required under the prior permits but nevertheless asserts that this provision does not require a new program or higher level of service. Again the importance is in the details –a comparison of the prior permit provisions and MRP provision C.8.d.i shows that the MRP changes the default assumptions regarding the need for investigations. Under the

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[102] County Narrative Statement, pp. 14-15, 25; Sommers Declaration, pp. 2, 3, 7.

[103] County Narrative Statement, Sommers Declaration.

previous permit's provision C.1, only notification was required, and then only when the permittee discovered it was causing a violation. The MRP requires investigation for problems in receiving waters without regard to permittee causation. The result is that more investigation will be required – even where the outcome determines the problem in receiving waters was not caused by the MS4.

The Regional Board asserts that MRP provision C.8.d.i is actually less stringent and costly than the prior permit because the number of investigations is capped during the permit term. The existence of a cap alone, however, does not mean the new provisions are less costly. First, the investigation cap would only save costs if the programs previously spent more money on investigations than they will under the MRP, which just is not the case. In addition, because MRP provision C.8.d.i(1) requires the County to use elaborate EPA evaluation procedures, and the prior permit did not, the cost of each investigation project is increased. In short, the Regional Board is incorrect that the MRP is less stringent and costly that the prior permit and it has put forward no evidence to support the sweeping generalizations because such evidence would not support its point.[104]

(b) C.8.d.ii – BMP Effectiveness Investigation

The Regional Board states that MRP Provision C.8.d.ii is consistent with the prior permits because the prior permits required the County to conduct monitoring to evaluate the effectiveness of representative storm water pollution prevention or control measures. The prior permits, however, did not limit what prevention or control measures could be evaluated. The MRP, on the other hand, specifies that the evaluated BMP must be for "stormwater treatment or hydrograph modification control." This new provision could prevent or discourage the County from complying by studying source control BMP, such as street sweeping or restrictions on plastic bags, which would have been sufficient under the old permit. In effect, the MRP requires the County to evaluate more costly structural BMPs instead of less expensive source control measures. This increases costs under the MRP over the prior permits and is a new program or higher level of service.

(c) C.8.d.iii – Geomorphic Project

The Regional Board claims that MRP Provision C.8.d.iii is not a new program or higher level of service. Specifically, the Regional Board points to the amendment to the prior permits, which required the County to develop and implement hydromodification management plans and to monitor the effectiveness of hydromodification control measures. While prior permits indeed required the implementation of hydromodification management plans, contrary to it assertion, the Adopted Order R2-2005-0038 cited by the Regional Board contains no requirement to monitor effectiveness of hydromodification control measures.

As above, the significance is in the details – the prior permits did not require the County to do what is now required. MRP provision C.8.d.iii(3) requires the County to conduct a geomorphic study, which among other things, requires that the County survey channel

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[104] Sommers Declaration, pp. 7-8.

dimensions and construct permanent protruding monuments. This is obviously new, and different from, the prior requirements to develop hydromodification management plan. In addition the permit amendments incorporating hydromodification management measures applied to Provision C.3 addressing new development and redevelopment projects, not monitoring. Accordingly, as MRP Provision C.8.d.iii requires the County to institute programs not required by the prior permits and to expend more funds than required under the prior permits, it is a new program or higher level of service.

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

The County contends MRP Provisions C.8.e.i, C.8.e.ii and C.8.e.vi constitute new programs or higher levels of service. The Regional Board, disagreeing with the County, addresses each of these provisions separately in it Response. Accordingly, the County will follow the same format.

(a) C.8.e.i – Pollutants of Concern Loads Monitoring Locations

MRP Provision C.8.e.i requires the County to monitor for pollutants of concern at locations specified in the MRP. The purpose of this provision is fourfold: 1) to identify which Bay tributaries, including stormwater conveyances, contribute most to Bay impairments from pollutants of concern; 2) to quantify annual loads or concentrations of pollutants of concern from tributaries to the Bay; 3) to quantify the decadal-scale loading or concentration trends of pollutants of concern from small tributaries to the Bay; and 4) to quantify the projected impacts of management actions, including control measures on tributaries, and identify where these management actions should be implemented to have the greatest beneficial impact.

The Regional Board admits that these requirements add more specificity than the County's previous permits. Nevertheless, the Regional Board again brushes the specifics to the side and asserts without any evidence that MRP Provision C.8.e.i does not increase the monitoring requirements of the previous permits.

In support of its argument, the Regional Board quotes language in the prior monitoring program language. Specifically, the monitoring programs "characterize 'representative drainage areas and stormwater discharges'… assess 'existing or potential adverse impacts on beneficial uses caused by pollutants of concern in stormwater discharges…' and evaluate 'effectiveness of representative stormwater pollution prevention or control measures.'"[105] The Regional Board contends this language is equivalent to the four above-noted requirements of MRP Provision C.8.e.i.

The prior permit only required the County to implement a monitoring plan, which the County developed and the Regional Board approved. Now, these prior approved monitoring plans will no longer suffice, requiring the County to greatly supplement the previous monitoring efforts. Additionally, the County has presented financial data addressing the additional

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[105] Regional Board Response, p.36 (citing County's prior permits).

expenditures that will be required to comply with MRP Provision C.8.e.i.[106] The Regional Board does not attempt to discredit the County's figures and has not presented any competing evidence.

Although the Regional Board is correct that the County has alternatives that can be used instead of implementing C.8.e.i, use of these alternatives would not lower the higher level of service required by the MRP. In fact, MRP provision C.8.e., page 73, states that alternative approaches may only be pursued if the alternative requires "an equivalent level of monitoring effort." As such, the alternatives would be just as burdensome and costly and the approach specified in the MRP.

Accordingly, concrete evidence has been presented to the Commission showing the higher level of service, and this evidence has not been refuted. Accordingly, it is effectively undisputed that MRP Provision C.8.i is a new program or represents requirements demanding higher levels of service.

(b) C.8.e.ii – Long-Term Monitoring Locations

MRP Provision C.8.e.ii requires the County to conduct long-term monitoring at stations listed in the MRP in order to assess long-term trends in pollutant concentrations and toxicity in receiving waters and sediment in order to identify whether stormwater discharges are causing or contributing to toxic impacts on aquatic life. Again, the Regional Board is offloading its own work and resource demands on to the budget of the County.

The County identified this provision as a new requirement; the prior permits did not require long-term monitoring. In response, the Regional Board argues that because claimants, including the County, were required to conduct some multiyear monitoring programs, "C.8 Claimants were already subject to long term monitoring requirements." However, this statement misses the point. The County acknowledges that it was previously required to perform *some* multiyear monitoring, but that multiyear monitoring was not equivalent to the monitoring required by MRP Provision C.8.e.ii. Furthermore, the County will have to implement a new program in order to comply with this provision of the MRP.

Specifically, the County, along with the co-permittees, is required to establish and maintain two new Pollutant of Concern (POC) monitoring stations. POC monitoring stations will require substantial funds to construct, operate, and maintain. The two new field sampling stations will need multiple autosamplers, accessory tubing, cables, batteries, and sample bottles, security enclosures, and solar panels, all of which requires ongoing maintenance and associated costs. Analysis for many of the parameters is costly and provided by very few laboratories. For example, accurate methods for measuring the pesticide fipronil have only been published in the last 5-10 years and there is commercial market incentive for laboratories to offer this service at low cost. It is likely that several that several different labs will be needed to provide SWAMP-comparable results as required by the MRP.

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[106] County Narrative Statement, Sommers Declaration, Exhibit "A".

The County submitted uncontested financial figures to demonstrate this difference from the prior permits. The new long-term monitoring requirements will require the County to spend an additional **$1,682** over the two years after the MRP's implementation. The Regional Board fails to address these additional expenditures, and instead only points to generic language of the previous permits. The Regional Board has done nothing to undermine the plain facts established by the evidence submitted with the Test Claim – that the long term monitoring required by the MRP is much more costly than the prior program.

Accordingly, as the County must institute a new program, and expend additional funds in order to comply with MRP Provision C.8.e.ii, MRP Provision c.8.e.ii requires a new program or higher level of service.

(c) C.8.e.vi – Sediment Delivery Estimate/Budget

MRP Provision C.8.e.vi, requires the County to develop a design for a sediment delivery estimate and sediment budget for local tributaries and urban drainages.

The Regional Board admits that "prior permits did not require [Test Claimants] to design or implement sediment delivery studies."[107] Nevertheless, the Regional Board somehow argues the additional requirements added by MRP Provision C.8.e.vi only add specificity to the previously required monitoring requirements, and therefore do not impose a higher level of service. Once again, the Regional Board fails to address the County's argument that MRP Provision C.8.e.vi imposes on them a new requirement having a substantial financial burden.

Furthermore, the Regional Board fails to cite to any provision of any of the County's prior permits in order to substantiate its conclusory assertion that C.8.e.vi is not a new program or higher level of service. The Regional Board also fails to explain how C.8.e.vi is required in order to comply with the published requirements of the Clean Water Act. Rather, this is yet another example of the Regional Board using its discretion to offload its desired work and associated resource needs to local governments.

The County put forth evidence showing an increase in expenditures will, in fact, be required in order to comply with the new MRP provision C.8 requirements. The Regional Board does not rebut these figures. Furthermore, the Regional Board fails to explain the alleged similarities between the prior permits and the MRP, instead relying solely on its conclusory statement that the MRP is only more specific. The County has shown the Regional Board's argument is inaccurate; both by using the cost information as evidence and by demonstrating the prior permits did not require the new sediment delivery estimate or budget. Accordingly, the County submits it has effectively established that MRP Provision C.8.e.vi is a new program or higher level of service.

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

MRP Provision C.8.f requires the County, and other SCVURPP co-permittees, to encourage citizen monitoring and make reasonable efforts to seek out citizen and stakeholder

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[107] Regional Board Response, pp. 37-38.

information and comment as well as requiring the County to demonstrate annually in their annual Urban Creeks Monitoring Reports that the County has encouraged citizen and stakeholder observations and reporting of waterbody conditions.

The County contends this provision implements a new program and higher level of service. The prior permits did not require the same type and scope of activities to encourage citizen monitoring. Specifically, the prior permits and plans did not require the County to implement a citizen monitoring requirement. The MRP provisions require the County to increase its level of coordination as well as expend more staff hours in order to accomplish the required citizen encouragement and coordination. To support this position, the County submitted evidence demonstrating the increased expenditures that will be needed in order to meet the requirements of C.8.f.

6. C.8.g – Reporting

Provision C.8.g imposes various requirements for reporting of monitoring results. Specifically, the County is required to submit the following annual reports: Electronic Status Monitoring Data Report; Urban Creek Monitoring Report; and Integrated Monitoring Report. The Regional Board argues that these reporting requirements are either de minimus or purely add more specificity to the previous reporting requirements.

The County disagrees. Prior reporting obligations were less costly. By significantly increasing the number of data parameters and programs required under C.8.c, C.8.d, and C.8.e, the total level of reporting effort must be increased to comply with the MRP. The County set forth evidence that the Regional Board has not refuted proving the MRP C.8 provisions are more costly that under prior permits. Accordingly, MRP Provision C.8.g is a new program or reflects requirements calling for a higher level of service.

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

MRP provision C.8.h requires that monitoring data must be SWAMP[108] comparable. In order to comply with SWAMP, minimum data quality and reporting format must be consistent with the latest version of the SWAMP Quality Assurance Project Plan for applicable parameters, including data quality objectives, field and laboratory banks, field duplicates, laboratory spikes, and clean techniques, using the most recent standard operating procedures. These types of monitoring protocol were not required by the County's prior permits.

The Regional Board admits that prior permits did not require the monitoring protocol to be SWAMP comparable. However, the Regional Board states that the County was still subject to equivalent requirements. Specifically, the Regional Board states the required quality assurance procedures for monitoring were equivalent to the SWAMP quality assurance project plan, and therefore is not a new requirement. However, the Regional Board fails to address the additional requirements and expenditures the MRP imposes on the County, and asserts its

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[108] SWAMP is the States Water Board's Surface Water and Ambient Monitoring Program.

general argument that provisions relating to the same general subject matter must be equivalent. The Regional Board is being disingenuous. Its observation that prior permits required quality assurance procedures does not alter the fact that the MRP imposes much greater and more burdensome and expensive quality assurance procedures.

The County has put forward uncontested evidence showing that cost increases will occur in order to comply with the MRP Provision C.8.h. These increases support the assertion that quality assurance requirements under the previous permits were not equivalent to those under the MRP Provision C.8.h. Provision C.8.h of the MRP requires the County to significantly update or add to existing field standard operating procedures and they must also train field staff to allow for SWAMP comparable monitoring data to be properly collected. Additionally, new data management systems must be developed and managed, which result in significant cost increases. Monitoring data quality assurance procedures will also have to be developed, documented and adhered to by the County, which will require an increased level of effort and associated costs.

As noted above, the County must develop new programs to comply with MRP Provision C.8.h. The new programs will require the County to incur additional costs, as documented in the original Test Claim filing. These figures have not been challenged. Accordingly, the undisputed evidence shows MRP Provision C.8.h requires a new program or higher levels of service.

B. Provision C.8 Is Not Required by Federal Law

The central issues before the Commission is whether the challenged provisions of the MRP exceed federal requirements for MS4 permits or are the product of the Regional Board's exercise of discretion. The Regional Board asserts the challenged C.8 provisions are required by the Clean Water Act and are not reimbursable state mandates. The County disagrees.

The Regional Board's arguments in this section are somewhat repetitive of the issues addressed in Section II, and those issues will not be discussed again here to the extent possible. In general, the Regional Board argues the Clean Water Act section 402(p)(3)(B) provides "broad legal authority for the requirements in Provision C.8."[109] According to the Regional Board, the C.8 monitoring provisions are required by the section 402(p)(3)(B) statements that MS4 permits must effectively prohibit non-stormwater discharges, require controls to reduce the discharge of pollutants to the MEP, and such other provisions as the State determines appropriate for the control of such pollutants.[110]

The County recognizes that NPDES permits, as a general matter, must include monitoring requirements, and that those requirements should enable the Regional Board to determine whether the permittee is in compliance with the permit's substantive provisions. The

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[109] Regional Board Response, p. 42.

[110] The Regional Board persists in its argument that this last provision of section 402(p)(3)(B) requires the imposition of controls beyond MEP. This is incorrect, as explained above.

Clean Water Act does not require, however, the specific types of monitoring at issue here or monitoring for purposes other than determining compliance with substantive permit provisions.

While the Regional Board generically claims the C.8 monitoring provisions are necessary to ensure compliance with the section 402(p)(3)(B) requirements to effectively prohibit non-stormwater discharges and to ensure the permit includes controls to reduce the discharge of pollutants to the MEP, it does not offer any explanation as to why the particular C.8 provisions at issue in the Test Claim are needed for that purpose. For example, the Regional Board contends the C.8 provisions at issue here are necessary to insure non-stormwater discharges are effectively prohibited. The MRP includes an entire provision on Illicit Discharge Detection and Elimination (C.5) and a provision on Exempted and Conditionally Exempted Dischargers (C.15), which has not been challenged in this proceeding, and which bear basically no relationship to the C.8 provisions at issue. In addition, the Regional Board can determine compliance with the Illicit Discharge Detection and Elimination permit provisions by virtue of the numerous reporting requirements contained in that permit section.[111] In addition, the Regional Board has not explained why the monitoring provisions in the prior permits were insufficient to determine that the permit includes controls to reduce the discharge of pollutants to the MEP, and why the new provisions are needed to achieve that end. While the Regional Board has certain power under state law to potentially order dischargers to investigate receiving waters remote from the dischargers' outfalls (see Wat. Code, § 13267), there is no necessity under the Clean Water Act to do so because such monitoring is not necessary to determine compliance with the substantive permit provisions.

The Regional Board claims that "[u]nder Clean Water Act section 303, a stormwater permit must include provisions in MS4 permits that are required to implement the wasteload allocations of TMDLs."[112] As indicated above, Section 303 does not contain any such provision and EPA's prior regulation requiring implementation plans for TMDLs has long ago been withdrawn in recognition that implementation is a state law-driven matter exclusively.

Finally, and significantly, the Regional Board ignores the fact that by exercising its true discretion in deciding how to implement general Clean Water Act provisions, the Regional Board freely chose to impose state mandates.[113]

(a) Collaborative And Watershed Monitoring

The Regional Board argues that the MRP's collaborative and watershed monitoring requirements are mandated by federal law.[114] This contention fails for two reasons. First, it fails

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[111] *See, e.g.*, MRP C.5.c.iii, C.5.d.iii, C.5.e.iii, and C.5.f.iii.

[112] Regional Board Response, p. 42.

[113] *Hayes, supra*, 11 Cal.App. 4th at 1593-94.

[114] Regional Board Response, p. 43.

to address the main point the County made in the Narrative Statement: collaborative watershed-level activities as required under the MRP "may be *authorized*, but are *not required* by federal law."[115] The Regional Board's argument heading states such monitoring is "required by federal law," but it offers no citation or explanation that demonstrates that is the case. Second, the Regional Board's contention that the MRP does not actually require collaborative monitoring is unavailing because all alternatives under C.8 require any permittee that opts out of collaborative monitoring to undertake the same level of effort. Because C.8 imposes new programs and a higher level of service, the fact that an equally burdensome alternative exists is not persuasive for these proceedings.

(b) Characterization of MS4 Discharges

The Regional Board's contention that MRP provisions requiring monitoring of local receiving waters has already been fully addressed above. The increased burden imposed by these provisions over the monitoring program under the prior permits is effectively uncontested, not necessary to comply with the Clean Water Act, and the Regional Board has offered no evidence or explanation to the contrary.

(c) Citizen Monitoring

The Regional Board argues that the Clean Water Act mandated MRP provisions regarding citizen monitoring. The Regional Board's citation to authority does not support its position. First, the Regional Board cites Clean Water Act section 101(e),[116] which simply provides that rulemaking and enforcement under the Act (activities undertaken by EPA or delegated state agencies like the Regional Board, not local government permittees) should allow for public comment. It also says nothing about the type of citizen monitoring at issue in the C.8 provisions. Second, the Regional Board cites Code of Federal Regulations, title 40, part 122.26(d)(2)(iv), which just requires management plans to allow for public participation in "a comprehensive planning process" – again, just a requirement to allow for public comment, unrelated to soliciting citizen monitoring efforts. Third, the Regional Board cites Code of Federal Regulations, title 40, part 122.26(d)(2)(iv)(b)(5), a component of the illicit discharge detection and elimination program. This regulation does not relate to the type of citizen monitoring at issue in the C.8 provisions, and is implemented by provision C.5.c[117] under the Illicit Discharge provisions.

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[115] County Narrative Statement, p. 23.

[116] 33 U.S.C. § 1251(e).

[117] "Permittees shall have a central contact point, including a phone number for complaints and spill reporting, and publicize this number to both internal Permittee staff and the public."

(d) Electronic Reporting

The Regional Board's argument that electronic reporting is required by federal law is also unpersuasive and unsupported by authority. The Regional Board states that purpose of the only regulations it cites, Code of Federal Regulations, title 40, part 122.41(j) and 122.48, "is to ensure monitoring data are of adequate quality for their intended use." Electronic reporting, however, has nothing to do with the quality of the data; it just describes a new program for reporting data, the transition cost of which is not insignificant, given associated hardware, software and personnel needs to support it. The Regional Board's authority is therefore inapposite. Certainly there is nothing the Regional Board can point to in the Clean Water Act or EPA's regulations that actually requires electronic reporting.

1. Electronic Reporting Is Not Required for Private Stormwater Dischargers

In one last attempt to respond to the County's argument that Provision C.8 is a reimbursable mandate, the Regional Board notes that electronic reporting is in fact required for private stormwater dischargers. The Regional Board circumvents the entire argument of the County.

The MRP in particular, and the MS4 program in general, do not apply to private entities. The Regional Board appears to be supporting this position by relying on its earlier argument based on a misinterpretation of the *City of Richmond* case, which stood for the proposition that state mandates cannot exist when a government entity is acting in the capacity as a private entity.[118] However, as previously explained, this is not the case in the Test Claim at hand. The MRP applies solely to public agencies in order to implement a public program, and the very definition of an MS4 is unique to governments.[119] Moreover, the MRP requires reporting on regional and receiving water monitoring that simply cannot be compared to the reporting of facility inspections and outfall monitoring required for industrial and construction facilities.

C. Provision C.10 Is a New Program That Requires a Higher Level of Service

The Regional Board admits that Provision C.10, which sets deadlines for phased reductions in trash loads from municipal separate storm sewer systems, requires a higher level of service than the previous MS4 permit.[120] However, the Regional Board then contradicts itself and states that Provision C.10 is not a new program, and suggests without any supporting

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[118] *City of Richmond, supra*, 64 Cal.App.4th at 1199.

[119] 40 C.F.R. § 122.26(b)(8).

[120] Regional Board Response, p. 48.

authority that Provision C.10 is for some reason not subject to reimbursement.[121] The Regional Board's argument is unsupported.

The MRP's Provision C.10 is by far the most expensive provision at issue in the Test Claim. The financial impact is staggering. The County has submitted evidence that the C.10 provisions will require the County to incur **$1,788,583** in FY 2010-2012. The Regional Board has not responded to or refuted this cost estimate evidence. In and of itself, this undisputed evidence demonstrates that the MRP's trash control provisions clearly impose new programs and higher levels of service and is a reimbursable state mandate.

1. C.10.a.i – Short-Term Trash Loading Reduction Plan

The Regional Board admits that MRP Provision C.10.a.i "includes more specificity than was required in the prior permits."[122] However, the Regional Board dismisses this increase in specificity by stating the County was required in the prior permits to implement plans that provided for trash removal from the urban landscape and from stormdrain systems. However, the Regional Board is now requiring the County to implement a Short-Term Trash Reduction Plan to reduce 40% of trash from the storm drainage system. This program requirement poses a significantly higher level of service than previously required, since the previous program is no longer sufficient, and, under the MRP on its face, only new and increased levels of control measure implementation can be use to demonstrate the 40% reduction.

As the Regional Board notes, the previous permits required the County to implement street sweeping and storm drain maintenance, litter control, and general plans related to trash control.[123] The tasks cited by the Regional Board related to investigation and were not focused on trash reductions required by Provision C.10.a.i. Most importantly, the previous requirements cannot be used as a baseline because only new and increased levels of control measure implementation can be used to demonstrate the 40% reduction. To comply with this baseline reduction, the County will be required to develop new programs and expend substantially more funds than previously required. For example, anticipated new programs that the County will need to develop, implement and include in its Short Term Plans to achieve a 40% reduction in trash by July 1, 2014, include targeted enforcement of illegal dumping activities that require law enforcement resources; staffing resources needed to prevent the use of single use plastic grocery bags; new or enhanced street sweeping programs that require additional staffing, equipment and/or contract resources to increase sweeping frequencies in trash-prone areas; and, enhanced public education and outreach programs designed to reduce littering. Therefore, it is self-evident that the new 40% required reduction constitutes a new program and higher levels of service.

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[121] *Id.*

[122] *Id.* at 49.

[123] *Id.* at p. 50.

2. C.10.a.ii – Baseline Trash Load and Trash Reduction Tracking Method

MRP Provision C.10.a.ii requires the County to document and create baseline data on the amount of trash being discharged, develop a mechanism to track trash load reductions, and report to the Regional Board on its progress. This requirement is not comparable with the previous permit or the Clean Water Act, and therefore is a reimbursable state mandate.

No requirements in prior permits issued to the County, nor plans developed by the County or SCVURPPP, on behalf of the County, included provisions or tasks to develop baseline trash loading estimates or load reduction methodologies. The prior permit only required the County to document the amount of trash actually removed, whereas the new permit now requires the County to document the amount of litter being discharged, a very different requirement. These two measures are not comparable. Reporting the amount of litter being discharged will require the County, in conjunction with SCVURPPP, to develop and design an entirely new program to address these unknown figures, whereas the previous reporting requirement concerned figures known to the County, specifically, the amount of trash actually removed from the stormwater system.

Accordingly, Provisions C.10.a.ii requires a new program and higher levels of service to be implemented than was required by the previous permit.

3. C.10.a.iii – Minimum Full Trash Capture

MRP Provision C.10.a.iii requires the County to install and maintain a mandatory minimum number of trash full capture devices. The C.10 provisions in general are the most costly in the Test Claim, and the Minimum Full Trash Capture provisions are the most expensive of all the C.10 provisions. Again, the estimates for the state mandated investment required here are significant: **$423,045** in 2010 and **$423,045** in 2011. In total, the estimated two year costs for all SCVURPPP permittees attributable to MRP Provision C.10.a.iii is **$19,761,664**.

While these cost estimates make it clear that the MRP requires a huge investment in Minimum Full Trash Capture devices, the prior permits did not require any of these devices to be installed. The Regional Board notes that Santa Clara County had cooperated in a pilot program regarding trash full capture devices.[124] However, during the implementation of the pilot program, no full trash capture devices were installed within the unincorporated County and, thus, the County did not install the trash capture devices to comply with the requirements of Provision C.10.a.iii. The devices that were installed as part of the pilot program were done so voluntarily within the jurisdictional limits of the cities of San Jose and Sunnyvale, and were not required under the prior permits.

Simply stating that the County instituted a partial pilot program, without acknowledging that the pilot program was voluntarily implemented not by the County, but rather by the cities of Sunnyvale and San Jose, does not mean the County, or any other permittee was required to

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[124] *Id.* at 51.

perform the MRP program. A partial voluntary pilot program is significantly different from the requirements under the MRP. Nevertheless, this is the argument the Regional Board seems to make without citing any prior permit provisions requiring the County and other permittees to install and maintain full trash capture devices. Accordingly, the Regional Board cannot credibly argue that this provision does not institute a new program or higher level of service.

4. C.10.b.i and C.10.b.ii – Hot Spot Cleanup, Definition, and Selection

Under provision C.10.b.i and C.10.b.ii, the County is required to identify and submit information and photo documentation on trash hot spots to the Water Board. Prior permits did not require the identification and submittal of information to the Water Board regarding trash hot spots. Nevertheless, the Regional Board contends these additional provisions are only extensions of the prior permits, which required cleanup and assessments of stream locations that were essentially deemed trash hot spots.

Although the County was required to conduct trash hot spot cleanups, the prior permits did not require the identification and submittal of information to the Water Board regarding trash hot spots. In order to comply, the County must develop a new program and expend substantial funds to so do. For example, the County, in conjunction with SCVURPPP, must select hot spots, conduct a two-day workshop to obtain input on potential hot spot locations from stakeholders, and develop a County-wide report with information required by the MRP.

As the County must institute programs that were not previously required, and because the County must expend additional funds in order to comply, MRP Provisions C.10.b.i and C.10.b.ii constitute new programs and a higher level of service and are therefore a reimbursable state mandates.

5. C.10.b.iii – Hot Spot Assessments

Similar to the other C.10.b provisions, the Regional Board asserts MRP Provision C.10.b.iii is not a new program even though the Regional Board acknowledges this provision establishes more specific requirements than the previous permit. Specifically, the MRP requires the County to assess trash hot spots located throughout Santa Clara County and clean-up these hot spots to a level of "no visual impact."

The County submits that this requirement is substantially greater than the previous requirements under the prior permits. Specifically, the County has never been required to conduct trash hot spot clean-ups under prior permits. Nevertheless, the Regional Board argues that the clean-up and assessment of stream locations was equivalent to the creek cleanups under the prior permits. However, the Regional Board fails to note that under the prior permits, the County participated in the creek cleanups in conjunction with SCVURPPP and these were done on a pilot scale and on a voluntary basis, and not under any requirement.

Accordingly, as the County is required to perform tasks not previously required, and because performing these tasks will result in increased expenditures, the County submits MRP Provisions C.10.b.iii is a new program or higher levels of service, and thus is entitled to reimbursement.

6. C.10.c – Long-Term Trash Load Reduction

MRP Provision C.10.c requires the County to develop a long-term plan for trash reduction and to submit this plan to the Regional Board. The Regional Board admits that such a long-term trash reduction plan has never been required. Nevertheless, it somehow asserts that such a program does not impose a new program or higher level of service. The Regional Board cites no evidence to show that the County was ever required to conduct planning efforts for short-term trash reduction. The County was never previously required to implement such a plan. Accordingly, this provision clearly requires the County to implement a new program at a cost of **$30,647** for FY 2010-2012.

These additional expenditures, along with the fact that previous permits did not require such a program to be implemented, is evidence that MRP Provision C.10.c is a new program or higher levels of service, and therefore is subject to reimbursement by the State.

7. C.10.d – Reporting

MRP Provision C.10.d requires the County to provide a summary of: 1) trash load reduction actions; 2) the total trash loads and dominant types of trash removed by each of the actions; and 3) the percent annual trash load reduction relative to the baseline load. The prior permits did not require reporting requirements associated with trash. Accordingly, the County contends this MRP Provision C.10.d institutes a new program or higher levels of service subject to reimbursement.

The Regional Board admits that MRP Provision C.10.d is more specific than the previous permit because the previous permit did not require these trash reports. However, the Regional Board notes that the County, along with Alameda and Brisbane, were previously required to "report on their municipal maintenance activities and stream assessment and cleanup activities in their annual reports and other reports."[125] As a result, the Regional Board argues this prior permit language required the same programs and service levels as MRP Provision C.10.d. The new reporting requirements go beyond those established in prior permits, of which none were associated with trash. To comply with this provision of the MRP, the County must expend an additional **$16,850**. These noted expenditures, along with the implementation of a program that never before existed, evidences that MRP Provision C.10.d implements a new program or higher levels of service.

D. Provision C.10 is Not Required by Federal Law

The Regional Board states Provision C.10 is required by federal law and thus is not subject to reimbursement by the State. In support of this argument, the Regional Board states that the trash load reduction measure at issue was originally adopted by the Water Board in 1975, and thus is beyond the 12 month period for the County to challenge. However, the 1975 date cited by the Regional Board undermines its position that the mandate flows from the Clean

[125] Regional Board Response, p. 53.

Received
September 15, 2011
Commission on
State Mandates

Water Act's stormwater permitting provisions, which were not even enacted until 1987, and its later references otherwise do not support its theory.

Finally, the Regional Board, after stating that the Test Claim is untimely, argues that the measures were also federal mandates, in that the Regional Board "implemented numerous federal requirements in adopting Provision C.10." The Regional Board points to its prior argument, which has been rejected by the Commission on two prior occasions, that the trash requirements are mandated by the Clean Water Act. However, the Regional Board points to no specific language of the Clean Water Act that supports its position. Accordingly, Provision C.10 is not required by federal law, and therefore is a reimbursable state mandate.

E. Provisions C.11.f and C.12.f – Mercury and PCB Diversion studies

The County contends provisions C.11.f and C.12.f of the MRP are reimbursable state mandates. MRP Provisions C.11.f and C.12.f require the County to evaluate the reduced loads of mercury and PCBs from pilot projects to divert dry weather and first-flush stormwater flows to sanitary sewers, and further requires the County to work together with other permittees to implement a pilot project in each of the five counties in order to evaluate those load reductions. The Regional Board argues these provisions does not require a new program or higher levels of service, and are instead federal mandates.

1. MRP Provisions C.11.f and C.12.f Are New Programs or Higher Levels of Service

MRP Provisions C.11.f and C.12.f requires the County to conduct specific diversion studies and pilot programs for Mercury and PCBs. The Regional Board believes these measures are in line with the prior permits, which required control programs for Mercury and PCBs. However, the level of service required by the previous control programs was much less than the MRP requires for diversion studies and pilot programs.

As the Regional Board notes, the County's prior permit required it to "implement 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…'" as well as to "'identify, assess, and manage controllable sources of PCBs and dioxin-like compounds found in urban runoff, if any….'" [126] The Regional Board argues this language is equivalent to MRP provisions c.11.f and C.12.f. However, once again, the distinction is in the details and the Regional Board not only ignores them, but also contorts the language of the prior MS4 for a far reaching conclusion: that through the iterative process, the term identification and assessment means requiring the above noted requirements. In order to comply with this requirement, the County must spend an estimated additional. In order to comply with this requirement, the County must spend an estimated additional **$13,296** in FY 2010-2012.

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[126] *Id.* at 56.

Received
September 15, 2011
Commission on
State Mandates

Although the County is experiencing an increase in costs, the Regional Board ignores that evidence and alleges that the MRP's "more detailed requirements were necessary to refine Claimants' existing programs to address mercury and PCBs contamination."[127] The burdensome new provisions cannot fairly be said to merely "refine" existing programs; the MRP adds new programs for diversion and studies that never existed before. It is a new program arguably related to a TMDL implementation plan, which is not a federal requirement as set forth above and is strictly a manifestation of state law developed under Water Code section 13242. Accordingly, MRP Provisions C.11.f and C.12.f are new programs or higher levels of service.

2. C.11.f and C.12.f Are Not Mandated by Federal Law.

The Regional Board argues that MRP Provisions C.11.f and C.12.f are federal mandates, and therefore are not reimbursable. To support this argument, the Regional Board points to three separate requirements imposed by the Clean Water Act for discharge permits issued to local governments.

First, MRP Provisions C.11.f and C.12.f require measures to be implemented to control all dry weather flows. The Regional Board asserts that because the Clean Water Act requires the County to effectively prohibit non-stormwater discharges into storm sewers, all dry weather flows are prohibited from being present in the MS4. The Regional Board argues that "[d]ry weather flows are not included in the definition of "stormwater,"[128] thus such flows are prohibited." This argument has several problems. First, there is no factual basis for the Regional Board's assumption that any flow in the MS4 during dry weather comes from a prohibited non-stormwater discharge. Many portions of the MS4 in the County have flows during dry weather that do not, in fact, result from prohibited non-stormwater discharges. Indeed, this fact is acknowledged and memorialized in Provision C.15.a of the MRP, which expressly exempts the following unpolluted non-stormwater discharges:

(1) Flows from riparian habitats or wetlands;

(2) Diverted stream flows;

(3) Flows from natural springs;

(4) Rising ground waters;

(5) Uncontaminated and unpolluted groundwater infiltration;

(6) Single family homes' pumped groundwater, foundation drains, and water from crawl space pumps and footing drains;

(7) Pumped groundwater from drinking water aquifers; and

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[127] *Id.* at 56.

[128] 40 C.F.R. 122.26(b)(13).

(8) NPDES permitted discharges (individual or general permits).

Any and all of these exempted sources may be the reason for dry weather flow. In addition, Provision C.15.b allows conditionally exempted sources of non-stormwater discharges as well. Thus, the Regional Board is inaccurate in stating that all water flowing out of the MS4 during dry weather is prohibited.

Second, the Regional Board argues that the Mercury and PCB diversion studies are required to reduce the discharge of pollutants to the MEP. This claim is undercut by the Regional Board's admission that "the provisions are more specific that the federal laws and regulations that are cited in the permit."[129] By exercising its discretion as the NPDES permit writer, the Regional Board freely chose to implement costly and reimbursable state mandates.

XI. CONCLUSION

The documentation the County submitted to initiate these proceedings established that the MRP imposes numerous costly state mandates. The evidence concerning the magnitude of these costs is uncontested and the Regional Board has brushed the specifics of the differences between the prior permits and MRP to the side in favor of sweeping generalizations designed to avoid the relevant comparisons because they demonstrate that the challenged provisions represent new programs and/or requirements for higher levels of service. In fact, when appropriate scrutiny is applied, as shown above, the Regional Boards lengthy arguments that the MRP provisions at issue are either federal mandates or are not new programs or higher levels of service are not supported by fact or by law. These arguments are also the same arguments the Commission has rejected twice before. The County therefore respectfully request that the Commission determine that the MRP provisions set forth in the Test Claim are reimbursable state mandates.

Dated: September 15, 2011

MIGUEL MÁRQUEZ, COUNTY COUNSEL
ELIZABETH G. PIANCA, DEPUTY COUNTY COUNSEL

By: _____
Elizabeth G. Pianca, Deputy County Counsel

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[129] Regional Board Response, p. 57.

Received
September 15, 2011
Commission on
State Mandates

PROOF OF SERVICE

I, Elizabeth G. Pianca, declare that I am over 18 years of age and not a party to the within action. I am employed with the Office of County Counsel, County of Santa Clara at 70 W. Hedding Street, 9th Fl., East Wing, San Jose, California 95110. On September 15, 2011, the following document(s) were transmitted as follows:

NARRATIVE STATEMENT AND DOCUMENTATION IN SUPPORT OF REBUTTAL TO SAN FRANCISCO BAY REGIONAL WATER QUALITY CONTROL BOARD'S AND THE CALIFORNIA DEPARTMENT OF FINANCE'S RESPONSE TO TEST CLAIM 10-TC-03 MUNICIPAL REGIONAL STORMWATER PERMIT –SANTA CLARA COUNTY

	BY FACSIMILE: I caused a true and correct copy of the document to be transmitted by a facsimile machine compliant with rule 2003 of the California Rules of Court to the offices of the addresses at the telephone numbers shown on the service list.
✔	**BY ELECTRONIC MAIL:** I uploaded a true copy thereof to the CSM Drop Box at the Commission on State Mandates' website to be posted and the Commission on State Mandates to transmit notice via electronic mail to all parties and interested parties on its mailing list in accordance with the Commission on State Mandates' Procedures For Electronic Filing of Documents [Cal. Code Regs., tit. 2. § 1181.2, subd. (c)(1)].
	BY HAND DELIVERY: I caused a true and correct copy of the document(s) to be hand-delivered to the person(s) as shown.
	BY OVERNIGHT MAIL TO ALL PARTIES LISTED: I am readily familiar with my employer's practice for the collection and processing of overnight mail packages. Under that practice, packages would be deposited with an overnight mail carrier that same day, with overnight delivery charges thereon fully prepaid, in the ordinary course of business.
	BY FIRST CLASS MAIL TO ALL PARTIES LISTED: I am readily familiar with my employer's practice for the collection and processing of mail. Under that practice, envelopes would be deposited with the U.S. Postal Service that same day, with first class postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing shown in this proof of service.

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

EXECUTED on the 15th day of September, 2011, in San Jose, California.

Elizabeth G. Pianca

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September 15, 2011
Commission on
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Documentation in Support of Rebuttal to San Francisco Bay Regional Water Quality Control Board's and the California Department of Finance's Response to Test Claim 10-TC-03 Municipal Regional Stormwater Permit—

Santa Clara County

Received
September 15, 2011
Commission on
State Mandates

INDEX TO DOCUMENTATION IN SUPPORT OF REBUTTAL
VOLUME I—EXECUTIVE ORDER AND RELATED DOCUMENTATION

Received
September 15, 2011
Commission on
State Mandates

TAB NO. 1

Received
September 15, 2011
Commission on
State Mandates

California Regional Water Quality Control Board
San Francisco Bay Region
Municipal Regional Stormwater NPDES Permit

Order R2-2009-0074
NPDES Permit No. CAS612008
October 14, 2009

California Regional Water Quality Control Board
San Francisco Bay Region
Municipal Regional Stormwater NPDES Permit

ORDER R2-2009-0074
NPDES PERMIT NO. CAS612008

Issuing Waste Discharge Requirements and National Pollutant Discharge Elimination System (NPDES) Permit for the discharge of stormwater runoff from the municipal separate storm sewer systems (MS4s) of the following jurisdictions and entities, which are permitted under this San Francisco Bay Municipal Regional Stormwater Permit (MRP):

The cities of Alameda, Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Piedmont, Pleasanton, San Leandro, and Union City, Alameda County, the Alameda County Flood Control and Water Conservation District, and Zone 7 of the Alameda County Flood Control and Water Conservation District, which have joined together to form the Alameda Countywide Clean Water Program (Alameda Permittees)

The cities of Clayton, Concord, El Cerrito, Hercules, Lafayette, Martinez, Orinda, Pinole, Pittsburg, Pleasant Hill, Richmond, San Pablo, San Ramon, and Walnut Creek, the towns of Danville and Moraga, Contra Costa County, the Contra Costa County Flood Control and Water Conservation District, which have joined together to form the Contra Costa Clean Water Program (Contra Costa Permittees)

The cities of Campbell, Cupertino, Los Altos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, and Sunnyvale, the towns of Los Altos Hills and Los Gatos, the Santa Clara Valley Water District, and Santa Clara County, which have joined together to form the Santa Clara Valley Urban Runoff Pollution Prevention Program (Santa Clara Permittees)

The cities of Belmont, Brisbane, Burlingame, Daly City, East Palo Alto, Foster City, Half Moon Bay, Menlo Park, Millbrae, Pacifica, Redwood City, San Bruno, San Carlos, San Mateo, and South San Francisco, the towns of Atherton, Colma, Hillsborough, Portola Valley, and Woodside, the San Mateo County Flood Control District, and San Mateo County, which have joined together to form the San Mateo Countywide Water Pollution Prevention Program (San Mateo Permittees)

The cities of Fairfield and Suisun City, which have joined together to form the Fairfield-Suisun Urban Runoff Management Program (Fairfield-Suisun Permittees)

The City of Vallejo and the Vallejo Sanitation and Flood Control District (Vallejo Permittees)

Table of Contents

The California Regional Water Quality Control Board, San Francisco Bay Region, (hereinafter referred to as the Water Board) finds that:

FINDINGS

Incorporation of Fact Sheet

1. The Fact Sheet for the San Francisco Bay Municipal Regional Stormwater National Pollutant Discharge Elimination System (NPDES) Permit (Appendix I) includes cited regulatory and legal references and additional explanatory information in support of the requirements of this Permit. This information, including any supplements thereto, and any response to comments on the Tentative Orders, is hereby incorporated by reference.

Existing Permits

2. **Alameda County**—The cities of Alameda, Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Piedmont, Pleasanton, San Leandro, and Union City, Alameda County (Unincorporated area), the Alameda County Flood Control and Water Conservation District, and Zone 7 of the Alameda County Flood Control and Water Conservation District have joined together to form the Alameda Countywide Clean Water Program (hereinafter collectively referred to as the Alameda Permittees) and have submitted a permit application (Report of Waste Discharge), dated July 26, 2007, for reissuance of their waste discharge requirements under the NPDES permit to discharge stormwater runoff from storm drains and watercourses within the Alameda Permittees' jurisdictions. The Alameda Permittees are currently subject to NPDES Permit No. CAS0029831 issued by Order No. R2-2003-0021 on February 19, 2003, and amended by Order No. R2-2007-0025 on March 14, 2007, to the Alameda Permittees to discharge stormwater runoff from storm drains and watercourses within their jurisdictions.

3. **Contra Costa County**—The cities of Clayton, Concord, El Cerrito, Hercules, Lafayette, Martinez, Orinda, Pinole, Pittsburg, Pleasant Hill, Richmond, San Pablo, San Ramon, and Walnut Creek, the towns of Danville and Moraga, Contra Costa County, and the Contra Costa County Flood Control and Water Conservation District have joined together to form the Contra Costa Clean Water Program (hereinafter collectively referred to as the Contra Costa Permittees) and have submitted a permit application (Report of Waste Discharge), dated September 30, 2003, for reissuance of their waste discharge requirements under the NPDES permit to discharge stormwater runoff from storm drains and watercourses within the Contra Costa Permittees' jurisdictions. The Contra Costa Permittees are currently subject to NPDES Permit No. CAS0029912 issued by Order No. 99-058 on July 21, 1999, amended by Order No. R2-2003-0022 on February 9, 2003, amended by Order Nos. R2-2004-059 and R2-2004-0061 on July 21, 2004, and amended by Order No. R2-2006-0050 on July 12, 2006, to the Contra Costa Permittees to discharge stormwater runoff from storm drains and watercourses within their jurisdictions.

4. **San Mateo County**—The cities of Belmont, Brisbane, Burlingame, Daly City, East Palo Alto, Foster City, Half Moon Bay, Menlo Park, Millbrae, Pacifica, Redwood City, San Bruno, San Carlos, San Mateo, and South San Francisco, the towns of Atherton, Colma, Hillsborough, Portola Valley, and Woodside, the San Mateo County Flood Control District and San Mateo County have joined together to form the San Mateo Countywide Water Pollution Prevention

Program (hereinafter collectively referred to as the San Mateo Permittees) and have submitted a permit application (Report of Waste Discharge), dated January 23, 2004, for reissuance of their waste discharge requirements under the NPDES permit to discharge stormwater runoff from storm drains and watercourses within the San Mateo Permittees' jurisdictions. The San Mateo Permittees are currently subject to NPDES Permit No. CAS0029921 issued by Order No. 99-059 on July 21, 1999, amended by Order No. R2-2003-0023 on February 19, 2003, amended by Order Nos. R2-2004-0060 and R2-2004-0062 on July 21, 2004, and amended by Order R2-2007-0027 on March 14, 2007, to the San Mateo Permittees to discharge stormwater runoff from storm drains and watercourses within their jurisdictions.

5. **Santa Clara County**—The cities of Campbell, Cupertino, Los Altos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, and Sunnyvale, the towns of Los Altos Hills and Los Gatos, the Santa Clara Valley Water District, and the County of Santa Clara have joined together to form the Santa Clara Valley Urban Runoff Pollution Prevention Program (hereinafter collectively referred to as the Santa Clara Permittees) and have submitted a permit application (Report of Waste Discharge), dated February 25, 2005, for reissuance of their waste discharge requirements under the NPDES permit to discharge stormwater runoff from storm drains and watercourses within the Santa Clara Permittees' jurisdictions. The Santa Clara Permittees are currently subject to NPDES Permit No. CAS029718 issued by Order No. 01-024 on April 21, 2001, amended by Order No. 01-119 on October 17, 2001, and Order No. R2-2005-0035 on July 20, 2005, to the Santa Clara Permittees to discharge stormwater runoff from storm drains and watercourses within their jurisdictions.

6. **Fairfield-Suisun**—The cities of Fairfield and Suisun City have joined together to form the Fairfield-Suisun Urban Runoff Management Program (hereinafter referred to as the Fairfield-Suisun Permittees) and have submitted a permit application (Report of Waste Discharge), dated October 17, 2007, for reissuance of their waste discharge requirements under the NPDES permit to discharge stormwater runoff from storm drains and watercourses within the Fairfield-Suisun Permittees' jurisdictions. The Fairfield-Suisun Permittees are currently subject to NPDES Permit No. CAS0612005 issued by Order No. R2-2003-0034 on April 16, 2003, and amended by Order R2-2007-0026 on March 14, 2007, to the Fairfield-Suisun Permittees to discharge stormwater runoff from storm drains and watercourses within their jurisdictions.

7. **Vallejo**—The City of Vallejo and the Vallejo Sanitary District (hereinafter referred to as the Vallejo Permittees) are currently subject to NPDES Permit No. CAS612006 issued by the United States Environmental Protection Agency (USEPA) on April 27, 1999, and that became effective on May 30, 1999, for the discharge of stormwater runoff from storm drains and watercourses within the Vallejo Permittees' jurisdictions.

8. The Alameda, Contra Costa, San Mateo, Santa Clara, Fairfield-Suisun, and Vallejo Permittees are hereinafter referred to in this Order as the Permittees.

Applicable Federal, State and Regional Regulations

9. Section 402(p) of the federal Clean Water Act (CWA), as amended by the Water Quality Act of 1987, requires NPDES permits for stormwater discharges from municipal separate storm sewer systems (MS4s), stormwater discharges associated with industrial activity (including construction activities), and designated stormwater discharges, which are considered significant contributors of pollutants to waters of the United States. On November 16, 1990, USEPA published regulations (40 CFR Part 122), which prescribe permit application requirements for MS4s pursuant to CWA 402(p). On May 17, 1996, USEPA published an Interpretive Policy

Memorandum on Reapplication Requirements for Municipal Separate Storm Sewer Systems, which provided guidance on permit application requirements for regulated MS4s.

10. The Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) is the Water Board's master water quality control planning document. It designates beneficial uses and water quality objectives for waters of the State, including surface waters and groundwater. It also includes programs of implementation to achieve water quality objectives. The Basin Plan was duly adopted by the Water Board and approved by the State Water Resources Control Board (State Board), Office of Administrative Law and the USEPA, where required.

11. The Water Board finds stormwater discharges from urban and developing areas in the San Francisco Bay Region to be significant sources of certain pollutants that cause or may be causing or threatening to cause or contribute to water quality impairment in waters of the Region. Furthermore, as delineated in the CWA section 303(d) list, the Water Board has found that there is a reasonable potential that municipal stormwater discharges cause or may cause or contribute to an excursion above water quality standards for the following pollutants: mercury, PCBs, furans, dieldrin, chlordane, DDT, and selenium in San Francisco Bay segments; pesticide associated toxicity in all urban creeks; and trash and low dissolved oxygen in Lake Merritt, in Alameda County. In accordance with CWA section 303(d), the Water Board is required to establish TMDLs for these pollutants to these waters to gradually eliminate impairment and attain water quality standards. Therefore, certain early pollutant control actions and further pollutant impact assessments by the Permittees are warranted and required pursuant to this Order.

12. The San Francisco Estuary Project, established pursuant to CWA Section 320, culminated in June 1993 with completion of its Comprehensive Conservation and Management Plan (CCMP) for the preservation, restoration, and enhancement of the San Francisco Bay-Delta Estuary. The 2007 update of the CCMP includes new and revised actions, while retaining many of the original plan's actions. The CCMP includes recommended actions in the areas of aquatic resources, wildlife, wetlands, water use, pollution prevention and reduction, dredging and waterway modification, land use, public involvement and education, and research and monitoring. Recommended actions which may, in part, be addressed through implementation of this Permit include, but are not limited to, the following:

    (1) ACTION AR-9.1 (New 2007)
    Improve understanding of sources, types, and impacts of marine debris in the Estuary.

    (5) ACTION AR-9.2 (New 2007)
    Expand existing marine debris prevention and cleanup programs and develop new initiatives to reduce discharge of debris to waterways.

    (10) ACTION PO-1.2 (Revised 2007)
    Recommend institutional and financial changes needed to place more focus on pollution prevention.

    (12) ACTION PO-1.6 (Revised 2007)
    Implement a comprehensive strategy to reduce pesticides coming into the Estuary.

    (13) ACTION PO-1.7.1 (New 2007)
    Develop product stewardship program for new commercial products to minimize future pollutant releases.

(14) ACTION PO-1.8 (New 2007)
Develop and implement programs to prevent pollution of the Estuary by other harmful pollutants like trash, bacteria, sediments, and nutrients.

(15) ACTION PO-2.1 (Revised 2007)
Pursue a mass emissions strategy to reduce pollutant discharges into the Estuary from point and nonpoint sources and to address the accumulation of pollutants in estuarine organisms and sediments.

(16) ACTION PO-2.4 (Revised 2007)
Improve the management and control of urban runoff from public and private sources.

(18) ACTION PO-3.3 (New 2007)
Accomplish large-scale improvements to Bay-Delta area infrastructure and implement pollution prevention strategies to prevent pollution threats to public health and wildlife.

(19) ACTION PO-4.1 (New 2007)
Increase regulatory incentives for municipalities, through urban runoff and other programs, to invest in projects that restore or enhance stream and wetland functions.

(20) ACTION LU-1.1 (Revised 2007)
Local land use jurisdiction's General Plans should incorporate watershed protection goals for wetlands and stream environments and to reduce pollutants in runoff.

(21) ACTION LU-1.1.1 (New 2007): Provide assistance to local agencies to ensure that applicable nonpoint source control elements are incorporated into local government and business practices.

(22) ACTION LU-1.5 (LU-3.2 in 1993 CCMP; Revised 2007)
Provide incentives and promote the use of building, planning, and maintenance guidelines for site planning and implementation of best management practices (BMPs) as related to stormwater and encourage local jurisdictions to adopt these guidelines as local ordinances.

(23) ACTION LU-1.6 (New 2007)
Continue and enhance training and certification for planners, public works departments, consultants, and builders on sustainable design and building practices with the goal of preventing or minimizing alteration of watershed functions (e.g., flood water conveyance, groundwater infiltration, stream channel and floodplain maintenance), and preventing construction-related erosion and post-construction pollution.

(24) ACTION LU-2.7 (New 2007)
Adopt and implement policies and plans that protect and restore water quality, flood water storage, and other natural functions of stream and wetland systems.

(25) ACTION LU-3.1 (New 2007)
Promote, encourage, and support collaborative partnerships with broad stakeholder representation, such as watershed councils, in order to develop diverse community-based approaches to long-term stewardship.

(26) ACTION LU-4.1 (Revised 2007)
Educate the public about how human actions impact the Estuary and its watersheds.

(28) ACTION PI-2.5 (Revised 2007)
Assist in the development of long-term educational programs designed to prevent pollution to the Estuary's ecosystem and provide assistance to other programs as needed.

13. Under section 13389 of the California Water Code, this action to adopt an NPDES permit is exempt from the provisions of Chapter 3 of the California Environmental Quality Act (CEQA).

Nature of Discharges and Sources of Pollutants

14. Stormwater runoff is generated from various land uses in all the hydrologic sub basins in the Basin and discharges into watercourses, which in turn flow into Central, Lower and South San Francisco Bay.

15. The quality and quantity of runoff discharges vary considerably and are affected by hydrology, geology, land use, season, and sequence and duration of hydrologic events. Pollutants of concern in these discharges are certain heavy metals; excessive sediment production from erosion due to anthropogenic activities; petroleum hydrocarbons from sources such as used motor oil; microbial pathogens of domestic sewage origin from illicit discharges; certain pesticides associated with acute aquatic toxicity; excessive nutrient loads, which can cause or contribute to the depletion of dissolved oxygen and/or toxic concentrations of dissolved ammonia; trash, which impairs beneficial uses including, but not limited to, support for aquatic life; and other pollutants which can cause aquatic toxicity in the receiving waters.

16. Federal, State or regional entities within the Permittees' boundaries, not currently named in this Order, operate storm drain facilities and/or discharge stormwater to the storm drains and watercourses covered by this Order. The Permittees may lack jurisdiction over these entities. Consequently, the Water Board recognizes that the Permittees should not be held responsible for such facilities and/or discharges. The Water Board will consider such facilities for coverage under its NPDES permitting scheme pursuant to US EPA Phase II stormwater regulations. Under Phase II, the Water Board can permit these federal, State, and regional entities through use of the Statewide Phase II NPDES General Permit.

17. Certain pollutants present in stormwater and/or urban runoff can be derived from extraneous sources over which the Permittees have limited or no direct jurisdiction. Examples of such pollutants and their respective sources are polycyclic aromatic hydrocarbons (PAHs), which are products of internal combustion engine operation and other sources; heavy metals, such as copper from vehicle brake pad wear and zinc from vehicle tire wear; dioxins as products of combustion; polybrominated diphenyl ethers that are incorporated in many household products as flame retardants; mercury resulting from atmospheric deposition; and naturally occurring minerals from local geology. All these pollutants, and others, can be deposited on paved surfaces, rooftops, and other impervious surfaces as fine airborne particles—thus yielding stormwater runoff pollution that is unrelated to the activity associated with a given project site.

18. The Water Board will notify interested agencies and interested persons of the availability of reports, plans, and schedules, including Annual Reports, and will provide interested persons with an opportunity for a public hearing and/or an opportunity to submit their written views and recommendations. The Water Board will consider all comments and may modify the reports, plans, or schedules or may modify this Order in accordance with applicable law. All submittals required by this Order conditioned with acceptance by the Water Board will be subject to these notification, comment, and public hearing procedures.

19. This Order supersedes and rescinds Order Nos. 99-058, 99-059, 01-024, R2-2003-0021, R2-2003-0034, and supersedes NPDES Permit Nos. CAS0029831, CAS0029912, CAS0029921, CAS029718, CAS0612005, and CAS612006.

    This Order serves as a NPDES permit, pursuant to CWA section 402, or amendments thereto, and shall become effective December 1, 2009, provided the Regional Administrator, USEPA, Region 9, has no objections.

IT IS HEREBY ORDERED that the Permittees, in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted hereunder and the provisions of the Clean Water Act as amended and regulations and guidelines adopted hereunder, shall comply with the following:

A. DISCHARGE PROHIBITIONS

A.1. The Permittees shall, within their respective jurisdictions, effectively prohibit the discharge of non-stormwater (materials other than stormwater) into, storm drain systems and watercourses. NPDES-permitted discharges are exempt from this prohibition. Provision C.15 describes a tiered categorization of non-stormwater discharges based on potential for pollutant content that may be discharged upon adequate assurance that the discharge contains no pollutants of concern at concentrations that will impact beneficial uses or cause exceedances of water quality standards.

A.2. It shall be prohibited to discharge 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.

B. RECEIVING WATER LIMITATIONS

B.1. The discharge shall not cause the following conditions to create a condition of nuisance or to adversely affect beneficial uses of waters of the State:

- **a.** Floating, suspended, or deposited macroscopic particulate matter, or foam;
- **b.** Bottom deposits or aquatic growths;
- **c.** Alteration of temperature, turbidity, or apparent color beyond present natural background levels;
- **d.** Visible, floating, suspended, or deposited oil or other products of petroleum origin; and
- **e.** Substances present in concentrations or quantities that would cause deleterious effects on aquatic biota, wildlife, or waterfowl, or that render any of these unfit for human consumption.

B.2. The discharge shall not cause or contribute to a violation of any applicable water quality standard for receiving waters. If applicable water quality objectives are adopted and approved by the State Board after the date of the adoption of this Order, the Water Board may revise and modify this Order as appropriate.

C.1. Compliance with Discharge Prohibitions and Receiving Water Limitations

The Permittees shall comply with Discharge Prohibitions A.1 and A.2 and Receiving Water Limitations B.1 and B.2 through the timely implementation of control measures and other actions as specified in Provisions C.2 through C.15.

If exceedance(s) of water quality standards or water quality objectives (collectively, WQSs) persist in receiving waters, the Permittees shall comply with the following procedure:

C.1.a. Upon a determination by either the Permittee(s) or the Water Board that discharges are causing or contributing to an exceedance of an applicable WQS, the Permittee(s) shall notify, within no more than 30 days, and thereafter, except for any exceedances of WQSs for pesticides, trash, mercury, polychlorinated biphenols, copper, polybrominated diphenyl ethers, and selenium that are addressed pursuant to Provisions C.8 through C.14 of this Order, submit a report to the Water Board that describes BMPs that are currently being implemented, and the current level of implementation, and additional BMPs that will be implemented, and/or an increased level of implementation, to prevent or reduce the discharge of pollutants that are causing or contributing to the exceedance of WQSs. The report may be submitted in conjunction with the Annual Report, unless the Water Board directs an earlier submittal, and shall constitute a request to the Water Board for amendment of this NPDES Permit. The report and application for amendment shall include an implementation schedule. The Water Board may require modifications to the report and application for amendment; and

C.1.b. Submit any modifications to the report required by the Water Board within 30 days of notification.

As long as the Permittees have complied with the procedures set forth above, they do not have to repeat the same procedure for continuing or recurring exceedances of the same WQSs unless directed by the Water Board to develop additional control measures and BMPs and reinitiate the Permit amendment process.

C.2. Municipal Operations

The purpose of this provision is to ensure development and implementation of appropriate BMPs by all Permittees to control and reduce non-stormwater discharges and polluted stormwater to storm drains and watercourses during operation, inspection, and routine repair and maintenance activities of municipal facilities and infrastructure.

C.2.a. Street and Road Repair and Maintenance

i. **Task Description** – Asphalt/Concrete Removal, Cutting, Installation and Repair - The Permittees shall develop and implement appropriate BMPs at street and road repair and/or maintenance sites to control debris and waste materials during road and parking lot installation, repaving or repair maintenance activities, such as those described in the California Stormwater Quality Association's Handbook for Municipal Operations.

ii. **Implementation Levels**

(1) The Permittees shall require proper management of concrete slurry and wastewater, asphalt, pavement cutting, and other street and road maintenance materials and wastewater to avoid discharge to storm drains from such work sites. The Permittees shall coordinate with sanitary sewer agencies to determine if disposal to the sanitary sewer system is available for the wastewater generated from these activities provided that appropriate approvals and pretreatment standards are met.

(2) The Permittees shall require sweeping and/or vacuuming to remove debris, concrete, or sediment residues from such work sites upon completion of work. The Permittees shall require cleanup of all construction remains, spills and leaks using dry methods (e.g., absorbent materials, rags, pads, and vacuuming), as described in the Bay Area Stormwater Management Agencies Association's (BASMAA's) Blueprint for a Clean Bay.

iii. **Reporting** – The Permittees shall report on implementation of and compliance with these BMPs in the Annual Report

C.2.b. Sidewalk/Plaza Maintenance and Pavement Washing

i. **Task Description** – The Permittees shall implement, and require to be implemented, BMPs for pavement washing, mobile cleaning, pressure wash operations in such locations as parking lots and garages, trash areas, gas station fueling areas, and sidewalk and plaza cleaning, which prohibit the discharge of polluted wash water and non-stormwater to storm drains. The Permittees shall implement the BMPs included in BASMAA's Mobile Surface Cleaner Program. The Permittees shall coordinate with sanitary sewer agencies to determine if disposal to the sanitary sewer is available for the wastewater generated from these activities provided that appropriate approvals and pretreatment standards are met.

ii. **Reporting** – The Permittees shall report on implementation of and compliance with these BMPs in their Annual Report.

C.2.c. Bridge and Structure Maintenance and Graffiti Removal

i. **Task Description**

(1) The Permittees shall implement appropriate BMPs to prevent polluted stormwater and non-stormwater discharges from bridges and structural maintenance activities directly over water or into storm drains.

(2) The Permittees shall implement BMPs for graffiti removal that prevent non-stormwater and wash water discharges into storm drains.

ii. **Implementation Levels**

(1) The Permittees shall prevent all debris, including structural materials and coating debris, such as paint chips, or other debris and pollutants generated in bridge and structure maintenance or graffiti removal from entering storm drains or water courses.

(2) The Permittees shall protect nearby storm drain inlets before removing graffiti from walls, signs, sidewalks or other structures. The Permittees shall prevent any discharge of debris, cleaning compound waste, paint waste or wash water due to graffiti removal from entering storm drains or watercourses.

(3) The Permittees shall determine the proper disposal method for wastes generated from these activities. The Permittees shall train their employees and/or specify in contracts about these proper capture and disposal methods for the wastes generated.

iii. **Reporting** – The Permittees shall report on implementation of and compliance with these BMPs in their Annual Report.

C.2.d. Stormwater Pump Stations

The objective of this sub-provision is to prevent the discharge of water with low dissolved oxygen (DO) from pump stations, and to explore the use of pump stations for trash capture and removal from waters to protect beneficial uses of receiving waters.

i. **Task Description** – Operation and Maintenance of Stormwater Pump Stations – The Permittees shall develop and implement measures to operate, inspect, and maintain these facilities to eliminate non-stormwater discharges containing pollutants, and to reduce pollutant loads in the stormwater discharges to comply with WQSs.

ii. **Implementation Levels** – The Permittees shall comply with the following implementation measures to reduce polluted water discharges from Permittee-owned or operated pump stations:

(1) Complete an inventory of pump stations within each Permittee's jurisdiction, including locations, and key characteristics[1] by March 1, 2010.

(2) Inspect and collect DO data from all pump stations twice a year during the dry season after July 1, starting in 2010. DO monitoring is exempted where all discharge from a pump station remains in the stormwater collection system or infiltrates into a dry creek immediately downstream.

(3) If DO levels are at or below 3 milligrams per liter (3 mg/L), apply corrective actions, such as continuous pumping at a low flow rate, aeration, or other appropriate methods to maintain DO concentrations of the discharge above 3 mg/L. Verify corrective actions are effective by increasing DO monitoring interval to weekly until two weekly samples are above 3 mg/L.

(4) Starting in fall 2010, inspect pump stations a minimum of two times during the wet season in the first business day after ¼-inch and larger storm events after a minimum of a two week antecedent period with no precipitation. Post-storm inspections shall collect and report presence and quantity estimates of trash, including presence of odor, color, turbidity, and floating hydrocarbons. Remove debris and trash and replace any oil absorbent booms, as needed.

iii. Reporting – The Permittees shall report information resulting from C.2.d.ii.(2)-(4), including DO monitoring data and subsequent corrective actions taken to verify compliance with the 3 mg/L implementation level, in their Annual Report, and maintain records of inspection and maintenance activities and volume or mass of waste materials removed from pump stations.

C.2.e. Rural Public Works Construction and Maintenance

i. Task Description – Rural Road and Public Works Construction and Maintenance - For the purpose of this provision, rural means any watershed or portion thereof that is developed with large lot home-sites, such as one acre or larger, or with primarily agricultural, grazing or open space uses. The Permittees shall implement and require contractors to implement BMPs for erosion and sediment control during and after construction for maintenance activities on rural roads, particularly in or adjacent to stream channels or wetlands. The Permittees shall notify the Water Board, the California Department of Fish and Game and the U.S. Army Corps of Engineers, where applicable, and obtain appropriate agency permits for rural public works activities before work in or near creeks and wetlands.

[1] Characteristics include name of pump station, latitude and longitude in WGS 84, number of pumps, drainage area in acres, dominant land use(s), first receiving water body, maximum pumping capacity of station in gallons per minute (gpm), flow measurement capability (Y or N), flow measurement method, average wet season discharge rate in gpm, dry season discharge (Y, N, or unknown), nearest municipal wastewater treatment plant, wet well storage capacity in gallons, trash control (Y or N), trash control measure, and date built or last updated.

ii. Implementation Level

(1) The Permittees shall develop, where they do not already exist, and implement BMPs for erosion and sediment control measures during construction and maintenance activities on rural roads, including developing and implementing appropriate training and technical assistance resources for rural public works activities, by April 1, 2010.

(2) The Permittees shall develop and implement appropriate BMPs for the following activities, which minimize impacts on streams and wetlands in the course of rural road and public works maintenance and construction activities:

(a) Road design, construction, maintenance, and repairs in rural areas that prevent and control road-related erosion and sediment transport;

(b) Identification and prioritization of rural road maintenance on the basis of soil erosion potential, slope steepness, and stream habitat resources;

(c) Construction of roads and culverts that do not impact creek functions. New or replaced culverts shall not create a migratory fish passage barrier, where migratory fish are present, or lead to stream instability;

(d) Development and implementation of an inspection program to maintain rural roads' structural integrity and prevent impacts on water quality;

(e) Maintenance of rural roads adjacent to streams and riparian habitat to reduce erosion, replace damaging shotgun culverts and excessive erosion;

(f) Re-grading of unpaved rural roads to slope outward where consistent with road engineering safety standards, and installation of water bars as appropriate; and

(g) Replacement of existing culverts or design of new culverts or bridge crossings shall use measures to reduce erosion, provide fish passage and maintain natural stream geomorphology in a stable manner.

(3) The Permittees shall develop or incorporate existing training and guidance on permitting requirements for rural public works activities so as to stress the importance of proper planning and construction to avoid water quality impacts.

(4) The Permittees shall provide training incorporating these BMPs to rural public works maintenance staff at least twice within this Permit term.

iii. Reporting – The Permittees shall report on the implementation of and compliance with BMPs for the rural public works construction and maintenance activities in their Annual Report, including reporting on increased maintenance in priority areas.

C.2.f. Corporation Yard BMP Implementation

i. Task Description – Corporation Yard Maintenance

(1) The Permittees shall prepare, implement, and maintain a site specific Stormwater Pollution Prevention Plan (SWPPP) for corporation yards, including municipal vehicle maintenance, heavy equipment and maintenance vehicle parking areas, and material storage facilities to comply with water quality standards. Each SWPPP 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, May 2003, and its addenda, as appropriate.

(2) The requirements in this provision shall apply only to facilities that are not already covered under the State Board's Industrial Stormwater NPDES General Permit.

(3) The site specific SWPPPs for corporation yards shall be completed by July 1, 2010.

ii. Implementation Level

(1) Implement BMPs to minimize pollutant discharges in stormwater and prohibit non-stormwater discharges, such as wash waters and street sweeper, vactor, and other related equipment cleaning wash water. Pollution control actions shall include, but not be limited to, good housekeeping practices, material and waste storage control, and vehicle leak and spill control.

(2) Routinely inspect corporation yards to ensure that no non-stormwater discharges are entering the storm drain system and, during storms, pollutant discharges are prevented to the maximum extent practicable. At a minimum, an inspection shall occur before the start of the rainy season.

(3) Plumb all vehicle and equipment wash areas to the sanitary sewer after coordination with the local sanitary sewer agency and equip with a pretreatment device (if necessary) in accordance with the requirements of the local sanitary sewer agency.

(4) Use dry cleanup methods when cleaning debris and spills from corporation yards. If wet cleaning methods must be used (e.g., pressure washing), the Permittee shall ensure that wash water is collected and disposed in the sanitary sewer after coordination with the local sanitary sewer agency and in accordance with the requirements of the local sanitary sewer agency. Any private companies hired by the Permittee to perform cleaning activities on Permittee-owned property shall follow the same requirements. In areas where sanitary sewer connection is not available, the Permittees shall collect and haul the wash water to a municipal

wastewater treatment plant, or implement appropriate BMPs and dispose of the wastewater to land in a manner that does not adversely impact surface water or groundwater.

(5) Outdoor storage areas containing waste pollutants shall be covered and/or bermed to prevent discharges of polluted stormwater runoff or run-on to storm drain inlets.

iii. Reporting – The Permittees shall report on implementation of SWPPPs, the results of inspections, and any follow-up actions in their Annual Report.

C.3. New Development and Redevelopment

The goal of Provision C.3 is for the Permittees to use their planning authorities to include appropriate source control, site design, and stormwater treatment measures in new development and redevelopment projects to address both soluble and insoluble stormwater runoff pollutant discharges and prevent increases in runoff flows from new development and redevelopment projects. This goal is to be accomplished primarily through the implementation of low impact development (LID) techniques.

C.3.a. New Development and Redevelopment Performance Standard Implementation

i. **Task Description** – At a minimum each Permittee shall:

(1) Have adequate legal authority to implement all requirements of Provision C.3;

(2) Have adequate development review and permitting procedures to impose conditions of approval or other enforceable mechanisms to implement the requirements of Provision C.3. For projects discharging directly to CWA section 303(d)-listed waterbodies, conditions of approval must require that post-development runoff not exceed pre-development levels for such pollutants that are listed;

(3) Evaluate potential water quality effects and identify appropriate mitigation measures when conducting environmental reviews, such as under CEQA;

(4) Provide training adequate to implement the requirements of Provision C.3 for staff, including interdepartmental training;

(5) Provide outreach adequate to implement the requirements of Provision C.3, including providing education materials to municipal staff, developers, contractors, construction site operators, and owner/builders, early in the planning process and as appropriate;

(6) For all new development and redevelopment projects that are subject to the Permittee's planning, building, development, or other comparable review, but not regulated by Provision C.3, encourage the inclusion of adequate site design measures that may include minimizing land disturbance and impervious surfaces (especially parking lots); clustering of structures and pavement; directing roof runoff to vegetated areas; use of micro-detention, including distributed landscape-based detention; preservation of open space; protection and/or restoration of riparian areas and wetlands as project amenities;

(7) For all new development and redevelopment projects that are subject to the Permittee's planning, building, development, or other comparable review, but not regulated by Provision C.3, encourage the inclusion of adequate source control measures to limit pollutant generation, discharge, and runoff. These source control measures should include:

- Storm drain stenciling.

- Landscaping that minimizes irrigation and runoff, promotes surface infiltration where possible, minimizes the use of pesticides and fertilizers, and incorporates appropriate sustainable landscaping practices and programs such as Bay-Friendly Landscaping.
- Appropriate covers, drains, and storage precautions for outdoor material storage areas, loading docks, repair/maintenance bays, and fueling areas.
- Covered trash, food waste, and compactor enclosures.
- Plumbing of the following discharges to the sanitary sewer, subject to the local sanitary sewer agency's authority and standards:
  - Discharges from indoor floor mat/equipment/hood filter wash racks or covered outdoor wash racks for restaurants.
  - Dumpster drips from covered trash and food compactor enclosures.
  - Discharges from outdoor covered wash areas for vehicles, equipment, and accessories.
  - Swimming pool water, if discharge to onsite vegetated areas is not a feasible option.
  - Fire sprinkler test water, if discharge to onsite vegetated areas is not a feasible option.

(8) Revise, as necessary, General Plans to integrate water quality and watershed protection with water supply, flood control, habitat protection, groundwater recharge, and other sustainable development principles and policies (e.g., referencing the Bay-Friendly Landscape Guidelines).

ii. **Implementation Level** – Most of the elements of this task should already be fully implemented because they are required in the Permittees' existing stormwater permits.

Due Dates for Full Implementation – Immediate for C.3.a.i.(1)-(5), May 1, 2010 for C.3.a.i.(6)-(7), and December 1, 2010 for C.3.a.i.(8). For Vallejo Permittees: December 1, 2010 for C.3.a.i.(1)-(8)

iii. **Reporting** – Provide a brief summary of the method(s) of implementation of Provisions C.3.a.i.(1)–(8) in the 2011 Annual Report.

C.3.b. Regulated Projects

i. **Task Description** – The Permittees shall require all projects fitting the category descriptions listed in Provision C.3.b.ii below (hereinafter called Regulated Projects) to implement LID source control, site design, and stormwater treatment onsite or at a joint stormwater treatment facility[2] in accordance with Provisions C.3.c and C.3.d, unless the Provision C.3.e alternate compliance options are evoked. For adjacent Regulated Projects that will discharge runoff to a joint stormwater treatment facility, the treatment facility must be completed by

[2] **Joint stormwater treatment facility** – Stormwater treatment facility built to treat the combined runoff from two or more Regulated Projects located adjacent to each other,

the end of construction of the first Regulated Project that will be discharging runoff to the joint stormwater treatment facility.

Regulated Projects, as they are defined in this Provision, do not include detached single-family home projects that are not part of a larger plan of development.

ii. Regulated Projects are defined in the following categories:

(1) **Special Land Use Categories**

(a) **New Development or redevelopment projects** that fall into one of the categories listed below and that create and/or replace 10,000 square feet or more of impervious surface (collectively over the entire project site). This category includes development projects of the following four types on public or private land that fall under the planning and building authority of a Permittee:

(i) Auto service facilities, described by the following Standard Industrial Classification (SIC) Codes: 5013, 5014, 5541, 7532-7534, and 7536-7539;

(ii) Retail gasoline outlets;

(iii) Restaurants (SIC Code 5812); or

(iv) Uncovered parking lots that are stand-alone or part of any other development project. This category includes the top uncovered portion of parking structures unless drainage from the uncovered portion is connected to the sanitary sewer along with the covered portions of the parking structure.

(b) For redevelopment projects in the categories specified in Provision C.3.b.ii.(1)(a)(i)-(iv), specific exclusions are:

(i) Interior remodels;

(ii) Routine maintenance or repair such as:

- roof or exterior wall surface replacement,
- pavement resurfacing within the existing footprint.

(c) Where a redevelopment project in the categories specified in Provision C.3.b.ii.(1)(a)(i)-(iv) results in an alteration of **more than 50 percent** of the impervious surface of a previously existing development that was not subject to Provision C.3, the entire project, consisting of all existing, new, and/or replaced impervious surfaces, must be included in the treatment system design (i.e., stormwater treatment systems must be designed and sized to treat stormwater runoff from the entire redevelopment project).

(d) Where a redevelopment project in the categories specified in Provision C.3.b.ii.(1)(a)(i)-(iv) results in an alteration of **less than 50 percent** of the impervious surface of a previously existing development that was not subject to Provision C.3, only the new and/or replaced impervious surface of the project must be included in the treatment system design (i.e., stormwater treatment systems must be designed and sized to treat stormwater runoff from the new and/or replaced impervious surface of the project).

(e) For any private development project in the categories specified in Provisions C.3.b.ii.(1)(a)(i)-(iv) for which a planning application has been deemed complete by a Permittee on or before the Permit effective date, the lower 5000 square feet impervious surface threshold (for classification as a Regulated Project) shall not apply so long as the project applicant is diligently pursuing the project. Diligent pursuance may be demonstrated by the project applicant's submittal of supplemental information to the original application, plans, or other documents required for any necessary approvals of the project by the Permittee. If during the time period between the Permit effective date and the required implementation date of December 1, 2011, for the 5000 square feet threshold, the project applicant has not taken any action to obtain the necessary approvals from the Permittee, the project will then be subject to the lower 5000 square feet impervious surface threshold specified in Provision C.3.b.ii.(1).

(f) For any private development project in the categories specified in Provisions C.3.b.ii.(1)(a)(i)-(iv) with an application deemed complete after the Permit effective date, the lower 5000 square feet impervious surface threshold (for classification as a Regulated Project) shall not apply if the project applicant has received final discretionary approval for the project before the required implementation date of December 1, 2011, for the 5000 square feet threshold.

(g) For public projects for which funding has been committed and construction is scheduled to begin by December 1, 2012, the lower 5000 square feet of impervious surface threshold (for classification as a Regulated Project) shall not apply.

Effective Date – Immediate, except December 1, 2010, for Vallejo Permittees.

Beginning December 1, 2011, all references to 10,000 square feet in Provision C.3.b.ii.(1) change to 5,000 square feet.

(2) **Other Development Projects**

New development projects that create 10,000 square feet or more of impervious surface (collectively over the entire project site) including commercial, industrial, residential housing subdivisions (i.e., detached single-family home subdivisions, multi-family attached subdivisions (town homes), condominiums, and apartments), mixed-use, and public projects. This category includes development projects on public or private land that fall under the planning and building authority of a Permittee. Detached single-family home projects that are not part of a larger plan of development are specifically excluded.

Effective Date – Immediate, except December 1, 2010, for Vallejo Permittees.

(3) **Other Redevelopment Projects**

Redevelopment projects that create and/or replace 10,000 square feet or more of impervious surface (collectively over the entire project site) including commercial, industrial, residential housing subdivisions (i.e., detached single-family home subdivisions, multi-family attached subdivisions (town homes), condominiums, and apartments), mixed-use, and public projects. Redevelopment is any land-disturbing activity that results in the creation, addition, or replacement of exterior impervious surface area on a site on which some past development has occurred. This category includes redevelopment projects on public or private land that fall under the planning and building authority of a Permittee.

Specific exclusions to this category are:

- Interior remodels.
- Routine maintenance or repair such as:
  - roof or exterior wall surface replacement, or
  - pavement resurfacing within the existing footprint.

(a) Where a redevelopment project results in an alteration of **more than 50 percent** of the impervious surface of a previously existing development that was not subject to Provision C.3, the entire project, consisting of all existing, new, and/or replaced impervious surfaces, must be included in the treatment system design (i.e., stormwater treatment systems must be designed and sized to treat stormwater runoff from the entire redevelopment project).

(b) Where a redevelopment results in an alteration **of less than 50 percent** of the impervious surface of a previously existing development that was not subject to Provision C.3, only the new and/or replaced impervious surface of the project must be included in the treatment system design (i.e., stormwater treatment systems must be designed and sized to treat stormwater runoff from the new and/or replaced impervious surface of the project).

Effective Date – Immediate, except December 1, 2010, for Vallejo Permittees.

(4) **Road Projects**

Any of the following types of road projects that create 10,000 square feet or more of newly constructed contiguous impervious surface and that fall under the building and planning authority of a Permittee:

(a) Construction of new streets or roads, including sidewalks and bicycle lanes built as part of the new streets or roads.

(b) Widening of existing streets or roads with additional traffic lanes.

(i) Where the addition of traffic lanes results in an alteration of **more than 50 percent** of the impervious surface of an existing street or road that was not subject to Provision C.3, **the entire project, consisting of all existing, new, and/or replaced impervious surfaces, must be included in the treatment system design** (i.e.,

stormwater treatment systems must be designed and sized to treat stormwater runoff from the entire street or road that had additional traffic lanes added).

(ii) Where the addition of traffic lanes results in an alteration **of less than 50 percent** of the impervious surface of an existing street or road that was not subject to Provision C.3, **only the new and/or replaced impervious surface of the project must be included in the treatment system design** (i.e., stormwater treatment systems must be designed and sized to treat stormwater runoff from only the new traffic lanes). However, if the stormwater runoff from the existing traffic lanes and the added traffic lanes cannot be separated, any onsite treatment system must be designed and sized to treat stormwater runoff from the entire street or road. If an offsite treatment system is installed or in-lieu fees paid in accordance with Provision C.3.e, the offsite treatment system or in-lieu fees must address only the stormwater runoff from the added traffic lanes.

(c) Construction of impervious trails that are greater than 10 feet wide or are creek-side (within 50 feet of the top of bank).

(d) Specific exclusions to Provisions C.3.b.ii.(4)(a)-(c) are:

- Sidewalks built as part of new streets or roads and built to direct stormwater runoff to adjacent vegetated areas.
- Bicycle lanes that are built as part of new streets or roads but are not hydraulically connected to the new streets or roads and that direct stormwater runoff to adjacent vegetated areas.
- Impervious trails built to direct stormwater runoff to adjacent vegetated areas, or other non-erodible permeable areas, preferably away from creeks or towards the outboard side of levees.
- Sidewalks, bicycle lanes, or trails constructed with permeable surfaces.[3]
- Caltrans highway projects and associated facilities.

(e) For any private road or trail project described by Provisions C.3.b.ii.(4)(b) or (c) for which a planning application has been deemed complete by a Permittee on or before the Permit effective date, the requirements of Provisions C.3.b.ii.(4)(b) or (c) to classify the project as a Regulated Project shall not apply so long as the project applicant is diligently pursuing the project. Diligent pursuance may be demonstrated by the project applicant's submittal of supplemental information to the original application, plans, or other documents required for any necessary approvals of the project by the Permittee. If during the time period between the Permit effective date and the required implementation date of December 1, 2011, for Provisions C.3.b.ii.(4)(b) and (c), the project applicant has not taken

[3] **Permeable surfaces** include pervious concrete, porous asphalt, unit pavers, and granular materials.

any action to obtain the necessary approvals from the Permittee, the project will then be classified as a Regulated Project under Provisions C.3.b.ii.(4)(b) or (c).

(f) For any private road or trail project with an application deemed complete after the Permit effective date, the requirements of Provisions C.3.b.i.(4)(b) or (c) to classify the project as a Regulated Project shall not apply if the project applicant has received final discretionary approval for the project before the required implementation date of December 1, 2011, for Provisions C.3.b.ii.(4)(b) and (c).

(g) For any public road or trail project for which funding has been committed and construction is scheduled to begin by December 1, 2012, the requirements of Provisions C.3.b.i.(4)(b) or (c) to classify the project as a Regulated Project shall not apply.

Effective Date – Immediate for C.3.b.ii.(4)(a) and (d)-(g), and December 1, 2011, for C.3.b.ii.(4)(b) and (c). For Vallejo Permittees: Immediate for C.3.b.ii.(4)(d)-(g), and December 1, 2011 for C.3.b.ii.(4)(a)-(c).

iii. Green Street Pilot Projects

The Permittees shall cumulatively complete ten pilot green street projects that incorporate LID techniques for site design and treatment in accordance with Provision C.3.c and that provide stormwater treatment sized in accordance with Provision C.3.d. It is also desirable that they meet or exceed the Bay-Friendly Landscape Scorecard minimum requirements (see www.BayFriendly.org).

(1) Parking lot projects that provide LID treatment in accordance with Provisions C.3.c and Provision C.3.d. for stormwater runoff from the parking lot and street may be considered pilot green street projects.

(2) A Regulated Project (as defined in Provision C.3.b.ii) may not be counted as one of the ten pilot green street projects.

(3) At least two pilot green street projects must be located in each of the following counties: Alameda, Contra Costa, San Mateo, and Santa Clara.

(4) The Permittees shall construct the ten pilot green street projects in such a manner that they, as a whole:

(a) Are representative of the various types of streets: arterial, collector, and local; and

(b) Contain the following key elements:

(i) Stormwater storage for landscaping reuse or stormwater treatment and/or infiltration for groundwater replenishment through the use of natural feature systems;

(ii) Creation of attractive streetscapes that enhance neighborhood livability by enhancing the pedestrian environment and introducing park-like elements into neighborhoods;

(iii) Service as an urban greenway segment that connects neighborhoods, parks, recreation facilities, schools, mainstreets, and wildlife habitats;

(iv) Parking management that includes maximum parking space requirements as opposed to minimum parking space requirements, parking requirement credits for subsidized transit or shuttle service, parking structures, shared parking, car sharing, or on-street diagonal parking;

(v) Meets broader community goals by providing pedestrian and, where appropriate, bicycle access; and

(vi) Located in a Priority Development Area as designated under the Association of Bay Area Government's and Metropolitan Transportation Commission's FOCUS[4] program.

(5) The Permittees shall conduct appropriate monitoring of these projects to document the water quality benefits achieved. Appropriate monitoring may include modeling using the design specifications and specific site conditions.

Due Date – All pilot green street projects shall be completed by December 1, 2014.

iv. Implementation Level – All elements of Provision C.3.b.i.-iii shall be fully implemented by the effective/due dates set forth in their respective sub-provision, and a database or equivalent tabular format shall be developed and maintained that contains all the information listed under Reporting (Provision C.3.b.v.).

Due Dates for Full Implementation – See specific Effective Dates listed under Provisions C.3.b.ii& iii. .The database or equivalent tabular format required by Provision C.3.b.iv shall be developed by December 1, 2010. (For Vallejo Permittees: December 1, 2011)

v. Reporting

(1) **Annual Reporting – C.3.b.ii. Regulated Projects**

For each Regulated Project approved during the fiscal year reporting period, the following information shall be reported electronically in the fiscal year Annual Report, in tabular form (as set forth in the attached Provision C.3.b. Sample Reporting Table):

(a) Project Name, Number, Location (cross streets), and Street Address;

(b) Name of Developer, Phase No. (if project is being constructed in phases, each phase should have a separate entry), Project Type (e.g., commercial, industrial, multiunit residential, mixed-use, public), and description;

(c) Project watershed;

(d) Total project site area and total area of land disturbed;

[4] FOCUS is a regional incentive-based development and conservation strategy for the Bay Area.

(e) Total new impervious surface area and/or total replaced impervious surface area;

(f) If redevelopment or road widening project, total pre-project impervious surface area and total post-project impervious surface area;

(g) Status of project (e.g., application date, application deemed complete date, project approval date);

(h) Source control measures;

(i) Site design measures;

(j) All post-construction stormwater treatment systems installed onsite, at a joint stormwater treatment facility, and/or at an offsite location;

(k) Operation and maintenance responsibility mechanism for the life of the project.

(l) Hydraulic Sizing Criteria used;

(m) Alternative compliance measures for Regulated Project (if applicable)

(i) If alternative compliance will be provided at an offsite location in accordance with Provision C.3.e.i.(1), include information required in Provision C.3.b.v.(a) – (l) for the offsite project; and

(ii) If alternative compliance will be provided by paying in-lieu fees in accordance with Provision C.3.e.i.(2), provide information required in Provision C.3.b.v.(a) – (l) for the Regional Project. Additionally, provide a summary of the Regional Project's goals, duration, estimated completion date, total estimated cost of the Regional Project, and estimated monetary contribution from the Regulated Project to the Regional Project; and

(n) Hydromodification (HM) Controls (see Provision C.3.g.) – If not required, state why not. If required, state control method used.

(2) **Pilot Green Streets Project Reporting - Provision C.3.b.iii.**

(a) On an annual basis, the Permittees shall report on the status of the pilot green street projects.

(b) For each completed project, the Permittees shall report the capital costs, operation and maintenance costs, legal and procedural arrangements in place to address operation and maintenance and its associated costs, and the sustainable landscape measures incorporated in the project including, if relevant, the score from the Bay-Friendly Landscape Scorecard.

(c) The 2013 Annual Report shall contain a summary of all green street projects completed by January 1, 2013. The summary shall include for each completed project the following information:

(i) Location of project

(ii) Size of project, including total impervious surface treated

(iii) Map(s) of project showing areas where stormwater runoff will be treated by LID measures

(iv) Specific type(s) of LID treatment measures included

(v) Total and specific costs of project

(vi) Specific funding sources for project and breakdown of percentage paid by each funding source

(vii) Lessons learned, including recommendations to facilitate funding and building of future projects

(viii) Identification of responsible party and funding source for operation and maintenance.

C.3.c. Low Impact Development (LID)

The goal of LID is to reduce runoff and mimic a site's predevelopment hydrology by minimizing disturbed areas and impervious cover and then infiltrating, storing, detaining, evapotranspiring, and/or biotreating stormwater runoff close to its source. LID employs principles such as preserving and recreating natural landscape features and minimizing imperviousness to create functional and appealing site drainage that treats stormwater as a resource, rather than a waste product. Practices used to adhere to these LID principles include measures such as rain barrels and cisterns, green roofs, permeable pavement, preserving undeveloped open space, and biotreatment through rain gardens, bioretention units, bioswales, and planter/tree boxes.

Task Description

i. The Permittees shall, at a minimum, implement the following LID requirements:

(1) **Source Control Requirements**

Require all Regulated Projects to implement source control measures onsite that at a minimum, shall include the following:

(a) Minimization of stormwater pollutants of concern in urban runoff through measures that may include plumbing of the following discharges to the sanitary sewer, subject to the local sanitary sewer agency's authority and standards:

- Discharges from indoor floor mat/equipment/hood filter wash racks or covered outdoor wash racks for restaurants;
- Dumpster drips from covered trash, food waste and compactor enclosures;
- Discharges from covered outdoor wash areas for vehicles, equipment, and accessories;
- Swimming pool water, if discharge to onsite vegetated areas is not a feasible option; and
- Fire sprinkler test water, if discharge to onsite vegetated areas is not a feasible option;

(b) Properly designed covers, drains, and storage precautions for outdoor material storage areas, loading docks, repair/maintenance bays, and fueling areas;

(c) Properly designed trash storage areas;

(d) Landscaping that minimizes irrigation and runoff, promotes surface infiltration, minimizes the use of pesticides and fertilizers, and incorporates other appropriate sustainable landscaping practices and programs such as Bay-Friendly Landscaping;

(e) Efficient irrigation systems; and

(f) Storm drain system stenciling or signage.

(2) **Site Design and Stormwater Treatment Requirements**

(a) Require each Regulated Project to implement at least the following design strategies onsite:

(i) Limit disturbance of natural water bodies and drainage systems; minimize compaction of highly permeable soils; protect slopes and channels; and minimize impacts from stormwater and urban runoff on the biological integrity of natural drainage systems and water bodies;

(ii) Conserve natural areas, including existing trees, other vegetation, and soils;

(iii) Minimize impervious surfaces;

(iv) Minimize disturbances to natural drainages; and

(v) Minimize stormwater runoff by implementing one or more of the following site design measures:

- Direct roof runoff into cisterns or rain barrels for reuse.
- Direct roof runoff onto vegetated areas.
- Direct runoff from sidewalks, walkways, and/or patios onto vegetated areas.
- Direct runoff from driveways and/or uncovered parking lots onto vegetated areas.
- Construct sidewalks, walkways, and/or patios with permeable surfaces.[3]
- Construct driveways, bike lanes, and/or uncovered parking lots with permeable surfaces.[3]

(b) Require each Regulated Project to treat 100% of the amount of runoff identified in Provision C.3.d for the Regulated Project's drainage area with LID treatment measures onsite or with LID treatment measures at a joint stormwater treatment facility.

(i) LID treatment measures are harvesting and re-use, infiltration, evapotranspiration, or biotreatment.

(ii) A properly engineered and maintained biotreatment system may be considered only if it is infeasible to implement harvesting and re-use, infiltration, or evapotranspiration at a project site.

(iii) Infeasibility to implement harvesting and re-use, infiltration, or evapotranspiration at a project site may result from conditions including the following:

- Locations where seasonal high groundwater would be within 10 feet of the base of the LID treatment measure.
- Locations within 100 feet of a groundwater well used for drinking water.
- Development sites where pollutant mobilization in the soil or groundwater is a documented concern.
- Locations with potential geotechnical hazards.
- Smart growth and infill or redevelopment sites where the density and/or nature of the project would create significant difficulty for compliance with the onsite volume retention requirement.
- Locations with tight clay soils that significantly limit the infiltration of stormwater.

(iv) By May 1, 2011, the Permittees, collaboratively or individually, shall submit a report on the criteria and procedures the Permittees shall employ to determine when harvesting and re-use, infiltration, or evapotranspiration is feasible and infeasible at a Regulated Project site. This report shall, at a minimum, contain the information required in Provision C.3.c.iii.(1).

(v) By December 1, 2013, the Permittees, collaboratively or individually, shall submit a report on their experience with determining infeasibility of harvesting and re-use, infiltration, or evapotranspiration at Regulated Project sites. This report shall, at a minimum, contain the information required in Provision C.3.iii.(2).

(vi) Biotreatment systems shall be designed to have a surface area no smaller than what is required to accommodate a 5 inches/hour stormwater runoff surface loading rate. The planting and soil media for biotreatment systems shall be designed to sustain plant growth and maximize stormwater runoff retention and pollutant removal. By December 1, 2010, the Permittees, working collaboratively or individually, shall submit for Water Board approval, a proposed set of model biotreatment soil media specifications and soil infiltration testing methods to verify a long-term infiltration rate of 5 to 10 inches/hour. This submittal to the Water Board shall, at a minimum, contain the information required in Provision C.3.c.iii.(3). Once the Water Board approves biotreatment soil media specifications and soil infiltration testing methods, the Permittees shall ensure that biotreatment systems installed to meet the requirements of Provision C.3.c and d comply with the Water Board-approved minimum specifications and soil infiltration testing methods.

(vii) Green roofs may be considered biotreatment systems that treat roof runoff only if they meet certain minimum specifications. By May 1, 2011, the Permittees shall submit for Water Board approval, proposed minimum specifications for green roofs.

This submittal to the Water Board shall, at a minimum, contain the information required in Provision C.3.c.iii.(4). Once the Water Board approves green roof minimum specifications, the Permittees shall ensure that green roofs installed to meet the requirements of Provision C.3.c and d comply with the Water Board-approved minimum specifications.

(c) Require any Regulated Project that does not comply with Provision C.3.c.i.(2)(b) above to meet the requirements established in Provision C.3.e for alternative compliance.

ii. Implementation Level – All elements of the tasks described in Provision C.3.c.i shall be fully implemented.

Due Date for Full Implementation – December 1, 2011

(1) For any private development project for which a planning application has been deemed complete by a Permittee on or before the Permit effective date, Provision C.3.c.i shall not apply so long as the project applicant is diligently pursuing the project. Diligent pursuance may be demonstrated by the project applicant's submittal of supplemental information to the original application, plans, or other documents required for any necessary approvals of the project by the Permittee. If during the time period between the Permit effective date and the required implementation date of December 1, 2011, the project applicant has not taken any action to obtain the necessary approvals from the Permittee, the project will then be subject to the requirements of Provision C.3.c.i.

(2) For any private development project with an application deemed complete after the Permit effective date, the requirements of Provision C.3.c.i shall not apply if the project applicant has received final discretionary approval for the project before the required implementation date of December 1, 2011.

(3) For public projects for which funding has been committed and construction is scheduled to begin by December 1, 2012, the requirements of Provision C.3.c.i shall not apply.

iii. Reporting

(1) Feasibility/Infeasibility Criteria Report - By May 1, 2011, the Permittees, collaboratively or individually, shall submit a report to the Water Board containing the following information:

- Literature review and discussion of documented cases/sites, particularly in the Bay Area and California, where infiltration, harvesting and reuse, or evapotranspiration have been demonstrated to be feasible and/or infeasible.
- Discussion of proposed feasibility and infeasibility criteria and procedures the Permittees shall employ to make a determination of when biotreatment will be allowed at a Regulated Project site.

(2) Status Report on Application of Feasibility/Infeasibility Criteria – By December 1, 2013, the Permittees shall submit a report to the Water Board containing the following information:

- Discussion of the most common feasibility and infeasibility criteria employed since implementation of Provision C.3.c requirements, including site-specific examples;
- Discussion of barriers, including institutional and technical site specific constraints, to implementation of harvesting and reuse, infiltration, or evapotranspiration, and proposed strategies for removing these identified barriers;
- If applicable, discussion of proposed changes to feasibility and infeasibility criteria and rationale for the changes; and
- Guidance for the Permittees to make a consistent and appropriate determination of the feasibility of harvesting and reuse, infiltration, or evapotranspiration for each Regulated Project.

(3) Model Biotreatment Soil Media Specifications - By December 1, 2010, the Permittees, collaboratively or individually, shall submit a report to the Water Board containing the following information:

- Proposed soil media specifications for biotreatment systems;
- Proposed soil testing methods to verify a long-term infiltration rate of 5-10 inches/hour;
- Relevant literature and field data showing the feasibility of the minimum design specifications;
- Relevant literature, field, and analytical data showing adequate pollutant removal and compliance with the Provision C.3.d hydraulic sizing criteria; and
- Guidance for the Permittees to apply the minimum specifications in a consistent and appropriate manner.

(4) Green Roof Minimum Specifications - By May 1, 2011, the Permittees, collaboratively or individually, shall submit a report to the Water Board containing the following information:

- Proposed minimum design specifications for green roofs;
- Relevant literature and field data showing the feasibility of the minimum design specifications;
- Relevant literature, field, and analytical data showing adequate pollutant removal and compliance with the Provision C.3.d hydraulic sizing criteria;
- Discussion of data and lessons learned from already installed green roofs;
- Discussion of barriers, including institutional and technical site specific constraints, to installation of green roofs and proposed strategies for removing these identified barriers; and

- Guidance for the Permittees to apply the minimum specifications in a consistent and appropriate manner.

(5) Report the method(s) of implementation of Provisions C.3.c.i above in the 2012 Annual Report. For specific tasks listed above that are reported using the reporting tables required for Provision C.3.b.v, a reference to those tables will suffice.

C.3.d. Numeric Sizing Criteria for Stormwater Treatment Systems

i. **Task Description** – The Permittees shall require that stormwater treatment systems constructed for Regulated Projects meet at least one of the following hydraulic sizing design criteria:

(1) **Volume Hydraulic Design Basis** – Treatment systems whose primary mode of action depends on volume capacity shall be designed to treat stormwater runoff equal to:

(a) The maximized stormwater capture volume for the area, on the basis of historical rainfall records, determined using the formula and volume capture coefficients set forth in Urban Runoff Quality Management, WEF Manual of Practice No. 23/ASCE Manual of Practice No. 87, (1998), pages 175–178 (e.g., approximately the 85th percentile 24-hour storm runoff event); or

(b) The volume of annual runoff required to achieve 80 percent or more capture, determined in accordance with the methodology set forth in Section 5 of the California Stormwater Quality Association's Stormwater Best Management Practice Handbook, New Development and Redevelopment (2003), using local rainfall data.

(2) **Flow Hydraulic Design Basis** – Treatment systems whose primary mode of action depends on flow capacity shall be sized to treat:

(a) 10 percent of the 50-year peak flowrate;

(b) The flow of runoff produced by a rain event equal to at least two times the 85th percentile hourly rainfall intensity for the applicable area, based on historical records of hourly rainfall depths; or

(c) The flow of runoff resulting from a rain event equal to at least 0.2 inches per hour intensity.

(3) **Combination Flow and Volume Design Basis** – Treatment systems that use a combination of flow and volume capacity shall be sized to treat at least 80 percent of the total runoff over the life of the project, using local rainfall data.

ii. **Implementation Level** – The Permittees shall immediately require the controls in this task.

Due Date for Full Implementation – Immediate, except December 1, 2010, for Vallejo Permittees.

iii. **Reporting** – Permittees shall use the reporting tables required in Provision C.3.b.v.

iv. Limitations on Use of Infiltration Devices in Stormwater Treatment Systems

(1) For Regulated Projects, each Permittee shall review planned land use and proposed treatment design to verify that installed stormwater treatment systems with no under-drain, and that function primarily as infiltration devices, should not cause or contribute to the degradation of groundwater quality at project sites. An infiltration device is any structure that is deeper than wide and designed to infiltrate stormwater into the subsurface and, as designed, bypass the natural groundwater protection afforded by surface soil. Infiltration devices include dry wells, injection wells, and infiltration trenches (includes french drains).

(2) For any Regulated Project that includes plans to install stormwater treatment systems which function primarily as infiltration devices, the Permittee shall require that:

(a) Appropriate pollution prevention and source control measures are implemented to protect groundwater at the project site, including the inclusion of a minimum of two feet of suitable soil to achieve a maximum 5 inches/hour infiltration rate for the infiltration system;

(b) Adequate maintenance is provided to maximize pollutant removal capabilities;

(c) The vertical distance from the base of any infiltration device to the seasonal high groundwater mark is at least 10 feet. (Note that some locations within the Permittees' jurisdictions are characterized by highly porous soils and/or high groundwater tables. In these areas, a greater vertical distance from the base of the infiltration device to the seasonal high groundwater mark may be appropriate, and treatment system approvals should be subject to a higher level of analysis that considers the potential for pollutants (such as from onsite chemical use), the level of pretreatment to be achieved, and other similar factors in the overall analysis of groundwater safety);

(d) Unless stormwater is first treated by a method other than infiltration, infiltration devices are not approved as treatment measures for runoff from areas of industrial or light industrial activity; areas subject to high vehicular traffic (i.e., 25,000 or greater average daily traffic on a main roadway or 15,000 or more average daily traffic on any intersecting roadway); automotive repair shops; car washes; fleet storage areas (e.g., bus, truck); nurseries; and other land uses that pose a high threat to water quality;

(e) Infiltration devices are not placed in the vicinity of known contamination sites unless it has been demonstrated that increased infiltration will not increase leaching of contaminants from soil, alter groundwater flow conditions affecting contaminant migration in groundwater, or adversely affect remedial activities; and

(f) Infiltration devices are located a minimum of 100 feet horizontally away from any known water supply wells, septic systems, and

underground storage tanks with hazardous materials. (Note that some locations within the Permittees' jurisdictions are characterized by highly porous soils and/or high groundwater tables. In these areas, a greater horizontal distance from the infiltration device to known water supply wells, septic systems, or underground storage tanks with hazardous materials may be appropriate, and treatment system approvals should be subject to a higher level of analysis that considers the potential for pollutants (such as from onsite chemical use), the level of pretreatment to be achieved, and other similar factors in the overall analysis of groundwater safety).

C.3.e. Alternative or In-Lieu Compliance with Provision C.3.c.

i. The Permittees may allow a Regulated Project to provide alternative compliance with Provision C.3.c in accordance with one of the two options listed below:

(1) **Option 1: LID Treatment at an Offsite Location**
Treat a portion of the amount of runoff identified in Provision C.3.d for the Regulated Project's drainage area with LID treatment measures onsite or with LID treatment measures at a joint stormwater treatment facility **and** treat the remaining portion of the Provision C.3.d runoff with LID treatment measures at an offsite project in the same watershed. The offsite LID treatment measures must provide hydraulically-sized treatment (in accordance with Provision C.3.d) of an equivalent quantity of both stormwater runoff and pollutant loading and achieve a net environmental benefit.

(2) **Option 2: Payment of In-Lieu Fees**
Treat a portion of the amount of runoff identified in Provision C.3.d for the Regulated Project's drainage area with LID treatment measures onsite or with LID treatment measures at a joint stormwater treatment facility **and** pay equivalent in-lieu fees[5] to treat the remaining portion of the Provision C.3.d runoff with LID treatment measures at a Regional Project.[6] The Regional Project must achieve a net environmental benefit.

(3) For the alternative compliance options described in Provision C.3.e.i.(1) and (2) above, offsite projects must be constructed by the end of construction of the Regulated Project. If more time is needed to construct the offsite project, for each additional year, up to three years, after the construction of the Regulated Project, the offsite project must provide an additional 10% of the calculated equivalent quantity of both stormwater runoff and pollutant loading. Regional Projects must be completed within three years after the end of construction of the Regulated Project. However, the timeline for completion of the Regional Project may be

[5] **In-lieu fees** – Monetary amount necessary to provide both hydraulically-sized treatment (in accordance with Provision C.3.d) with LID treatment measures of an equivalent quantity of stormwater runoff and pollutant loading, and a proportional share of the operation and maintenance costs of the Regional Project.

[6] **Regional Project** – A regional or municipal stormwater treatment facility that discharges into the same watershed that the Regulated Project does.

extended, up to five years after the completion of the Regulated Project, with prior Executive Officer approval. Executive Officer approval will be granted contingent upon a demonstration of good faith efforts to implement the Regional Project, such as having funds encumbered and applying for the appropriate regulatory permits.

ii. Special Projects

(1) When considered at the watershed scale, certain types of smart growth, high density, and transit-oriented development can either reduce existing impervious surfaces, or create less "accessory" impervious areas and automobile-related pollutant impacts. Incentive LID treatment reduction credits approved by the Water Board may be applied to these types of Special Projects.

(2) By December 1, 2010, the Permittees shall submit a proposal to the Water Board containing the following information:

- Identification of the types of projects proposed for consideration of LID treatment reduction credits and an estimate of the number and cumulative area of potential projects during the remaining term of this Permit for each type of project;
- Identification of institutional barriers and/or technical site-specific constraints to providing 100% LID treatment onsite that justify the allowance for non-LID treatment measures onsite;
- Specific criteria for each type of Special Project proposed, including size, location, minimum densities, minimum floor area ratios, or other appropriate limitations;
- Identification of specific water quality and environmental benefits provided by these types of projects that justify the allowance for non-LID treatment measures onsite;
- Proposed LID treatment reduction credit for each type of Special Project and justification for the proposed credits. The justification shall include identification and an estimate of the specific water quality benefit provided by each type of Special Project proposed for LID treatment reduction credit; and
- Proposed total treatment reduction credit for Special Projects that may be characterized by more than one category and justification for the proposed total credit.

iii. Effective Date – December 1, 2011.

iv. Implementation Level

(1) For any private development project for which a planning application has been deemed complete by a Permittee on or before the Permit effective date, Provisions C.3.e.i-ii shall not apply so long as the project applicant is diligently pursuing the project. Diligent pursuance may be demonstrated by the project applicant's submittal of supplemental information to the original application, plans, or other documents required for any necessary

approvals of the project by the Permittee. If during the time period between the Permit effective date and the required implementation date of December 1, 2011, the project applicant has not taken any action to obtain the necessary approvals from the Permittee, the project will then be subject to the requirements of Provision C.3.e.i-ii.

(2) For public projects for which funding has been committed and construction is scheduled to begin by December 1, 2012, the requirements of Provisions C.3.e.i-ii shall not apply.

(3) Provisions C.3.e.i-ii supersede any Alternative Compliance Policies previously approved by the Executive Officer

(4) For all offsite projects and Regional Projects installed in accordance with Provision C.3.e.i-ii, the Permittees shall meet the Operation & Maintenance (O&M) requirements of Provision C.3.h.

v. **Reporting** –The Permittees shall submit the ordinance/legal authority and procedural changes made, if any, to implement Provision C.3.e with their 2012 Annual Report. Annual reporting thereafter shall be done in conjunction with reporting requirements under Provision C.3.b.v.

Any Permittee choosing to require 100% LID treatment onsite for all Regulated Projects and not allow alternative compliance under Provision C.3.e, shall include a statement to that effect in the 2012 Annual Report and all subsequent Annual Reports.

C.3.f. Alternative Certification of Stormwater Treatment Systems

i. **Task Description** – In lieu of reviewing a Regulated Project's adherence to Provision C.3.d, a Permittee may elect to have a third party conduct detailed review and certify the Regulated Project's adherence to Provision C.3.d. The third party reviewer must be a Civil Engineer or a Licensed Architect or Landscape Architect registered in the State of California, or staff of another Permittee subject to the requirements of this Permit.

ii. **Implementation Level** – Any Permittee accepting third-party reviews must make a reasonable effort to ensure that the third party has no conflict of interest with regard to the Regulated Project in question. That is, any consultant or contractor (or his/her employees) hired to design and/or construct a stormwater treatment system for a Regulated Project shall not also be the certifying third party. The Permittee must verify that the third party certifying any Regulated Project has current training on stormwater treatment system design (within three years of the certification signature date) for water quality and understands the groundwater protection principles applicable to Regulated Project sites.

Training conducted by an organization with stormwater treatment system design expertise (such as a college or university, the American Society of Civil Engineers, American Society of Landscape Architects, American Public Works Association, California Water Environment Association (CWEA), BASMAA, National Association of Flood & Stormwater Management Agencies, California

Stormwater Quality Association (CASQA), or the equivalent, may be considered qualifying training.

iii. **Reporting** – Projects reviewed by third parties shall be noted in reporting tables for Provision C.3.b.

C.3.g. Hydromodification Management

i. **Hydromodification Management (HM) Projects** are Regulated Projects that create and/or replace one acre or more of impervious surface and are not specifically excluded within the requirements of Attachments B–F. A project that does not increase impervious surface area over the pre-project condition is not an HM Project. All HM Projects shall meet the Hydromodification Management Standard of Provision C.3.g.ii.

ii. **HM Standard**

Stormwater discharges from HM Projects shall not cause an increase in the erosion potential of the receiving stream over the pre-project (existing) condition. Increases in runoff flow and volume shall be managed so that post-project runoff shall not exceed estimated pre-project rates and durations, where such increased flow and/or volume is likely to cause increased potential for erosion of creek beds and banks, silt pollutant generation, or other adverse impacts on beneficial uses due to increased erosive force. The demonstration that post-project stormwater runoff does not exceed estimated pre-project runoff rates and durations shall include the following:

(1) **Range of Flows to Control:** For Alameda, Contra Costa, San Mateo, and Santa Clara Permittees, HM controls shall be designed such that post-project stormwater discharge rates and durations match pre-project discharge rates and durations from 10 % of the pre-project 2-year peak flow[7] up-to the pre-project 10-year peak flow. For Fairfield-Suisun Permittees, HM controls shall be designed such that post-project stormwater discharge rates and durations shall match from 20 percent of the 2-year peak flow up to the pre-project 10-year peak flow. Contra Costa Permittees, when using pre-sized and pre-designed Integrated Management Practices (IMPs) per Attachment C of this Order, are not required to meet the low-flow criterion of 10% of the 2-year peak flow. These IMPs are designed to control 20% of the 2-year peak flow. After the Contra Costa Permittees conduct the required monitoring specified in Attachment C, the design of these IMPs will be reviewed.

(2) **Goodness of Fit Criteria:** The post-project flow duration curve shall not deviate above the pre-project flow duration curve by more than 10 percent

[7] Where referred to in this Order, the 2-year peak flow is determined using a flood frequency analysis based on USGS Bulletin 17 B to obtain the peak flow statistically expected to occur at a 2-year recurrence interval. In this analysis, the appropriate record of hourly rainfall data (e.g., 35-50 years of data) is run through a continuous simulation hydrologic model, the annual peak flows are identified, rank ordered, and the 2-year peak flow is estimated. Such models include USEPA's Hydrologic Simulation Program—Fortran (HSPF), U.S. Army Corps of Engineers' Hydrologic Engineering Center-Hydrologic Modeling System (HEC-HMS), and USEPA's Storm Water Management Model (SWMM).

over more than 10 percent of the length of the curve corresponding to the range of flows to control.

(3) **Precipitation Data:** Precipitation data used in the modeling of HM controls shall, at a minimum, be 30 years of hourly rainfall data representative of the area being modeled. Where a longer rainfall record is available, the longer record shall be used.

(4) **Calculating Post-Project Runoff:** Retention and detention basins shall be considered impervious surfaces for purposes of calculating post-project runoff. Pre- and post-project runoff shall be calculated and compared for the entire site, without separating or excluding areas that may be considered self-retaining.

(5) **Existing HM Control Requirements:** The Water Board has adopted HM control requirements for all Permittees (except for the Vallejo Permittees), and these adopted requirements are attached to this Order as listed below. The Permittees shall comply with all requirements in their own Permittee-specific Attachment, unless otherwise specified by this Order. In all cases, the HM Standard shall be achieved.

- Attachment B for Alameda Permittees
- Attachment C for Contra Costa Permittees
- Attachment D for Fairfield-Suisun Permittees
- Attachment E for San Mateo Permittees
- Attachment F for Santa Clara Permittees

iii. Types of HM Controls

Projects shall meet the HM Standard using any of the following HM controls or a combination thereof.

(1) **Onsite HM controls** are flow duration control structures and hydrologic source controls that collectively result in the HM Standard being met at the point(s) where stormwater runoff discharges from the project site.

(2) **Regional HM controls** are flow duration control structures that collect stormwater runoff discharge from multiple projects (each of which shall incorporate hydrologic source control measures as well) and are designed such that the HM Standard is met for all the projects at the point where the regional HM control discharges.

(3) **In-stream measures** shall be an option only where the stream, which receives runoff from the project, is already impacted by erosive flows and shows evidence of excessive sediment, erosion, deposition, or is a hardened channel.

In-stream measures involve modifying the receiving stream channel slope and geometry so that the stream can convey the new flow regime without increasing the potential for erosion and aggradation. In-stream measures are intended to improve long-term channel stability and prevent erosion by reducing the erosive forces imposed on the channel boundary.

In-stream measures, or a combination of in-stream and onsite controls, shall be designed to achieve the HM Standard from the point where the project(s) discharge(s) to the stream to the mouth of the stream or to achieve an equivalent degree of flow control mitigation (based on amount of impervious surface mitigated) as part of an in-stream project located in the same watershed. Designing in-stream controls requires a hydrologic and geomorphic evaluation (including a longitudinal profile) of the stream system downstream and upstream of the project. As with all in-stream activities, other regulatory permits must be obtained by the project proponent.[8]

iv. Reporting

For each HM Project approved during the reporting period, the following information shall be reported electronically in tabular form. This information shall be added to the required reporting information specified in Provision C.3.b.v.

(1) Device(s) or method(s) used to meet the HM Standard, such as detention basin(s), biodetention unit(s), regional detention basin, or in-stream control;

(2) Method used by the project proponent to design and size the device or method used to meet the HM Standard; and

(3) Other information as required in the Permittee's existing HM requirements, as shown in Attachments B–F.

v. Vallejo Permittees shall complete the following tasks in lieu of complying with Provisions C.3.g.i-iv.

(1) Develop a Hydrograph Modification Management Plan (HMP) for meeting the requirements of Provisions C.3.g.i–iv. The Vallejo Permittees' HMP shall be subject to approval by the Water Board.

(2) Vallejo Permittees shall include the following in their HMP:

(a) A map of the City of Vallejo, delineating areas where the HM Standard applies. The HM Standard shall apply in all areas except where a project:

- discharges stormwater runoff into creeks or storm drains that are concrete-lined or significantly hardened (e.g., with rip-rap, sackrete) downstream to their outfall in San Francisco Bay;
- discharges to an underground storm drain discharging to the Bay; or
- is located in a highly developed watershed.[9]

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[8] In-stream control projects require a Stream Alteration Agreement from the California Department of Fish & Game, a CWA section 404 permit from the U.S. Army Corps of Engineers, and a section 401 certification from the Water Board. Early discussions with these agencies on the acceptability of an in-stream modification are necessary to avoid project delays or redesign.

[9] Within the context of Provision C.3.g., "highly developed watersheds" refers to catchments or subcatchments that are 65% impervious or more.

However, plans to restore a creek reach may reintroduce the applicability of HM controls, and would need to be addressed in the HMP;

(b) A thorough technical description of the methods project proponents may use to meet the HM Standard. Vallejo Permittees shall use the same methodologies, or similar methodologies, to those already in use in the Bay Area to meet the HM Standard. Contra Costa sizing charts may be used on projects up to ten acres after any necessary modifications are made to the sizes to control runoff rates and durations from ten percent of the pre-project 2-year peak flow to the pre-project 10-year peak flow, and adjustments are made for local rainfall and soil types;

(c) A description of any land use planning measures the City of Vallejo will take (e.g., stream buffers and stream restoration activities, including restoration-in-advance of floodplains, revegetation, and use of less-impacting facilities at points of discharge) to allow expected changes in stream channel cross sections, stream vegetation, and discharge rates, velocities, and/or durations without adverse impacts on stream beneficial uses;

(d) A description of how the Vallejo Permittees will incorporate these requirements into their local approval processes, and a schedule for doing so; and

(e) Guidance for City of Vallejo project proponents explaining how to meet the HM Standard.

(3) Vallejo Permittees shall complete the HMP according to the schedule below. All required documents shall be submitted acceptable to the Executive Officer, except the HMP, which shall be submitted to the Water Board for approval. Vallejo Permittees shall report on the status of HMP development and implementation in each Annual Report and shall also provide a summary of projects incorporating measures to address Provision C.3.g and the measures used.

- By April 1, 2011, submit a detailed workplan and schedule for completion of the information required in Provision C.3.g.v.(2).
- By December 1, 2011, submit the map required in Provision C.3.g.v.(2)(a).
- By April 1, 2012, submit a draft HMP.
- By December 1, 2012, provide responses to Water Board comments on the draft HMP so that the final HMP is submitted for Water Board approval by July 1, 2013.
- Upon adoption by the Water Board, implement the HMP, which shall include the requirements of this measure. Before approval of the HMP by the Water Board, Vallejo Permittees shall encourage early implementation of measures likely to be included in the HMP.

C.3.h. Operation and Maintenance of Stormwater Treatment Systems

i. **Task Description** – Each Permittee shall implement an Operation and Maintenance (O&M) Verification Program.

ii. **Implementation Level** – At a minimum, the O&M Verification Program shall include the following elements:

(1) Conditions of approval or other legally enforceable agreements or mechanisms for all Regulated Projects that, at a minimum, require at least one of the following from all project proponents and their successors in control of the Project or successors in fee title:

(a) The project proponent's signed statement accepting responsibility for the O&M of the installed onsite, joint, and/or offsite stormwater treatment system(s) and HM control(s) (if any) until such responsibility is legally transferred to another entity;

(b) Written conditions in the sales or lease agreements or deed for the project that requires the buyer or lessee to assume responsibility for the O&M of the onsite, joint, and/or offsite installed stormwater treatment system(s) and HM control(s) (if any) until such responsibility is legally transferred to another entity;

(c) Written text in project deeds, or conditions, covenants and restrictions (CCRs) for multi-unit residential projects that require the homeowners association or, if there is no association, each individual owner to assume responsibility for the O&M of the installed onsite, joint, and/or offsite stormwater treatment system(s) and HM control(s) (if any) until such responsibility is legally transferred to another entity; or

(d) Any other legally enforceable agreement or mechanism, such as recordation in the property deed, that assigns the O&M responsibility for the installed onsite, joint, and/or offsite treatment system(s) and HM control(s) (if any) to the project owner(s) or the Permittee.

(2) Coordination with the appropriate mosquito and vector control agency with jurisdiction to establish a protocol for notification of installed stormwater treatment systems and HM controls.

(3) Conditions of approval or other legally enforceable agreements or mechanisms for all Regulated Projects that require the granting of site access to all representatives of the Permittee, local mosquito and vector control agency staff, and Water Board staff, for the sole purpose of performing O&M inspections of the installed stormwater treatment system(s) and HM control(s) (if any).

(4) A written plan and implementation of the plan that describes O&M (including inspection) of all Regional Projects and regional HM controls that are Permittee-owned and/or operated.

(5) A database or equivalent tabular format of all Regulated Projects (public and private) that have installed onsite, joint, and/or offsite stormwater

treatment systems. This database or equivalent tabular format shall include the following information for each Regulated Project:

(a) Name and address of the Regulated Project;

(b) Specific description of the location (or a map showing the location) of the installed stormwater treatment system(s) and HM control(s) (if any);

(c) Date(s) that the treatment system(s) and HM controls (if any) is/are installed;

(d) Description of the type and size of the treatment system(s) and HM control(s) (if any) installed;

(e) Responsible operator(s) of each treatment system and HM control (if any);

(f) Dates and findings of inspections (routine and follow-up) of the treatment system(s) and HM control(s) (if any) by the Permittee; and

(g) Any problems and corrective or enforcement actions taken.

(6) A prioritized plan for inspecting all installed stormwater treatment systems and HM controls. At a minimum, this prioritized plan must specify the following for each fiscal year:

(a) Inspection by the Permittee of all newly installed stormwater treatment systems and HM controls within 45 days of installation to ensure approved plans have been followed;

(b) Inspection by the Permittee of at least 20 percent of the total number (at the end of the preceding fiscal year) of installed stormwater treatment systems and HM controls;

(c) Inspection by the Permittee of at least 20 percent of the total number (at the end of the preceding fiscal year) of installed vault-based systems; and

(d) Inspection by the Permittee of all installed stormwater treatment systems subject to Provision C.3, at least once every five years.

iii. Maintenance Approvals: The Permittees shall ensure that onsite, joint, and offsite stormwater treatment systems and HM controls installed by Regulated Projects are properly operated and maintained for the life of the projects. In cases where the responsible party for a stormwater treatment system or HM control has worked diligently and in good faith with the appropriate State and federal agencies to obtain approvals necessary to complete maintenance activities for the treatment system or HM control, but these approvals are not granted, the Permittees shall be deemed to be in compliance with this Provision. Permittees shall ensure that constructed wetlands installed by Regulated Projects and used for urban runoff treatment shall abide by the Water Board's Resolution No. 94-102: Policy on the Use of Constructed Wetlands for Urban Runoff Pollution Control and the O&M requirements contained therein.

Due Date for Full Implementation: Immediate for Provisions C.3.h.i, C.3.h.ii.(1), and C.3.h.iii, and December 1, 2010, for Provisions C.3.h.ii.(2)-(6). For Vallejo Permittees: December 1, 2010, for Provisions C.3.h.i-iii.

iv. Reporting: Beginning with the 2010 Annual Report

(1) For each Regulated Project inspected during the reporting period (fiscal year) the following information shall be reported to the Water Board electronically in tabular form as part of the Annual Report (as set forth in the Provision C.3.h. Sample Reporting Table attached):

- Name of facility/site inspected.
- Location (street address) of facility/site inspected.
- Name of responsible operator for installed stormwater treatment systems and HM controls.
- For each inspection:
  - Date of inspection.
  - Type of inspection (e.g., initial, annual, follow-up, spot).
  - Type(s) of stormwater treatment systems inspected (e.g., swale, bioretention unit, tree well, etc.) and an indication of whether the treatment system is an onsite, joint, or offsite system.
  - Type of HM controls inspected.
  - Inspection findings or results (e.g., proper installation, proper operation and maintenance, system not operating properly because of plugging, bypass of stormwater because of improper installation, maintenance required immediately, etc.).
  - Enforcement action(s) taken, if any (e.g., verbal warning, notice of violation, administrative citation, administrative order).

(2) On an annual basis, before the wet season, provide a list of newly installed (installed within the reporting period) stormwater treatment systems and HM controls to the local mosquito and vector control agency and the Water Board. This list shall include the facility locations and a description of the stormwater treatment measures and HM controls installed.

(3) Each Permittee shall report the following information in the Annual Report each year:

(a) A discussion of the inspection findings for the year and any common problems encountered with various types of treatment systems and/or HM controls. This discussion should include a general comparison to the inspection findings from the previous year.

(b) A discussion of the effectiveness of the Permittee's O&M Program and any proposed changes to improve the O&M Program (e.g., changes in prioritization plan or frequency of O&M inspections, other changes to improve effectiveness of program).

C.3.i. Required Site Design Measures for Small Projects and Detached Single-Family Home Projects

i. Task Description – The Permittees shall require all development projects, which create and/or replace $\geq$ 2500 ft^2 to < 10,000 ft^2 of impervious surface, and

detached single-family home projects,[10] which create and/or replace 2,500 square feet or more of impervious surface, to install one or more of the following site design measures:

- Direct roof runoff into cisterns or rain barrels for reuse.
- Direct roof runoff onto vegetated areas.
- Direct runoff from sidewalks, walkways, and/or patios onto vegetated areas.
- Direct runoff from driveways and/or uncovered parking lots onto vegetated areas.
- Construct sidewalks, walkways, and/or patios with permeable surfaces.[3]
- Construct bike lanes, driveways, and/or uncovered parking lots with permeable surfaces.[3]

This provision applies to all development projects that require approvals and/or permits issued under the Permittee's' planning, building, or other comparable authority.

ii. **Implementation Level** – All elements of this task shall be fully implemented by December 1, 2012.

iii. **Reporting** – On an annual basis, discuss the implementation of the requirements of Provision C.3.i, including ordinance revisions, permit conditions, development of standard specifications and/or guidance materials, and staff training.

iv. **Task Description** – The Permittees shall develop standard specifications for lot-scale site design and treatment measures (e.g., for roof runoff and paved areas) as a resource for single-family homes and small development projects.

v. **Implementation Level** – This task may be fulfilled by the Permittees cooperating on a countywide or regional basis.

Due Date for Full Implementation – December 1, 2012.

vi. **Reporting** – A report containing the standard specifications for lot-scale treatment BMPs shall be submitted by December 1, 2012.

[10] **Detached single-family home project** – The building of one single new house or the addition and/or replacement of impervious surface to one single existing house, which is not part of a larger plan of development.

C.4. Industrial and Commercial Site Controls

Each Permittee shall implement an industrial and commercial site control program at all sites which could reasonably be considered to cause or contribute to pollution of stormwater runoff, with inspections and effective follow-up and enforcement to abate actual or potential pollution sources consistent with each Permittee's respective Enforcement Response Plan (ERP), to prevent discharge of pollutants and impacts on beneficial uses of receiving waters. Inspections shall confirm implementation of appropriate and effective BMPs and other pollutant controls by industrial and commercial site operators.

C.4.a. Legal Authority for Effective Site Management

i. Task Description – Permittees shall have sufficient legal enforcement authority to obtain effective stormwater pollutant control on industrial sites. Permittees shall have the ability to inspect and require effective stormwater pollutant control and to escalate progressively stricter enforcement to achieve expedient compliance and pollutant abatement at commercial and industrial sites within their jurisdiction.

ii. Implementation Level

(1) Permittees shall have the legal authority to oversee, inspect, and require expedient compliance and pollution abatement at all industrial and commercial sites which may be reasonably considered to cause or contribute to pollution of stormwater runoff. Permittees shall have the legal authority to require implementation of appropriate BMPs at industrial and commercial to address pollutant sources associated with outdoor process and manufacturing areas, outdoor material storage areas, outdoor waste storage and disposal areas, outdoor vehicle and equipment storage and maintenance areas, outdoor parking areas and access roads, outdoor wash areas, outdoor drainage from indoor areas, rooftop equipment, and contaminated and erodible surface areas, and other sources determined by the Permittees or Water Board Executive Officer to have a reasonable potential to contribute to pollution of stormwater runoff.

(2) Permittees shall notify the discharger of any actual or potential pollutant sources and violations and require problem correction within a reasonably short and expedient time frame commensurate with the threat to water quality. Permittees shall require timely correction of problems involving rapid temporary repair, and may allow longer time periods for implementation of more permanent solutions, if these require significant capital expenditure or construction. Violations shall be corrected prior to the next rain event or within 10 business days after the violations are noted. If more than 10 business days are required for correction, a rationale shall be given in the tabulated sheets.

C.4.b. Industrial and Commercial Business Inspection Plan (Inspection Plan)

i. Task Description – Permittees shall develop and implement an inspection plan that will serve as a prioritized inspection workplan. This inspection plan will allow inspection staff to categorize the commercial and industrial sites within the Permittee's jurisdiction by pollutant threat and inspection frequency, change inspection frequency based on site performance, and add and remove sites as businesses open and close.

The Inspection Plan shall contain the following information:

(1) Total number and a list of industrial and commercial facilities requiring inspection, within each Permittee's jurisdiction, to be determined on the basis of a prioritization criteria designed to assign a more frequent inspection schedule to the highest priority facilities per Section C.4.b.ii. below.

(2) A description of the process for prioritizing inspections and frequency of inspections. If any geographical areas are to be targeted for inspections due to high potential for stormwater pollution, these areas should be indicated in the Inspection Plan. A mechanism to include newly opened businesses that warrant inspection shall be included.

ii. Implementation Level – Each Permittee shall annually update and maintain a list of industrial and commercial facilities in the Inspection Plan to inspect that could reasonably be considered to cause or contribute to pollution of stormwater runoff. The following are some of the functional aspects of businesses and types of businesses that shall be included in the Inspection Plans:

(1) Sites that include the following types of functions that may produce pollutants when exposed to stormwater include, but are not limited to:
   (a) Outdoor process and manufacturing areas
   (b) Outdoor material storage areas
   (c) Outdoor waste storage and disposal areas
   (d) Outdoor vehicle and equipment storage and maintenance areas
   (e) Outdoor wash areas
   (f) Outdoor drainage from indoor areas
   (g) Rooftop equipment
   (h) Other sources determined by the Permittee or Water Board to have a reasonable potential to contribute to pollution of stormwater runoff

(2) The following types of Industrial and Commercial businesses that have a reasonable likelihood to be sources of pollutants to stormwater and non-stormwater discharges:
   (a) Industrial facilities, as defined at 40 CFR 122.26(b)(14), including those subject to the State General NPDES Permit for Stormwater Discharges Associated with Industrial Activity (hereinafter the Industrial General Permit);

(b) Vehicle Salvage yards;
(c) Metal and other recycled materials collection facilities, waste transfer facilities;
(d) Vehicle mechanical repair, maintenance, fueling, or cleaning;
(e) Building trades central facilities or yards, corporation yards;
(f) Nurseries and greenhouses;
(g) Building material retailers and storage;
(h) Plastic manufacturers; and
(i) Other facilities designated by the Permittee or Water Board to have a reasonable potential to contribute to pollution of stormwater runoff.

(3) **Prioritization of Facilities**
Facilities of the types described in Provision 4.b.ii.(2) above and identified by the Permittees as having the reasonable potential to contribute to pollution of stormwater runoff shall be prioritized on the basis of the potential for water quality impact using criteria such as pollutant sources on site, pollutants of concern, proximity to a waterbody, violation history of the facility, and other relevant factors.

(4) **Types/Contents of Inspections**
Each Permittee shall conduct inspections to determine compliance with its ordinances and this Permit. Inspections shall include but not be limited to the following:
(a) Prevention of stormwater runoff pollution or illicit discharge by implementing appropriate BMPs;
(b) Visual observations for evidence of unauthorized discharges, illicit connections, and potential discharge of pollutants to stormwater;
(c) Noncompliance with Permittee ordinances and other local requirements; and
(d) Verification of coverage under the Industrial General Permit, if applicable.

(5) **Inspection Frequency** – Permittees shall establish appropriate inspection frequencies for facilities based on Provision 4.b.ii (3) priority, potential for contributing pollution to stormwater runoff, and commensurate with the threat to water quality.

(6) **Record Keeping** – For each facility identified in Provision 4.b.ii, the Permittee shall maintain a database or equivalent of the following information at a minimum:
(a) Name and address of the business and local business operator;
(b) A brief description of business activity including SIC code;
(c) Inspection priority and inspection frequency; and
(d) If coverage under the Industrial General Permit is required.

iii. Reporting – The Permittees shall include the following in the Annual Report:

(1) The list of facilities identified in Provision 4.b.ii in the 2010 Annual Report and revisions or updates in subsequent annual reports; and

(2) The list of facilities scheduled for inspection during the current fiscal year.

C.4.c. Enforcement Response Plan (ERP)

i. Task Description – Permittees shall develop and implement an ERP that will serve as a reference document for inspection staff to take consistent actions to achieve timely and effective compliance from all commercial and industrial site operators.

ii. Implementation Level – The ERP shall contain the following:

(1) **Required enforcement actions** – including timeframes for corrections of problems – for various field violation scenarios. The ERP will provide guidance on appropriate use of the various enforcement tools, such as verbal and written notices of violation, citations, cleanup requirements, administrative and criminal penalties.

(2) **Timely Correction of Violations** – All violations must be corrected in a timely manner with the goal of correcting them before the next rain event but no longer than 10 business days after the violations are discovered. If more than 10 business days are required for compliance, a rationale shall be recorded in the electronic database or equivalent tabular system.

A description of the Permittee's procedures for follow-up inspections and enforcement actions or referral to another agency, including appropriate time periods for each level of corrective action.

(3) **Referral and Coordination with Water Board** – Each Permittee shall enforce its stormwater ordinances as necessary to achieve compliance at sites with observed violations. For cases in which Permittee enforcement tools are inadequate to remedy the noncompliance, the Permittee shall refer the case to the Water Board, district attorney or other relevant agencies for additional enforcement.

(4) **Recordkeeping** – Permittees shall maintain adequate records to demonstrate compliance and appropriate follow-up enforcement responses for facilities inspected.

Permittees shall maintain an electronic database or equivalent tabular system that contains the following information regarding industrial commercial site inspections:

(a) Name of Facility/Site Inspected
(b) Inspection Date
(c) Industrial General Permit coverage required (Yes or No)
(d) Compliance Status
(e) Type of Enforcement (if applicable)
(f) Type of Activity or Pollutant Source

Examples: Outdoor process/manufacturing areas, Outdoor material storage areas, Outdoor waste storage/disposal areas, outdoor vehicle and equipment storage/maintenance areas, Outdoor parking areas and access roads, Outdoor wash areas, Rooftop equipment, Outdoor drainage from indoor areas

(g) Specific Problems

(h) Problem Resolution

(i) Additional Comments

The electronic database or equivalent tabular system shall be made readily available to the Executive Officer and during inspections and audits by the Water Board staff or its representatives.

(5) The ERP shall be developed and implemented by April 1, 2010.

iii. Reporting – Permittees shall include the following information in each Annual Report:

(1) Number of inspections conducted, Number of violations issued (excluding verbal warnings), Percentage of sites inspected in violation, and number and percent of violations resolved within 10 working days or otherwise deemed resolved in a longer but still timely manner;

(2) Frequency and Types/categories of violations observed, Frequency and type of enforcement conducted;

(3) Summary of types of violations noted by business category; and

(4) Facilities that are required to have coverage under the Industrial General Permit, but have not filed for coverage.

C.4.d. Staff Training

i. Task Description

Permittees shall provide focused training for inspectors annually. Trainings may be Program-wide, Region-wide, or Permittee-specific.

ii. Implementation Level

At a minimum, train inspectors, within the 5-year term of this Permit, in the following topics:

(1) Urban runoff pollution prevention;

(2) Inspection procedures;

(3) Illicit Discharge Detection, Elimination and follow-up; and

(4) Implementation of typical BMPs at Industrial and Commercial Facilities.

Permittees, either countywide or regionally, if they have not already done so, are encouraged to create or adopt guidance for inspectors or reference existing inspector guidance including the California Association of Stormwater Quality Agencies (CASQA) Industrial BMP Handbook.

iii. Reporting

The Permittees shall include the following information in the Annual Report:

(1) Dates of trainings;

(2) Training topics that have been covered; and

(3) Percentage of Permittee inspectors attending training.

C.5. Illicit Discharge Detection and Elimination

The purpose of this provision is to implement the illicit discharge prohibition and to ensure illicit discharges are detected and controlled that are not otherwise controlled under provision C4, Industrial and Commercial Site Controls and C6, Construction Site Controls. Permittees shall develop and implement an illicit discharge program that includes an active surveillance component and a centralized complaint collection and follow-up component to target illicit discharge and non-stormwater sources. Permittees shall maintain a complaint tracking and follow-up data system as their primary accountability reporting for this provision.

C.5.a. Legal Authority

i. Task Description – Permittees shall have the legal authority to prohibit and control illicit discharges and escalate stricter enforcement to achieve expedient compliance.

ii. **Implementation Level**

(1) Permittees shall have adequate legal authority to address stormwater and non-stormwater pollution associated with, but not limited to the following:

(a) Sewage;

(b) Discharges of wash water resulting from the cleaning of exterior surfaces and pavement, or the equipment and other facilities of any commercial business, or any other public or private facility;

(c) Discharges of runoff from material storage areas, including containing chemicals, fuels, or other potentially polluting or hazardous materials;

(d) Discharges of pool or fountain water containing chlorine, biocides, or other chemicals; discharges of pool or fountain filter backwash water;

(e) Discharges of sediment, pet waste, vegetation clippings, or other landscape or construction-related wastes; and

(f) Discharges of food-related wastes (e.g., grease, fish processing, and restaurant kitchen mat and trash bin wash water, etc.).

(2) Permittees shall have adequate legal authority to prohibit, discover through inspection and surveillance, and eliminate illicit connections and discharges to storm drains.

(3) Permittees shall have adequate legal authority to control the discharge of spills, dumping, or disposal of materials other than storm water to storm drains.

C.5.b. Enforcement Response Plan (ERP)

i. Task Description – Permittees shall develop and implement an ERP that will serve as guidance for inspection staff to take consistent actions to achieve timely and effective abatement of illicit discharges.

ii. Implementation Level – The ERP shall contain the following:

(1) Recommended responses and enforcement actions – including timeframes for corrections of problems – for various types and degree of violations. The ERP shall provide guidelines on when to employ the range of regulatory responses from warnings, citations and cleanup and cost recovery, to administrative or criminal penalties.

(2) Timely Correction of Violations: All violations must be corrected in a timely manner with the goal of correcting them before the next rain event but no longer than 10 business days after the violations are discovered. If more than 10 business days are required for compliance, a rationale shall be recorded in the electronic database or equivalent tabular system. Immediate correction can be temporary and short-term if a long-term, permanent correction will involve significant resources and construction time. An example would be replumbing of a wash area to the sanitary sewer, which would involve an immediate short-term, temporary fix followed by permanent replumbing.

(3) If corrective actions are not implemented promptly or if there are repeat violations, Permittees shall escalate responses as needed to achieve compliance, including referral to other agencies were necessary.

(4) The ERP shall be developed and implemented by April 1, 2010.

C.5.c. Spill and Dumping Response, Complaint Response, and Frequency of Inspections

i. Task Description – Permittees shall have a central contact point, including a phone number for complaints and spill reporting, and publicize this number to both internal Permittee staff and the public. If 911 is selected, also maintain and publicize a staffed, non-emergency phone number with voicemail, which is checked during normal business hours.

Permittees shall develop a spill/dumping response flow chart and phone tree or contact list for internal use that shows the various responsible agencies and their contacts, who would be involved in illicit discharge incident response that goes beyond the Permittees immediate capabilities. The list shall be maintained and updated as changes occur.

Permittees shall conduct reactive inspections in response to complaints and follow-up inspections as needed to ensure that corrective measures have been implemented to achieve and maintain compliance.

ii. Implementation Level – Permittees will have the phone number and contact information available and integrated into training and outreach both to Permittee staff and the public by July 1, 2010.

iii. Reporting – Submit the complaint and spill response phone number and spill contact list with the 2010 Annual Report and update annually if changes occur.

C.5.d. Control of Mobile Sources

i. Task Description – The purpose of this section is to establish oversight and control of pollutants associated with mobile business sources.

ii. Implementation Level – Each Permittee shall develop and implement a program to reduce the discharge of pollutants from mobile businesses.

(1) The program shall include the following:

(a) Development and implementation of minimum standards and BMPs to be required for each of the various types of mobile businesses such as automobile washing, power washing, steam cleaning, and carpet cleaning. This guidance can be developed via county-wide or regional collaboration.

(b) Development and implementation of an enforcement strategy which specifically addresses the unique characteristics of mobile businesses.

(c) Outreach to mobile businesses operating within the Permittee's jurisdiction with minimum standards and BMP requirements and local ordinances through an outreach and education strategy.

(d) Inspection of mobile businesses as needed.

(2) Permittees should cooperate regionally in developing and implementing their programs for mobile businesses, including sharing of mobile business inventories, BMP requirements, enforcement action information, and education.

iii. Reporting – Permittees shall report on implementation of minimum standards and BMPs for mobile business and their enforcement strategy in each Annual Report.

C.5.e. Collection System Screening - Municipal Separate Storm Sewer System (MS4) Map Availability

i. Task Description – Permittees shall perform routine surveys for illicit discharges and illegal dumping in above ground check points in the collection system including elements that are typically inspected for other maintenance purposes, such as end of pipes, creeks, flood conveyances, storm drain inlets and catch basins, in coordination with public works/flood control maintenance surveys, video inspections of storm drains, and during other routine Permittee maintenance and inspection activities when Permittee staff are working in or near the MS4 system.

ii. Implementation Level – Permittees shall develop and implement a screening program utilizing the USEPA/Center for Watershed Protection publication, "Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessment." Permittees shall implement the screening program by conducting a survey of strategic collection system check points (one screening point per square mile of Permittee urban and suburban jurisdiction area, less open space) including some key major outfalls draining industrial areas as defined in 40 CFR 122.26 (b)(5) once each year in dry weather conditions meaning no significant rainfall within the past 3 weeks. Routine surveys that occur on an ongoing basis during regular conveyance system inspections may be credited toward this requirement. Make maps of the MS4 publicly available, either electronically or in hard copy by July 1, 2010. The public availability shall be through a publicized single point of contact that

is convenient for the public, such as a staffed counter or web accessible maps. The MS4 map availability shall be publicized through Permittee directories and web pages.

iii. Reporting – Permittees shall provide a summary of their collection screening program, a summary of problems found during collection system screening, and any changes to the screening program in each Annual Report.

C.5.f. Tracking and Case Follow-up

i. Task Description – All incidents or discharges reported to the complaint/spill system that might pose a threat to water quality shall be logged to track follow-up and response through problem resolution. The data collected shall be sufficient to demonstrate escalating responses for repeated problems, and inter/intra-agency coordination, where appropriate.

ii. Implementation Level – Create and maintain a water quality spill and discharge complaint tracking and follow-up in an electronic database or equivalent tabular system by April 1, 2010.

The spill and discharge complaint tracking system shall contain the following information:

(1) Complaint information:
  (a) Date and time of complaint
  (b) Type of pollutant
  (c) Problem Status (potential or actual discharge.)

(2) Investigation information:
  (a) Date and time started
  (b) Type of pollutant
  (c) Entered storm drain and/or receiving water
  (d) Date abated
  (e) Type of enforcement (if applicable)

(3) Response time (days)
  (a) Call to investigation
  (b) Investigation to abatement
  (c) Call to abatement

The electronic database or equivalent tabular system shall be made available to Water Board staff as needed for review of enforcement response through problem resolution.

iii. Reporting – Permittees shall provide the following information in the Annual Report:

(1) Number of discharges reported;

(2) Number of discharges reaching storm drains and/or receiving waters;

(3) Number and percentage of discharges resolved in a timely manner; and

(4) Summary of major types of discharges and complaints.

C.6. Construction Site Control

Each Permittee shall implement a construction site inspection and control program at all construction sites, with follow-up and enforcement consistent with each Permittee's respective Enforcement Response Plan (ERP), to prevent construction site discharges of pollutants and impacts on beneficial uses of receiving waters. Inspections shall confirm implementation of appropriate and effective erosion and other construction pollutant controls by construction site operators/developers; and reporting shall demonstrate the effectiveness of this inspection and problem solution activity by the Permittees.

C.6.a. Legal Authority for Effective Site Management

i. Task Description – Permittees shall have the ability to require effective stormwater pollutant controls, and escalate progressively stricter enforcement to achieve expedient compliance and clean up at all public and private construction sites.

ii. **Implementation Level**

(1) Permittees shall have the legal authority to require at all construction sites year round effective erosion control, run-on and runoff control, sediment control, active treatment systems (as appropriate), good site management, and non storm water management through all phases of construction (including but not limited to site grading, building, and finishing of lots) until the site is fully stabilized by landscaping or the installation of permanent erosion control measures.

(2) Permittees shall have the legal authority to oversee, inspect, and require expedient compliance and clean up at all construction sites year round.

iii. Reporting – Permittees shall certify adequacy of their respective legal authority in the 2010 Annual Report.

C.6.b. Enforcement Response Plan (ERP)

i. Task Description – Permittees shall develop and implement an ERP that will serve as a reference document for inspection staff to take consistent actions to achieve timely and effective compliance from all public and private construction site owners/operators.

ii. **Implementation Level**

(1) The ERP shall include required enforcement actions – including timeframes for corrections of problems – for various field violation scenarios. All violations must be corrected in a timely manner with the goal of correcting them before the next rain event but no longer than 10 business days after the violations are discovered. If more than 10 business days are required for compliance, a rationale shall be recorded in the electronic database or equivalent tabular system.

(2) If site owners/operators do not implement appropriate corrective actions in a timely manner, or if violations repeat, Permittees shall take progressively stricter responses to achieve compliance. The ERP shall include the structure for progressively stricter responses and various violation scenarios that evoke progressively stricter responses.

(3) The ERP shall be developed and implemented by April 1, 2010.

C.6.c. Best Management Practices Categories

i. Task Description – Permittees shall require all construction sites to have site specific, and seasonally- and phase-appropriate, effective Best Management Practices (BMPs) in the following six categories:

- Erosion Control
- Run-on and Run-off Control
- Sediment Control
- Active Treatment Systems (as necessary)
- Good Site Management
- Non Stormwater Management.

Theses BMP categories are listed in State General NPDES Permit for Stormwater Discharges Associated with Construction Activities (hereinafter the Construction General Permit).

ii. Implementation Level

The BMPs targeting specific pollutants within the six categories listed in C.6.c.i. shall be site specific. Site specific BMPs targeting specific pollutants from the six categories listed in C.6.c.i. can be a combination of BMPs from:

- California BMP Handbook, Construction, January 2003.
- Caltrans Stormwater Quality Handbooks, Construction Site Best Management Practices Manual, March 2003, and addenda.
- California Regional Water Quality Control Board, San Francisco Bay Region, Erosion and Sediment Control Field Manual, 2002.
- New BMPs available since the release of these Handbooks.

C.6.d. Plan Approval Process

i. Task Description – Permittees shall review erosion control plans for consistency with local requirements, appropriateness and adequacy of proposed BMPs for each site before issuance of grading permits for projects. Permittees shall also verify that sites disturbing one acre or more of land have filed a Notice of Intent for coverage under the Construction General Permit.

ii. Implementation Level – Before approval and issuance of local grading permits, each Permittee shall perform the following:

(1) Review the site operator's/developer's erosion/pollution control plan or Stormwater Pollution Prevention Plan (SWPPP) to verify compliance with the Permittee's grading ordinance and other local requirements. Also review the site operator's/developer's erosion/pollution control plan or SWPPP to verify that seasonally appropriate and effective BMPs for the six categories listed in C.6.c.i. are planned;

(2) For sites disturbing one acre or more of soil, verify that the site operators/developers have filed a Notice of Intent for permit coverage under the Construction General Permit; and

(3) Provide construction stormwater management educational materials to site operators/developers, as appropriate.

C.6.e. Inspections

i. Task Description – Permittees shall conduct inspections to determine compliance with local ordinances (grading and stormwater) and determine the effectiveness of the BMPs in the six categories listed in C.6.c.i.; and Permittees shall require timely corrections of all actual and threatened violations of local ordinances observed.

ii. Implementation Level

(1) **Wet Season Notification**

By September 1st of each year, each Permittee shall remind all site developers and/or owners disturbing one acre or more of soil to prepare for the upcoming wet season.

(2) **Frequency of Inspections**

Inspections shall be conducted monthly during the wet season[11] at the following sites:

(a) All construction sites disturbing one or more acre of land; and

(b) **High Priority Sites** – Other sites determined by the Permittee or the Water Board as significant threats to water quality. In evaluating threat to water quality, the following factors shall be considered:

(i) Soil erosion potential or soil type;

(ii) Site slope;

(iii) Project size and type;

(iv) Sensitivity or receiving waterbodies;

(v) Proximity to receiving waterbodies;

(vi) Non-stormwater discharges; and

(vii) Any other relevant factors as determined by the local agency or the Water Board.

[11] For the purpose of inspections, the wet season is defined as October through April, but sites need to implement seasonally appropriate BMPs in the six categories listed in C.6.c.i throughout the year.

(3) **Contents of Inspections**

Inspections shall focus on the adequacy and effectiveness of the site specific BMPs implemented for the six categories listed in C.6.c.i. Permittees shall require timely corrections of all actual and potential problems observed. Inspections of construction sites shall include, but are not limited to, the following:

(a) Assessment of compliance with Permittee's ordinances and permits related to urban runoff, including the implementation and maintenance of the verified erosion/pollution control plan or SWPPP (from C.6.d.ii.(1));

(b) Assessment of the adequacy and effectiveness of the site specific BMPs implemented for the six categories listed in C.6.c.i.;

(c) Visual observations for:

- actual discharges of sediment and/or construction related materials into stormdrains and/or waterbodies.
- evidence of sediment and/or construction related materials discharges into stormdrains and/or waterbodies.
- illicit connections.
- potential illicit connections.

(d) Education on stormwater pollution prevention, as needed.

(4) **Tracking**

All inspections must be recorded on a written or electronic inspection form. Inspectors shall follow the ERP if a violation is noted and shall require timely corrections of all actual and threatened violations of local ordinances observed. All violations must be corrected in a timely manner with the goal of correcting them before the next rain event but no longer than 10 business days after the violations are discovered. If more than 10 business days are required for compliance, a rationale shall be recorded on the inspection form.

Permittees shall track in an electronic database or tabular format all inspections. This electronic database or tabular format shall be made readily available to the Executive Officer and during inspections and audits by the Water Board staff or its representatives. This electronic database or tabular format shall record the following information for each site inspection:

(a) Site name;

(b) Inspection date;

(c) Weather during inspection;

(d) Has there been rainfall with runoff since the last inspection?;

(e) Enforcement Response Level (Use ERP);

(f) Problem(s) observed using Illicit Discharge and the six BMP categories listed in C.6.c.i.;

(g) Specific Problem(s) (List the specific problem(s) within the BMP categories);

(h) Resolution of Problems noted using the following three standardized categories: Problems Fixed, Need More Time, and Escalate Enforcement; and

(i) Comments, which shall include all Rationales for Longer Compliance Time, all escalation in enforcement discussions, and any other information that may be relevant to that site inspection.

iii. Reporting

(1) In each Annual Report, each Permittee shall summarize the following information:

(a) Total number of active sites disturbing less than one acre of soil requiring inspection;

(b) Total number of active sites disturbing 1 acre or more of soil;

(c) Total number of inspections conducted;

(d) Number and percentage[12] of violations in each of the six categories listed in C.6.c.i.;

(e) Number and percentage[13] of each type of enforcement action taken as listed in each Permittee's ERP;

(f) Number of discharges, actual and those inferred through evidence, of sediment or other construction related materials;

(g) Number of sites with discharges, actual and those inferred through evidence, of sediment or other construction related materials;

(h) Number and percentage[14] of violations fully corrected prior to the next rain event but no longer than 10 business days after the violations are discovered or otherwise considered corrected in a timely, though longer period; and

(i) Number and percentage[15] of violations not fully corrected 30 days after the violations are discovered.

(2) In each Annual Report, each Permittee shall evaluate its respective electronic database or tabular format and the summaries produced in C.6.e.ii.(4) above. This evaluation shall include findings on the program's strength, comparison to previous years' results, as well as areas that need

[12] Percentage shall be calculated as number of violations in each category divided by total number of violations in all six categories.

[13] Percentage shall be calculated as number of each type of enforcement action divided by the total number of enforcement actions.

[14] Percentage shall be calculated as follows: number of violations fully corrected prior to the goal of the next rain event but no later than10 business days after the violations are discovered divided by the total number of violations for the reporting year.

[15] Percentage shall be calculated as follows: number of violations not fully corrected 30 days after the violations are discovered divided by the total number of violations for the reporting year.

more focused education for site owners, operators, and developers the following year.

(3) The Executive Officer may require that the information recorded and tracked by C.6.e.ii.(4) be submitted electronically or in a tabular format. Permittees shall submit the information within 10-working days of the Executive Officer's requirement. Submittal of the information in tabular form for the reporting year is not required in each Annual Report but encouraged.

C.6.f. Staff Training

i. Task Description – Permittees shall provide training or access to training for staff conducting construction stormwater inspections.

ii. Implementation Level – Permittees shall provide training at least every other year to municipal staff responsible for conducting construction site stormwater inspections. Training topics will include information on correct uses of specific BMPs, proper installation and maintenance of BMPs, Permit requirements, local requirements, and ERP.

iii. Reporting – Permittees shall include in each Annual Report the following information: training topics covered, dates of training, and the percentage of Permittees' inspectors attending each training. If no training in that year, so state.

C.7. Public Information and Outreach

Each Permittee shall increase the knowledge of the target audiences regarding the impacts of stormwater pollution on receiving water and potential solutions to mitigate the problems caused; change the waste disposal and runoff pollution generation behavior of target audiences by encouraging implementation of appropriate solutions; and involve various citizens in mitigating the impacts of stormwater pollution.

C.7.a. Storm Drain Inlet Marking

i. Task Description – Permittees shall mark and maintain at least 80 percent of municipally-maintained storm drain inlets with an appropriate stormwater pollution prevention message, such as "No dumping, drains to Bay" or equivalent. At least 80% of municipally-maintained storm drain inlet markings shall be inspected and maintained at least once per 5-year permit term. For newly approved, privately maintained streets, Permittees shall require inlet marking by the project developer upon construction and maintenance of markings through the development maintenance entity. Markings shall be verified prior to acceptance of the project.

ii. **Implementation Level**

(1) Inspect and maintain markings of at least 80 percent of municipality maintained inlets to ensure they are legibly labeled with a no dumping message or equivalent once per permit term.

(2) Verify that newly developed streets are marked prior to acceptance of the project.

iii. **Reporting**

(1) In the 2013 Annual Report, each Permittee shall report prior years' annual percentages of municipality maintained inlet markings inspected and maintained as legible with a no dumping message or equivalent.

(2) In the 2013 Annual Report, each Permittee shall report prior years' annual number of projects accepted after inlet markings were verified.

C.7.b. Advertising Campaigns

i. Task Description – Permittees shall participate in or contribute to advertising campaigns on trash/litter in waterways and pesticides with the goal of significantly increasing overall awareness of stormwater runoff pollution prevention messages and behavior changes in target audience.

ii. **Implementation Level**

(1) Target a broad audience with two separate advertising campaigns, one focused on reducing trash/litter in waterways and one focused on reducing the impact of urban pesticides. The advertising campaigns may be coordinated regionally or county-wide.

(2) Permittees shall conduct a pre-campaign survey and a post-campaign survey to identify and quantify the audiences' knowledge, trends, and

attitudes and/or practices; and to measure the overall population's awareness of the messages and behavior changes achieved by the two advertising campaigns. These surveys may be done regionally or county-wide.

iii. Reporting

(1) In the Annual Report following the pre-campaign survey, each Permittee (or the Countywide Program, if the survey was done county-wide or regionally) shall provide a report of the survey completed, which at a minimum, shall include the following:

- A summary of how the survey was implemented.
- A copy of the survey.
- A copy of the survey results.
- An analysis of the survey results.
- A discussion of the outreach strategies based on the survey results.
- A discussion of the planned or future advertising campaigns to influence awareness and behavior changes regarding trash/litter and pesticides.

(2) In the Annual Report following the post campaign survey, each Permittee (or the Countywide Program, if survey was done county-wide or regionally) shall provide a report of the survey completed, which at minimum shall include the information required in the pre-campaign report (C.7.b.iii.(1)) and the following:

- A discussion of the campaigns.
- A discussion of the measurable changes in awareness and behavior achieved.
- An update of outreach strategies based on the survey results.

C.7.c. Media Relations – Use of Free Media

i. Task Description – Permittees shall participate in or contribute to a media relations campaign. Maximize use of free media/media coverage with the objective of significantly increasing the overall awareness of stormwater pollution prevention messages and associated behavior change in target audiences, and to achieve public goals.

ii. Implementation Level – Conduct a minimum of six pitches (e.g., press releases, public service announcements, and/or other means) per year at the county-wide program, regional, and/or local levels.

iii. Reporting – In each Annual Report, each Permittee (or the Countywide Program, if the media relations campaign was done county-wide or regionally) shall include the details of each media pitch, such as the medium, date, and content of the pitch.

C.7.d. Stormwater Point of Contact

i. Task Description – Permittees shall individually or collectively create and maintain a point of contact, e.g., phone number or website, to provide the public with information on watershed characteristics and stormwater pollution prevention alternatives.

ii. Implementation Level – Maintain and publicize one point of contact for information on stormwater issues. Permittees may combine this function with the complaint/spill contact required in C.5.

iii. Reporting – In the 2010 Annual Report, each Permittee shall discuss how this point of contact is publicized and maintained. If any change occurs in this contact, report in subsequent annual report.

C.7.e. Public Outreach Events

i. Task Description – Participate in and/or host events such as fairs, shows, workshops, (e.g., community events, street fairs, and farmers' markets), to reach a broad spectrum of the community with both general and specific stormwater runoff pollution prevention messages. Pollution prevention messages shall include encouraging residents to (1) wash cars at commercial car washing facilities, (2) use minimal detergent when washing cars, and (3) divert the car washing runoff to landscaped area.

ii. Implementation Level – Each Permittee shall annually participate and/or host the number of events according to its population, as shown in the table below:

Table 7.1 Public Outreach Events[16]

Permittee Population	Number of Outreach Events
< 10,000	2
10,001– 40,000	3
40,001 – 100,000	4
100,001 – 175,000	5
175,001 – 250,000	6
> 250,000	8
Non-population-based Permittees[17]	6

Should a public outreach event contain significant citizen involvement elements, the Permittee may claim credit for both Public Outreach Events (C.7.e.) and Citizen Involvement Events (C.7.g.).

iii. Reporting – In each Annual Report, each Permittee shall list the events (name of event, event location, and event date) participated in and assess the effectiveness

[16] Permittees may claim individual credits for all events in which their Countywide Program or BASMAA participates, supports, and/or hosts, which are publicized to reach the Permittees jurisdiction.

[17] Alameda County Flood Control and Water Conservation District, Contra Costa Flood Control and Water Conservation District, Santa Clara Valley Water District, Vallejo Sanitation and Flood Control District, and Zone 7 of the Alameda County Flood Control and Water Conservation District

of efforts with appropriate measures (e.g., success at reaching a broad spectrum of the community, number of participants compared to previous years, post-event survey results, quantity/volume materials cleaned up and comparisons to previous efforts).

C.7.f. Watershed Stewardship Collaborative Efforts

i. Task Description – Permittees shall individually or collectively encourage and support watershed stewardship collaborative efforts of community groups such as the Contra Costa Watershed Forum, the Santa Clara Basin Watershed Management Initiative, "friends of creek" groups, and other organizations that benefit the health of the watershed such as the Bay-Friendly Landscaping and Gardening Coalition. If no such organizations exist, encourage and support development of grassroots watershed groups or engagement of an existing group, such as a neighborhood association, in watershed stewardship activities. Coordinate with existing groups to further stewardship efforts.

ii. Implementation Level – Annually demonstrate effort.

iii. Reporting – In each Annual Report, each Permittee shall state the level of effort, describe the support given, state what efforts were undertaken and the results of these efforts, and provide an evaluation of the effectiveness of these efforts.

C.7.g. Citizen Involvement Events

i. Task Description – Permittees shall individually or collectively, support citizen involvement events, which provide the opportunity for citizens to directly participate in water quality and aquatic habitat improvement, such as creek/shore clean-ups, adopt-an-inlet/creek/beach programs, volunteer monitoring, service learning activities such as storm drain inlet marking, community riparian restoration activities, community grants, other participation and/or host volunteer activities.

ii. Implementation Level – Each Permittee shall annually sponsor and/or host the number of citizen involvement events according to its population, as shown in the table below:

Table 7.2 Community Involvement Events[18]

Permittee Population	Number of Involvement Events
< 10,000	1
10,001 – 40,000	1
40,001 – 100,000	2
100,001 – 175,000	3
175,001 – 250,000	4
> 250,000	5
Non-population-based Permittees	2

[18] Permittees can claim individual credit for all events sponsored or hosted by their Countywide Program or BASMAA, which are publicized to reach the Permittee's jurisdiction.

Should a citizen involvement event contain significant public outreach elements, the Permittee may claim credit for both Citizen Involvement Events (C.7.g.) and Public Outreach Events (C.7.e.).

iii. Reporting – In each Annual Report, each Permittee shall list the events (name of event, event location, and event date) participated in and assess the effectiveness of efforts with appropriate measures (e.g., success at reaching a broad spectrum of the community, number of participants compared to previous years, post-event survey results, number of inlets/creeks/shores/parks/and such adopted, quantity/volume materials cleaned up, data trends, and comparisons to previous efforts).

C.7.h. School-Age Children Outreach

i. Task Description – Permittees shall individually or collectively implement outreach activities designed to increase awareness of stormwater and/or watershed message(s) in school-age children (K through 12).

ii. Implementation Level – Implement annually and demonstrate effectiveness of efforts through assessment.

iii. Reporting – In each Annual Report, each Permittee shall state the level of effort, spectrum of children reached, and methods used, and provide an evaluation of the effectiveness of these efforts.

C.7.i. Outreach to Municipal Officials

i. Task Description – Permittees shall conduct outreach to municipal officials. One alternative means of accomplishing this is through the use of the Nonpoint Education for Municipal Officials program (NEMO) to significantly increase overall awareness of stormwater and/or watershed message(s) among regional municipal officials.

ii. Implementation Level – At least once per permit cycle, or more often.

iii. Reporting – Permittees shall summarize efforts in the 2013 Annual Report.

C.8. Water Quality Monitoring

C.8.a. Compliance Options

i. **Regional Collaboration** – All Permittees shall comply with the monitoring requirements in C.8, however, Permittees may choose to comply with any requirement of this Provision through a collaborative effort to conduct or cause to be conducted the required monitoring in their jurisdictions. Where all or a majority of the Permittees collaborate to conduct water quality monitoring, this shall be considered a regional monitoring collaborative.

Where an existing collaborative body has initiated plans, before the adoption of this Permit, to conduct monitoring that would fulfill a requirement(s) of this Provision, but the monitoring would not meet this Provision's due date(s) by a year or less, the Permittees may request the Executive Officer adjust the due date(s) to synchronize with such efforts.

The types, quantities, and quality of data required within Provision C.8 establish the minimum level-of-effort that a regional monitoring collaborative must achieve. Provided these data types, quantities, and quality are obtained, a regional monitoring collaborative may develop its own sampling design. For Pollutants of Concern and Long-Term monitoring required under C.8.e, an alternative approach may be pursued by Permittees provided that: either similar data types, data quality, data quantity are collected with an equivalent level of effort described under C.8.e; or an equivalent level of monitoring effort is employed to answer the management information needs stated under C.8.e.

ii. **Implementation Schedule** – Monitoring conducted through a regional monitoring collaborative shall commence data collection by October 2011. All other Permittee monitoring efforts shall commence data collection by October 2010. By July 1, 2010, each Permittee shall provide documentation to the Water Board, such as a written agreement, letter, or similar document that confirms whether the Permittee will conduct monitoring individually or through a regional monitoring collaborative.[19]

iii. **Permittee Responsibilities** – 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;

(2) Contributing to a regional collaborative effort;

[19] This documentation will allow the Water Board to know when monitoring will commence for each Permittee. Permittees who commit to monitoring individually may join the regional monitoring collaborative at any time. Any Permittee who discontinues monitoring through the regional collaborative must commence complying with all requirements of Provision C.8 immediately.

(3) Fulfilling monitoring requirements within its own jurisdictional boundaries; or

(4) A combination of the previous options, so that all requirements are fulfilled.

iv. **Third-party Monitoring** – Permittees may choose to fulfill requirements of Provision C.8 using data collected by citizen monitors or other third-party organizations, provided the data are demonstrated to meet the data quality objectives described in Provision C.8.h. Where an existing third-party organization has initiated plans to conduct monitoring that would fulfill a requirement(s) of this Provision, but the monitoring would not meet this Provision's due date(s) by a year or less, the Permittees may request that the Executive Officer adjust the due date(s) to synchronize with such efforts.

C.8.b. San Francisco Estuary Receiving Water Monitoring

With limited exceptions, urban runoff from the Permittees' jurisdictions ultimately discharges to the San Francisco Estuary. Monitoring of the Estuary is intended to answer questions[20] such as:

- Are chemical concentrations in the Estuary potentially at levels of concern and are associated impacts likely?
- What are the concentrations and masses of contaminants in the Estuary and its segments?
- What are the sources, pathways, loadings, and processes leading to contaminant related impacts in the Estuary?
- Have the concentrations, masses, and associated impacts of contaminants in the Estuary increased or decreased?
- What are the projected concentrations, masses, and associated impacts of contaminants in the Estuary?

Permittees shall 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), by contributing their fair-share financially on an annual basis.

C.8.c. Status Monitoring/Rotating Watersheds

i. Status Monitoring is intended to answer these questions: Are water quality objectives, both numeric and narrative, being met in local receiving waters,

[20] These are the management questions approved by the Regional Monitoring Program's Steering Committee on May 9, 2008, and stated at http://www.sfei/rmp/rmp_steering_meetings/rmp_steering_meeting_5_09_08/Item%2010a%20Attachment%201%20%20Draft%20RMP%20Management%20Questions%2005-02-08%20Annotated.pdf. While the stated objectives may change over time, the intent of this provision is for Permittees to continue contributing financially and as stakeholders in such a program as the RMP, which monitors the quality of San Francisco Bay.

including creeks, rivers and tributaries? Are conditions in local receiving waters supportive of or likely to be supportive of beneficial uses?

ii. **Parameters and Methods** – Permittees shall conduct Status Monitoring using the parameters, methods, occurrences, durations, and minimum number of sampling sites as described in Table 8.1. Spring sampling shall be conducted during the April - June timeframe; dry weather sampling shall be conducted during the July - September timeframe. Minor variations of the parameters and methods may be allowed with Executive Officer concurrence.

iii. **Frequency** – Permittees shall complete the Status Monitoring in Table 8.1 at the following frequencies:

- Alameda Permittees – annually
- Contra Costa Permittees – annually
- Fairfield-Suisun Permittees – twice during the Permit term
- San Mateo Permittees – annually
- Santa Clara Permittees – annually
- Vallejo Permittees – once during the Permit term

Table 8.1 Status Monitoring Elements

Status Monitoring Parameter	Sampling and/or Analytical Method[21]	Minimum Sampling Occurrence[22]	Duration of Sampling	Minimum # Sample Sites to Monitor/Yr[23] Santa Clara & Alameda Permittees/ Contra Costa & San Mateo Permittees/ Fairfield-Suisun & Vallejo Permittees	Result(s) that Trigger a Monitoring Project in Provision C.8.d.i.
Biological Assessment[24] (Includes Physical Habitat Assessment and General Water Quality Parameters[25]) Nutrients (total phosphorus, dissolved orthophosphate, total nitrogen, nitrate, ammonia, silica, chloride,	SWAMP Std Operating Procedure[26,27,28] for Biological Assessments & PHab; SWAMP comparable	1/yr (Spring Sampling)	Grab sample	Spring 20 / 10 / 4	BMI metrics that indicate substantially degraded community as per Attachment H, Table H-1 For Nutrients: 20% of results in one waterbody exceed one or more water quality standard

21 Refers to field protocol, instrumentation and/or laboratory protocol.

22 Refers to the number of sampling events at a specific site in a given year.

23 The number of sampling sites shown is based on the relative population in each Regional Stormwater Countywide Program and is listed in this order: Santa Clara & Alameda Countywide / Contra Costa & San Mateo Countywide / Vallejo & Fairfield-Suisun Programs.

24 The same general location must be used to collect benthic community, sediment chemistry, and sediment toxicity samples. General Water Quality Parameters need not be collected twice, where it is collected by a multi-parameter probe at a subset of these sample sites (see next row of Table 8.1).

25 Includes dissolved oxygen, temperature, conductivity, and pH.

26 Ode, P.R. 2007. Standard Operating Procedures for Collecting Benthic Macroinvertebrate Samples and Associated Physical and Chemical Data for Ambient Bioassessments in California, California State Water Resources Control Board Surface Water Ambient Monitoring Program (SWAMP), as subsequently revised (http://www.waterboards.ca.gov/water_issues/programs/swamp/docs/phab_sopr6.pdf). Permittees may coordinate with Water Board staff to modify their sampling procedures if these referenced procedures change during the Permit term.

27 Biological assessments shall include benthic macroinvertebrates and algae. Bioassessment sampling method shall be multihabitat reach-wide. Macroinvertebrates shall be identified according to the Standard Taxonomic Effort Level I of the Southwestern Association of Freshwater Invertebrate Taxonomists, using the most current SWAMP approved method. Current methods are documented in (1) SWAMP Standard Operating Procedure (SOP) and Interim Guidance on Quality Assurance for SWAMP Bioassessments, Memorandum to SWAMP Roundtable from Beverly H. van Buuren and Peter R. Ode, 5-21-07, and (2) Amendment to SWAMP Interim Guidance on Quality Assurance for SWAMP Bioassessments, Memorandum to SWAMP Roundtable from Beverly H. van Buuren and Peter R. Ode, 9-17-08. For algae, include mass (ash-free dry weight), chlorophyll a, diatom and soft algae taxonomy, and reachwide algal percent cover. Physical Habitat (PHab) Assessment shall include the SWAMP basic method plus 1) depth and pebble count + CPOM, 2) cobble embeddedness, 3) discharge measurements, and 4) in-stream habitat. Permittees may coordinate with Water Board staff to modify these sampling procedures if SWAMP procedures change during the Permit term.

28 Algae shall be collected in a consistent timeframe as Regional SWAMP. For guidance on algae sampling and evaluation: Fetscher, A. and K. McLaughlin, May 16, 2008. Incorporating Bioassessment Using Freshwater Algae into California's Surface Water Ambient Monitoring Program (SWAMP). Technical Report 563 and current SWAMP-approved updates to Standard Operating Procedures therein. Available at http://www.waterboards.ca.gov/water_issues/programs/swamp/docs/reports/563_periphyton_bioassessment.pdf.

Status Monitoring Parameter	**Sampling and/or Analytical Method**[21]	**Minimum Sampling Occurrence**[22]	**Duration of Sampling**	**Minimum # Sample Sites to Monitor/Yr**[23] Santa Clara & Alameda Permittees/ Contra Costa & San Mateo Permittees/ Fairfield-Suisun & Vallejo Permittees	**Result(s) that Trigger a Monitoring Project in Provision C.8.d.i.**
dissolved organic carbon, suspended sediment concentration)	methods for Nutrients				or established threshold
General Water Quality[29]	Multi-Parameter Probe	2/yr (Concurrent with bioassessment & during the Aug. - Sept. timeframe)	15-minute intervals for 1-2 weeks	3 / 2 / 1	20% of results in one waterbody exceed one or more water quality standard or established threshold
Chlorine (Free and Total)	USEPA Std. Method 4500 Cl F[30]	2/yr Spring & Dry Seasons	Grab sample	Spring 20 / 10 / 2 Dry 3 / 2 / 1	After immediate resampling, concentrations remain > 0.08 mg/L
Temperature	Digital Temperature Logger	60-minute intervals	60-minute intervals April through Sept.	8 / 4 / 1	20% of results in one waterbody exceed applicable temperature threshold[31]
Toxicity – Water Column[32]	Applicable SWAMP Comparable Method	2/yr (1/Dry Season & 1 Storm Event)	Grab or composite sample	3 / 2 / 1	If toxicity results < 50% of control results, repeat sample. If 2nd sample yields < 50% of control results, proceed to C.8.d.i.

[29] Includes dissolved oxygen, temperature, conductivity, and pH.

[30] The method of analysis shall achieve a method detection limit at least as low as that achieved by the Amperometric Titration Method (4500-Cl from *Standard Methods for Examination of Water and Wastewater*, Edition 20).

[31] If temperatures exceed applicable threshold (e.g., Maximum Weekly Average Temperature, Sullivan K., Martin, D.J., Cardwell, R.D., Toll, J.E., Duke, S. 2000. *An Analysis of the Effects of Temperature on Salmonids of the Pacific Northwest with Implications for Selecting Temperature Criteria, Sustainable Ecosystem Institute*) or spike with no obvious natural explanation observed.

[32] *US EPA three species toxicity tests: Selenastrum* growth and *Ceriodaphnia* and *Pimephales* with lethal and sublethal endpoints. Also H*yalella azteca with lethal endpoint.*

Status Monitoring Parameter	**Sampling and/or Analytical Method**[21]	**Minimum Sampling Occurrence**[22]	**Duration of Sampling**	**Minimum # Sample Sites to Monitor/Yr**[23] Santa Clara & Alameda Permittees/ Contra Costa & San Mateo Permittees/ Fairfield-Suisun & Vallejo Permittees	**Result(s) that Trigger a Monitoring Project in Provision C.8.d.i.**
Toxicity– Bedded Sediment, Fine-grained[33]	Applicable SWAMP Comparable Method	1/yr	Grab sample	3 / 2 / 1 At fine-grained depositional area at bottom of watershed	See Attachment H, Table H-1
Pollutants – Bedded Sediment,[34] fine-grained	Applicable SWAMP Comparable Method inc. grain size	1/yr	Grab sample	3 / 2 / 1 At fine-grained depositional area at bottom of watershed	See Attachment H, Table H-1
Pathogen Indicators[35]	U.S. EPA protocol[36]	1/yr (During Summer)	Follow U.S. EPA protocol	5 / 5 / * *Fairfield-Suisun & Vallejo Permittees: 3 sites twice in permit term	Exceedance of USEPA criteria
Stream Survey (stream walk & mapping)[37]	USA[38] or equivalent	1 waterbody/yr	N/A	9 / 6 / 3 stream miles/year	N/A

33 Bedded sediments should be fine-grain from depositional areas. Grain size and TOC must be reported. Coordinate with TMDL Provision requirements as applicable.

34 Bedded sediments should be fine-grain from depositional areas. Grain size and TOC must be reported. Analytes shall include all of those reported in MacDonald et al. 2000 (including copper, nickel, mercury, PCBs, DDT, chlordane, dieldrin) as well as pyrethroids (see Table 8.4 for list of pyrethroids). Coordinate with TMDL Provision requirements as applicable. MacDonald, D.D., G.G. Ingersoll, and T.A. Berger. 2000. Development and Evaluation of Consensus-based Sediment Quality Guidelines for Freshwater Ecosystems. *Archives of Environ. Contamination and Toxicology* 39(1):20–31.

35 Includes fecal coliform and *E. Coli.*

36 Rather than collecting samples over five separate days, Permittees may use Example #2, pg. 54, of USEPA's *Implementation Guidance for Ambient Water Quality Criteria for Bacteria*, March 2004 Final.

37 The Stream Surveys need not be repeated on a watershed if a Stream Survey was completed on that waterbody within the previous five years. The number of stream miles to be surveyed in any given year may be less than that shown in Table 8-1 in order to avoid repeating surveys at areas surveyed during the previous five years.

38 Center for Watershed Protection, Manual 10: *Unified Stream Assessment: A User's Manual,* February 2005.

iv. **Locations** – For each sampling year (per C.8.c.iii.), Permittees shall select at least one waterbody to sample from the applicable list below. Locations shall be selected so that sampling is sufficient to characterize segments of the waterbody(s). For example, Permittees required to collect a larger number of samples should sample two or more waterbodies, so that each sampling effort represents a reasonable segment length and/or type. Samples shall be collected in reaches that receive urban stormwater discharges, except in possible infrequent instances where non-urban-impacted stream samples are needed for comparison[39]. Waterbody selection shall be based on factors such as watershed area, land use, likelihood of urban runoff impacts, and existing monitoring data.

Table 8.2 Status Monitoring Locations – Waterbodies

SCVURPPP	ACCWP	CCCWP	SMCWPPP	FSUMRP	VALLEJO
Coyote Creek and tributaries	Arroyo Valle (below Livermore or lower)	Kirker Creek	San Pedro Creek and tributaries	Laurel Creek	Chabot Creek
Guadalupe River and tributaries	Arroyo Mocho	Mt. Diablo Creek	Pilarcitos Creek	Ledgewood Creek	Austin Creek & tributaries
San Tomas Creek and tributaries	Tassajara Creek	Walnut Creek and tributaries	Colma Creek		
Calabazas Creek	Alamo Creek	Rodeo Creek	San Bruno Creek and tributaries		
Permanente Creek and tributaries	Arroyo de la Laguna	Pinole Creek	Millbrae Creek and tributaries		
Stevens Creek and tributaries	Alameda Creek (at Fremont or below)	San Pablo Creek	Mills Creek and tributaries		
Matadero Creek and tributaries	San Lorenzo Creek & tribs	Alhambra Creek	Easton Creek and tributaries		
Adobe Creek	San Leandro Creek & tribs	Wildcat Creek	Sanchez Creek and tributaries		
Lower Penitencia Creek and tributaries	Oakland, Berkeley, or Albany Creeks		Burlingame Creek and tributaries		
Barron Creek			San Mateo Creek (below dam only)		
San Francisquito Creek & tributaries			Borel Creek & tributaries		
			Laurel Creek & tribs		
			Belmont Creek & tribs		
			Pulgas Creek & tribs		
			Cordilleras & tributaries		
			Redwood Creek & tribs		
			Atherton Creek & tribs		
			San Francisquito Creek and tributaries		

[39] Sampling efforts shall focus on stream reaches with urban stormwater system discharges. Sampling upstream of urban outfalls is not precluded where needed to meet sampling plan objectives.

v. Status Monitoring Results – When Status Monitoring produces results such as those described in the final column of Table 8.1, Permittees shall conduct Monitoring Project(s) as described in C.8.d.i.

C.8.d. Monitoring Projects – Permittees shall conduct the Monitoring Projects listed below.

i. **Stressor/Source Identification** – When Status results trigger a follow-up action as indicated in Table 8.1, Permittees shall take the following actions, as also required by Provision C.1. If the trigger stressor or source is already known, proceed directly to step 2. The first follow-up action shall be initiated as soon as possible, and no later than the second fiscal year after the sampling event that triggered the Monitoring Project.

(1) Conduct a site specific study (or non-site specific if the problem is wide-spread) in a stepwise process to identify and isolate the cause(s) of the trigger stressor/source. This study should follow guidance for Toxicity Reduction Evaluations (TRE)[40] or Toxicity Identification Evaluations (TIE).[41] A TRE, as adapted for urban stormwater data, allows Permittees to use other sources of information (such as industrial facility stormwater monitoring reports) in attempting to determine the trigger cause, potentially eliminating the need for a TIE. If a TRE does not result in identification of the stressor/source, Permittees shall conduct a TIE.

(2) Identify and evaluate the effectiveness of options for controlling the cause(s) of the trigger stressor/source.

(3) Implement one or more controls.

(4) Confirm the reduction of the cause(s) of trigger stressor/source.

(5) Stressor/Source Identification Project Cap: Permittees who conduct this monitoring through a regional collaborative shall be required to initiate no more than ten Stressor/Source Identification projects during the Permit term in total, and at least two must be toxicity follow-ups, unless monitoring results do not indicate the presence of toxicity. If conducted through a stormwater countywide program, the Santa Clara and Alameda

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[40] USEPA. August 1999. *Toxicity Reduction Evaluation Guidance for Municipal Wastewater Treatment Plants*. EPA/833B-99/002. Office of Wastewater Management, Washington, D.C.

[41] Select TIE methods from the following references after conferring with SWAMP personnel: For sediment: (1) Ho KT, Burgess R., Mount D, Norberg-King T, Hockett, RS. 2007. *Sediment toxicity identification evaluation: interstitial and whole methods for freshwater and marine sediments*. USEPA, Atlantic Ecology Division/Mid-Continental Ecology Division, Office of Research and Development, Narragansett, RI, or (2) Anderson, BS, Hunt, JW, Phillips, BM, Tjeerdema, RS. 2007. *Navigating the TMDL Process: Sediment Toxicity*. Final Report- 02-WSM-2. Water Environment Research Federation. 181 pp. For water column: (1) USEPA. 1991. *Methods for aquatic toxicity identification evaluations. Phase I Toxicity Characterization Procedures.* EPA 600/6-91/003. Office of Research and Development, Washington, DC., (2) USEPA. 1993. *Methods for aquatic toxicity identification evaluations. Phase II Toxicity Identification Procedures for Samples Exhibiting Acute and Chronic Toxicity*. EPA 600/R-92/080. Office of Research and Development, Washington, DC., or (3) USEPA. 1996. *Marine Toxicity Identification Evaluation (TIE), Phase I Guidance Document*. EPA/600/R-95/054. Office of Research and Development, Washington, DC.

Permittees each shall be required to initiate no more than five (two for toxicity); the Contra Costa and San Mateo Permittees each shall be required to initiate no more than three (one for toxicity); and the Fairfield-Suisun and Vallejo Permittees each shall be required to initiate no more than one Stressor/Source Identification project(s) during the Permit term.

(6) As long as Permittees have complied with the procedures set forth above, they do not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed to do so by the Water Board.

ii. **BMP Effectiveness Investigation** – Investigate the effectiveness of one BMP for stormwater treatment or hydrograph modification control. Permittees who do this project through a regional collaborative are required to initiate no more than one BMP Effectiveness Investigation during the Permit term. If conducted through a stormwater countywide program, the Santa Clara, Alameda, Contra Costa, and San Mateo Permittees shall be required to initiate one BMP Effectiveness Investigation each, and the Fairfield-Suisun and Vallejo Permittees shall be exempt from this requirement. The BMP(s) used to fulfill requirements of C.3.b.iii., C.11.e. and C.12.e. may be used to fulfill this requirement, provided the BMP Effectiveness Investigation includes the range of pollutants generally found in urban runoff. The BMP Effectiveness Investigation will not trigger a Stressor/Source Identification Project. Data from this Monitoring Project need not be SWAMP-comparable.

iii. **Geomorphic Project** – This monitoring is intended to answer the questions: How and where can our creeks be restored or protected to cost-effectively reduce the impacts of pollutants, increased flow rates, and increased flow durations of urban runoff?

Permittees shall select a waterbody/reach, preferably one that contains significant fish and wildlife resources, and conduct one of the following projects within each county, except that only one such project must be completed within the collective Fairfield-Suisun and Vallejo Permittees' jurisdictions:

(1) Gather geomorphic data to support the efforts of a local watershed partnership[42] to improve creek conditions; or

(2) Inventory locations for potential retrofit projects in which decentralized, landscape-based stormwater retention units can be installed; or

(3) Conduct a geomorphic study which will help in development of regional curves which help estimate equilibrium channel conditions for different-sized drainages. Select a waterbody/reach that is not undergoing changing land use. Collect and report the following data:

- Formally surveyed channel dimensions (profile), planform, and cross-sections. Cross-sections shall include the topmost floodplain terrace and

[42] A list of local watershed partnerships may be obtained from Water Board staff.

be marked by a permanent, protruding (not flush with ground) monument.

- Contributing drainage area.
- Best available information on bankfull discharges and width and depth of channel formed by bankfull discharges.
- Best available information on average annual rainfall in the study area.

Permittees shall complete the selected geomorphic project so that project results are reported in the Integrated Monitoring Report (see Provision C.8.g.v).

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

Pollutants of Concern (POC) monitoring is intended to assess inputs of Pollutants of Concern to the Bay from local tributaries and urban runoff, assess progress toward achieving wasteload allocations (WLAs) for TMDLs and help resolve uncertainties associated with loading estimates for these pollutants. In particular, there are four priority management information needs toward which POC monitoring must be directed: 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.

Permittees shall implement the following POC monitoring components or pursue an alternative approach that addresses each of the aforementioned management information needs. An alternative approach may be pursued by Permittees provided that: either similar data types, data quality, data quantity are collected with an equivalent level of effort described; or an equivalent level of monitoring effort is employed to answer the management information needs.

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. Permittees shall implement the following Long-Term monitoring components or, following approval by the Executive Officer, an equivalent monitoring program.

i. **Pollutants of Concern Loads Monitoring Locations** – Permittees shall conduct Pollutants of Concern monitoring at stations listed below. Permittees may install these stations in two phases providing at least half of the stations are monitored in the water year beginning October 2010, and all the stations are monitored in the water year beginning October 2012. Upon approval by the Executive Officer, Permittees may use alternate POC monitoring locations.

(1) Castro Valley Creek S3 at USGS gauging station in Castro Valley

(2) Guadalupe River

(3) Zone 4 Line A at Chabot Road in Hayward

(4) Rheem Creek at Giant Road in Richmond

(5) Walnut Creek at a downstream location

(6) Calabazas Creek at Lakeside Drive in Sunnyvale, at border with Santa Clara

(7) San Mateo Creek at downstream location

(8) Laurel Creek at Laurie Meadows park, off Casanova Drive in City of San Mateo.

ii. **Long-Term Monitoring Locations** – Permittees shall conduct Long-Term monitoring at stations listed below. After conferring with the Regional SWAMP program, and upon approval by the Executive Officer, Permittees may use alternate Long-Term monitoring locations.

Table 8.3. Long-Term Monitoring Locations

Stormwater Countywide Program	Waterbody	Suggested Location
Alameda Permittees	Alameda Creek OR	East of Alvarado Blvd*
	Lower San Leandro Creek	Empire Road*
Contra Costa Permittees	Kirker Creek OR	Floodway*
	Walnut Creek	Concord Avenue*
Santa Clara Permittees	Guadalupe River OR	USGS Gaging Station 11169025*
	Coyote Creek	Montague*
San Mateo Permittees	San Mateo Creek	Gateway Park*

* SWAMP is scheduled to collect sediment toxicity and sediment chemistry samples annually at these stations during the month of June.

iii. **Parameters and Frequencies** – Permittees shall conduct Pollutants of Concern sampling pursuant to Table 8.4, Categories 1 and 2. In Table 8.4, Category 1 pollutants are those for which the Water Board has active water quality attainment strategies (WQAS), such as TMDL or site-specific objective projects. Category 2 pollutants are those for which WQAS are in development. The lower monitoring frequency for Category 2 pollutants is sufficient to develop preliminary loading estimates for these pollutants.

Permittees shall conduct Long-Term monitoring pursuant to Table 8.4, Category 3. SWAMP has scheduled collection of Category 3 data at the Long-Term monitoring locations stated in C.8.e.ii. As stated in Provision C.8.a.iv., Permittees may use SWAMP data to fulfill Category 3 sampling requirements.

iv. **Protocols** – At a minimum, sampling and analysis protocols shall be consistent with 40 CFR 122.21(g)(7)(ii).

v. **Methods** – Methyl mercury samples shall be grab samples collected during storm events that produce rainfall of at least 0.10 inch, shall be frozen immediately upon collection, and shall be kept frozen during transport to the laboratory. All other Category 1 and 2 samples shall be wet weather flow-weighted composite samples, collected during storm events that produce rainfall of at least 0.10 inch. Sampled storms should be separated by 21 days of dry weather, but, at a minimum, sampled storms must have 72 hours of antecedent dry weather. Samples must include the first rise in the hydrograph. Category 3 monitoring data shall be SWAMP-comparable.

Table 8.4 Pollutants of Concern Loads & Long-Term Monitoring Elements

Category/Parameter	Sampling Years	Minimum Sampling Occurrence	Sampling Interval
Category 1 • Total and Dissolved Copper • Total Mercury[43] • Methyl Mercury • Total PCBs[44] • Suspended Sediments (SSC) • Total Organic Carbon • Toxicity – Water Column • Nitrate as N • Hardness	Annually	Average of 4 wet weather events per year For methyl mercury only: average of 2 wet & 2 dry weather events per year	Flow-weighted composite For methyl mercury only: grab samples collected during the first rise in the hydrograph of a storm event.
Category 2 • Total and Dissolved Selenium • Total PBDEs (Polybrominated Diphenyl Ethers) • Total PAHs (Poly-Aromatic Hydrocarbons) • Chlordane • DDTs (Dichloro-Diphenyl-Trichloroethane) • Dieldrin • Nitrate as N • Pyrethroids - bifenthrin, cyfluthrin, beta-cyfluthrin, cypermethrin, deltamethrin, esfenvalerate, lambda-cyhalothrin, permethrin, and tralomethrin • Carboryl and fipronil • Total and Dissolved Phosphorus	Oct. 2010 - 2011 water year and Oct. 2012 - 2013 water year	2 times per year	Flow-weighted composite
Category 3 Toxicity – Bedded Sediment, fine-grained[45]	Biennially, Coordinate	Once per year, during April-June,	Grab sample

[43] The monitoring type and frequency shown for mercury is not sufficient to determine progress toward achieving TMDL load allocations. Progress toward achieving load allocations will be accomplished by assessing loads avoided resulting from treatment, source control, and pollution prevention actions.

[44] The monitoring type and frequency shown for PCBs is not sufficient to determine progress toward achieving TMDL load allocations. Progress toward achieving load allocations will be accomplished by assessing loads avoided resulting from treatment, source control, and pollution prevention actions.

Category/Parameter	Sampling Years	Minimum Sampling Occurrence	Sampling Interval
Pollutants – Bedded Sediment, fine-grained	with SWAMP	coordinate with SWAMP	

vi. **Sediment Delivery Estimate/Budget** – The objective of this monitoring is to develop a strong estimate of the amount of sediment entering the Bay from local tributaries and urban drainages. By July 1, 2011, Permittees shall develop a design for a robust sediment delivery estimate/sediment budget in local tributaries and urban drainages. Permittees shall implement the study by July 1, 2012.

vii. **Emerging Pollutants** – Permittees shall develop a work plan and schedule for initial loading estimates and source analyses for emerging pollutants: endocrine-disrupting compounds, PFOS/PFAS (Perfluorooctane Sulfonates (PFOS), Perfluoroalkyl sulfonates (PFAS); these perfluorocompounds are related to Teflon products), and NP/NPEs (nonylphenols/nonylphenol esters —estrogen-like compounds). This work plan, which is to be implemented in the next Permit term, shall be submitted with the Integrated Monitoring Report (see Provision C.8.g.).

C.8.f. Citizen Monitoring and Participation

i. Permittees shall encourage Citizen Monitoring.

ii. In developing Monitoring Projects and evaluating Status & Trends data, Permittees shall make reasonable efforts to seek out citizen and stakeholder information and comment regarding waterbody function and quality.

iii. Permittees shall demonstrate annually that they have encouraged citizen and stakeholder observations and reporting of waterbody conditions. Permittees shall report on these outreach efforts in the annual Urban Creeks Monitoring Report.

C.8.g. Reporting

i. **Water Quality Standard Exceedence** – When data collected pursuant to C.8.a.-C.8.f. indicate that stormwater runoff or dry weather discharges are or may be causing or contributing to exceedance(s) of applicable water quality standards, including narrative standards, a discussion of possible pollutant sources shall be included in the Urban Creeks Monitoring Report. When data collected pursuant to C.8.a.-C.8.f. indicate that discharges are causing or contributing to an exceedance of an applicable water quality standard, Permittees shall notify the Water Board within no more than 30 days of such a determination and submit a follow-up report in accordance with Provision C.1 requirements. The preceding reporting requirements shall not apply to

[45] If Ceriodaphnia, H*yalella azteca,* or Pimephales survival or Selenastrum growth is < 50% of control results, repeat wet weather sample. If 2nd sample yields < 50% of control results, proceed to C.8.d.i.

continuing or recurring exceedances of water quality standards previously reported to the Water Board or to exceedances of pollutants that are to be addressed pursuant to Provisions C.8 through C.14 of this Order in accordance with Provision C.1.

ii. **Status Monitoring Electronic Reporting** – Permittees shall submit an Electronic Status Monitoring Data Report no later than January 15 of each year, reporting on all data collected during the foregoing October 1–September 30 period. Electronic Status Monitoring Data Reports shall be in a format compatible with the SWAMP database.[46] Water Quality Objective exceedances shall be highlighted in the Report.

iii. **Urban Creeks Monitoring Report** – Permittees shall submit a comprehensive Urban Creeks Monitoring Report no later than March 15 of each year, reporting on all data collected during the foregoing October 1–September 30 period, with the initial report due March 15, 2012, unless the Permittees choose to monitor through a regional collaborative, in which case the due date is March 15, 2013. Each Urban Creeks Monitoring Report shall contain summaries of Status, Long-Term, Monitoring Projects, and Pollutants of Concern Monitoring including, as appropriate, the following:

(1) Maps and descriptions of all monitoring locations;

(2) Data tables and graphical data summaries; Constituents that exceed applicable water quality standards shall be highlighted;

(3) For all data, a statement of the data quality;

(4) An analysis of the data, which shall include the following:

- Calculations of biological metrics and physical habitat endpoints.
- Comparison of biological metrics to:
  - Each other
  - Any applicable, available reference site(s)
  - Any applicable, available index of biotic integrity
  - Physical habitat endpoints.
- Identification and analysis of any long-term trends in stormwater or receiving water quality.

(5) A discussion of the data for each monitoring program component, which shall:

- Discuss monitoring data relative to prior conditions, beneficial uses and applicable water quality standards as described in the Basin Plan, the Ocean Plan, or the California Toxics Rule or other applicable water quality control plans.

[46] See http://mpsl.mlml.calstate.edu/swdataformats.htm. Permittees shall maintain an information management system that will support electronic transfer of data to the Regional Data Center of the ***California Environmental Data Exchange Network*** (***CEDEN***), located within the San Francisco Estuary Institute.

- Where appropriate, develop hypotheses to investigate regarding pollutant sources, trends, and BMP effectiveness.
- Identify and prioritize water quality problems.
- Identify potential sources of water quality problems.
- Describe follow-up actions.
- Evaluate the effectiveness of existing control measures.
- Identify management actions needed to address water quality problems.

iv. **Monitoring Project Reports** – Permittees shall report on the status of each ongoing Monitoring Project in each annual Urban Creeks Monitoring Report. In addition, Permittees shall submit stand-alone summary reports within six months of completing BMP Effectiveness and Geomorphic Projects; these reports shall include: a description of the project; map(s) of project locations; data tables and summaries; and discussion of results.

v. **Integrated Monitoring Report** – No later than March 15, 2014, Permittees shall prepare and submit an Integrated Monitoring Report through the regional collaborative monitoring effort on behalf of all participating Permittees, or on a countywide basis on behalf of participating Permittees, so that all monitoring conducted during the Permit term is reported.[47] This report shall be in lieu of the Annual Urban Creeks Monitoring Report due on March 15, 2014.

The report shall include, but not be limited to, a comprehensive analysis of all data collected pursuant to Provision C.8., and may include other pertinent studies. For Pollutants of Concern, the report shall include methods, data, calculations, load estimates, and source estimates for each Pollutant of Concern Monitoring parameter. The report shall include a budget summary for each monitoring requirement and recommendations for future monitoring. This report will be part of the next Report of Waste Discharge for the reissuance of this Permit.

vi. **Standard Report Content** –All monitoring reports shall include the following:

- The purpose of the monitoring and briefly describe the study design rationale.
- Quality Assurance/Quality Control summaries for sample collection and analytical methods, including a discussion of any limitations of the data.
- Brief descriptions of sampling protocols and analytical methods.
- Sample location description, including waterbody name and segment and latitude and longitude coordinates.
- Sample ID, collection date (and time if relevant), media (e.g., water, filtered water, bed sediment, tissue).
- Concentrations detected, measurement units, and detection limits.

[47] Permittees who do not participate in the Regional Monitoring Group or in a stormwater countywide program must submit an individual Integrated Receiving Water Impacts Report.

- Assessment, analysis, and interpretation of the data for each monitoring program component.
- Pollutant load and concentration at each mass emissions station.
- A listing of volunteer and other non-Permittee entities whose data are included in the report.
- Assessment of compliance with applicable water quality standards.
- A signed certification statement.

vii. **Data Accessibility** – Permittees shall make electronic reports available through a regional data center, and optionally through their web sites. Permittees shall notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list.

C.8.h. Monitoring Protocols and Data Quality

Where applicable, monitoring data must be SWAMP comparable. Minimum data quality shall be consistent with the latest version of the SWAMP Quality Assurance Project Plan (QAPP)[48] for applicable parameters, including data quality objectives, field and laboratory blanks, field duplicates, laboratory spikes, and clean techniques, using the most recent Standard Operating Procedures. A Regional Monitoring Collaborative may adapt the SWAMP QAPP for use in conducting monitoring in the San Francisco Bay Region, and may use such QAPP if acceptable to the Executive Officer.

[48] The current SWAMP QAPP at the time of Permit issuance is dated September 1, 2008, and is available at http://www.waterboards.ca.gov/water_issues/programs/swamp/docs/qapp/swamp_qapp_master090108a.pdf.

C.9. Pesticides Toxicity Control

To prevent the impairment of urban streams by pesticide-related toxicity, the Permittees shall implement a pesticide toxicity control program that addresses their own and others' use of pesticides within their jurisdictions that pose a threat to water quality and that have the potential to enter the municipal conveyance system. This provision implements requirements of the TMDL for Diazinon and Pesticide related Toxicity for Urban Creeks in the region. The TMDL includes urban runoff allocations for Diazinon of 100 ng/l and for pesticide related toxicity of 1.0 Acute Toxicity Units (TUa) and 1.0 Chronic Toxicity Units (TUc) to be met in urban creek waters. However, urban runoff management agencies (i.e., the Permittees) are not solely responsible for attaining the allocations because their authority to regulate pesticide use is constrained by federal and State law. Accordingly, the Permittees' requirements for addressing the allocations are set forth in the TMDL implementation plan and are included in this provision.

Pesticides of concern include: organophosphorous pesticides (chlorpyrifos, diazinon, and malathion); pyrethroids (bifenthrin, cyfluthrin, beta-cyfluthrin, cypermethrin, deltamethrin, esfenvalerate, lambda-cyhalothrin, permethrin, and tralomethrin); carbamates (e.g., carbaryl); and fipronil. The Permittees may coordinate with BASMAA, the Urban Pesticide Pollution Prevention Project, the Urban Pesticide Committee, the Bay-Friendly Landscaping and Gardening Coalition, and other agencies and organizations in carrying out these activities.

C.9.a. Adopt an Integrated Pest Management (IPM) Policy or Ordinance

i. **Task Description** – In their IPM policies or ordinances, the Permittees shall include provisions to minimize reliance on pesticides that threaten water quality and to require the use of IPM in municipal operations and on municipal property.

ii. **Implementation Level** – If not already in place, the Permittees shall adopt IPM policies or ordinances no later than July 1, 2010.

iii. **Reporting** – The Permittees shall submit a copy of their IPM ordinance(s) or policy(s) in their 2010 Annual Report.

C.9.b. Implement IPM Policy or Ordinance

i. **Task Description** – The Permittees shall establish written standard operating procedures for pesticide use that ensure implementation of the IPM policy or ordinance and require municipal employees and contractors to adhere to the IPM standard operating procedures.

ii. **Reporting**

(1) In their Annual Reports, the Permittees shall report on IPM implementation by showing trends in quantities and types of pesticide used, and suggest reasons for increases in use of pesticides that threaten water quality, specifically organophosphorous pesticides, pyrethroids, carbaryl, and fipronil.

(2) The Permittees shall maintain pesticide application standard operating procedures and submit them upon request.

C.9.c. Train Municipal Employees

i. **Task Description** – The Permittees shall ensure that all municipal employees who, within the scope of their duties, apply or use pesticides that threaten water quality are trained in IPM practices and the Permittee's IPM policy. This training may also include other training opportunities such as Bay-Friendly Landscape Maintenance Training & Qualification Program and EcoWise Certified.

ii. **Reporting**

(1) In their Annual Reports, the Permittees shall report the percentage of municipal employees who apply pesticides who have received training in IPM policy and IPM standard operating procedures within the last three years.

(2) The Permittees shall submit training materials (e.g., course outline, date, attendees) upon request.

C.9.d. Require Contractors to Implement IPM

i. **Task Description** – The Permittees shall hire IPM-certified contractors or include contract specifications requiring contractors to implement IPM no later than July 1, 2010.

ii. **Reporting** – In their Annual Reports, the Permittees shall submit documentation to confirm compliance, such as the Permittee's standard contract specification or copy of contractors' certification(s).

C.9.e. Track and Participate in Relevant Regulatory Processes (may be done jointly with other Permittees, such as through CASQA or BASMAA and/or the Urban Pesticide Pollution Prevention Project)

i. **Task Description**

(1) The Permittees shall track USEPA pesticide evaluation and registration activities as they relate to surface water quality, and when necessary, encourage USEPA to coordinate implementation of the Federal Insecticide, Fungicide, and Rodenticide Act and the CWA and to accommodate water quality concerns within its pesticide registration process;

(2) The Permittees shall track California Department of Pesticide Regulation (DPR) pesticide evaluation activities as they relate to surface water quality, and when necessary, encourage DPR to coordinate implementation of the California Food and Agriculture Code with the California Water Code and to accommodate water quality concerns within its pesticide evaluation process;

(3) The Permittees shall assemble and submit information (such as monitoring data) as needed to assist DPR and County Agricultural Commissioners in

ensuring that pesticide applications comply with water quality standards; and

(4) As appropriate, the Permittees shall submit comment letters on USEPA and DPR re-registration, re-evaluation, and other actions relating to pesticides of concern for water quality.

ii. **Reporting** – In their Annual Reports, the Permittees who participate in a regional effort to comply with C.9.e. may reference a regional report that summarizes regional participation efforts, information submitted, and how regulatory actions were affected. All other Permittees shall list their specific participation efforts, information submitted, and how regulatory actions were affected.

C.9.f. Interface with County Agricultural Commissioners

i. **Task Description** – The Permittees shall maintain regular communications with county agricultural commissioners (or other appropriate State and/or local agencies) to (1) get input and assistance on urban pest management practices and use of pesticides, (2) inform them of water quality issues related to pesticides, and (3) report violations of pesticide regulations (e.g., illegal handling) associated with stormwater management.

ii. **Reporting** – In their Annual Reports, the Permittees shall summarize improper pesticide usage reported to county agricultural commissioners and report follow-up actions to correct violations.

C.9.g. Evaluate Implementation of Source Control Actions Relating to Pesticides

i. **Task Description** – The Permittees shall evaluate the effectiveness of the control measures implemented, evaluate attainment of pesticide concentration and toxicity targets for water and sediment from monitoring data (Provision C.8.), and identify improvements to existing control measures and/or additional control measures, if needed, to attain targets with an implementation time schedule.

ii. **Reporting** – In their 2013 Annual Reports, the Permittees shall report the evaluation results, and if needed, submit a plan to implement improved and/or new control measures.

C.9.h. Public Outreach (may be done jointly with other Permittees, such as through CASQA or BASMAA and/or the Urban Pesticide Pollution Prevention Project or the Bay-Friendly Landscaping and Gardening Coalition).

i. **Point of Purchase Outreach:** The Permittees shall:

(1) Conduct outreach to consumers at the point of purchase;

(2) Provide targeted information on proper pesticide use and disposal, potential adverse impacts on water quality, and less toxic methods of pest prevention and control; and

(3) Participate in and provide resources for the "Our Water, Our World" program or a functionally equivalent pesticide use reduction outreach program.

ii. **Reporting** – In their Annual Reports, the Permittees who participate in a regional effort to comply with C.9.h.i. may reference a report that summarizes these actions. All other Permittees shall summarize activities completed and document any measurable awareness and behavior changes resulting from outreach.

iii. **Pest Control Contracting Outreach:** The Permittees shall conduct outreach to residents who use or contract for structural or landscape pest control and shall:

(1) Provide targeted information on proper pesticide use and disposal, potential adverse impacts on water quality, and less toxic methods of pest prevention and control, including IPM;

(2) Incorporate IPM messages into general outreach;

(3) Provide information to residents about "Our Water, Our World" or functionally equivalent program;

(4) Provide information to residents about EcoWise Certified IPM certification in Structural Pest Management, or functionally equivalent certification program; and

(5) Coordinate with household hazardous-waste programs to facilitate appropriate pesticide waste disposal, conduct education and outreach, and promote appropriate disposal.

iv. **Reporting** – In their 2013 Annual Reports, the Permittees who participate in a regional effort to comply with C.9.h.iii. may reference a report that summarizes these actions. All other Permittees shall document the effectiveness of their actions in their 2013 Annual Reports. This documentation may include percentages of residents hiring certified IPM providers and the change in this percentage.

v. **Outreach to Pest Control Operators:** The Permittees shall conduct outreach to pest control operators (PCOs) and landscapers; Permittees are encouraged to work with DPR, county agricultural commissioners, UC-IPM, BASMAA, the Urban Pesticide Committee, the EcoWise Certified Program (or functionally equivalent certification program), the Bio-integral Resource Center and others to promote IPM to PCOs and landscapers.

vi. **Reporting** – In each Annual Report, the Permittees who participate in a regional effort to comply with C.9.h.v. may reference a report that summarizes these actions. All other Permittees shall summarize how they reached PCOs and landscapers and reduced pesticide use.

C.10. Trash Load Reduction

The Permittees shall demonstrate compliance with Discharge Prohibition A.2 and trash-related Receiving Water Limitations through the timely implementation of control measures and other actions to reduce trash loads from municipal separate storm sewer systems (MS4s) by 40% by 2014, 70% by 2017, and 100% by 2022 as further specified below.

During this permit term, the Permittees shall develop and implement a Short-Term Trash Load Reduction Plan. This includes implementation of a mandatory minimum level of trash capture; cleanup and abatement progress on a mandatory minimum number of Trash Hot Spots; and implementation of other control measures and best management practices, such as trash reduction ordinances, to prevent or remove trash loads from MS4s to attain a 40% reduction in trash loads by July 1, 2014. The Permittees shall also develop and begin implementation of a Long-Term Trash Load Reduction Plan to attain a 70% reduction in trash loads from their MS4s by 2017 and 100% by 2022. Flood management agencies, which are non-population-based Permittees that do not have jurisdiction over urban watershed land, are not subject to these trash reduction requirements except for minimum full trash capture and Trash Hot Spot requirements, as specified in subsections C.10.a.iii and C.10.b below.

C.10.a. Short-Term Trash Load Reduction

i. **Short-Term Trash Loading Reduction Plan** – Each Permittee shall submit a Short-Term Trash Load Reduction Plan, including an implementation schedule, to the Water Board by February 1, 2012. The Plan shall describe control measures and best management practices, including any trash reduction ordinances, that are currently being implemented and the current level of implementation and additional control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 40% trash load reduction from its MS4 by July 1, 2014.

   The Short-Term Trash Load Reduction Plan shall account for required mandatory minimum Full Trash Capture devices called for in Provision C.10.a.iii and Trash Hot Spot Cleanup called for in Provision C.10.b.

ii. **Baseline Trash Load and Trash Load Reduction Tracking Method** – Each Permittee, working collaboratively or individually, shall determine the baseline trash load from its MS4 to establish the basis for trash load reductions and submit the determined load level to the Water Board by February 1, 2012, along with documentation of methodology used to determine the load level. The submittal shall also include a description of the trash load reduction tracking method that will be used to account for trash load reduction actions and to demonstrate progress and attainment of trash load reduction levels. The submittal shall account for the drainage areas of a Permittee's jurisdiction that are associated with the baseline trash load from its MS4, and the baseline trash load level per unit area by land use type and drainage area characteristics used to derive the total baseline trash load level for each Permittee.

   In the determination of applicable areas that generate trash loads for inclusion in the Baseline Trash Load, the Permittees may propose areas for exclusion, with supporting documentation, which meet Discharge Prohibition A.2 and trash-

related Receiving Water Limitations. Documentation demonstrating no material trash presence or adverse impact may include data from the maintenance of existing trash capture devices, data from trash flux measurements in the MS4 and the water column of streams during wet weather, Trash Hot Spot assessments, and litter audits of street curb and gutter areas in high pedestrian traffic and high commercial activity areas.

If proposed areas for exclusion are commercial, industrial, or high density residential areas, or adjacent to schools or event venues, the Permittee shall collect and submit by February 1, 2013, an additional year of documentation to further support the basis for the exclusion. If the data continue to support the exclusion determination, further trash reduction actions are not required in these areas, unless the Water Board notifies the Permittee otherwise.

Each Permittee shall submit a progress report by February 1, 2011, that indicates whether it is determining its baseline trash load and trash load reduction method individually or collaboratively with other Permittees and a summary of the approach being used. The report shall also include the types and examples of documentation that will be used to propose exclusion areas, and the land use characteristics and estimated area of potentially excluded areas.

iii. **Minimum Full Trash Capture** – Except as excluded below, population-based Permittees shall install and maintain a mandatory minimum number of full trash capture devices by July 1, 2014, to treat runoff from an area equivalent to 30% of Retail/Wholesale Land[49] that drains to MS4s within their jurisdictions (see Table 10.1 in Attachment J). If the sum of the areas that generate trash loads determined pursuant to C.10.a.ii above is a smaller acreage than the required trash capture acreage, a population-based Permittee may reduce its minimum full trash capture requirement to the smaller acreage. A population-based Permittee with a population less than 12,000 and retail/wholesale land less than 40 acres, or a population less than 2000, is exempt from this trash capture requirement. The minimum number of trash capture devices required to be installed and maintained by non-population-based Permittees is included in Attachment J.

All installed devices that meet the following full trash capture definition may be counted toward this requirement regardless of date of installation. A full capture system or device is any single device or series of devices that traps all particles retained by a 5 mm mesh screen and has a design treatment capacity of not less than the peak flow rate Q resulting from a one-year, one-hour, storm in the sub-drainage area.

C.10.b. Trash Hot Spot Selection and Cleanup

Trash Hot Spots in receiving waters shall be cleaned annually to achieve the multiple benefits of beginning abatement of these impacts as mitigation and to learn more about the sources and patterns of trash loading.

[49] [http://quake.abag.ca.gov/mitigation/pickdbh2.html] and Association of Bay Area Governments, 2005 ABAG Land Use Existing Land Use in 2005: Report and Data for Bay Area Counties

i. **Hot Spot Cleanup and Definition** – The Permittees shall cleanup selected Trash Hot Spots to a level of "no visual impact" at least one time per year for the term of the permit. Trash Hot Spots shall be at least 100 yards of creek length or 200 yards of shoreline length.

ii. **Hot Spot Selection** – Population-based Permittees shall identify high trash-impacted locations on State waters totaling at least one Trash Hot Spot per 30,000 population, or one per 100 acres of Retail/Wholesale Commercial Land Area, within their jurisdictions based on Association of Bay Area Governments (ABAG) 2005 data1, whichever is greater. If the hot spot number by one of the two determination methods is more than twice that determined by the other method, double the smaller hot spot number shall be used. Otherwise, the larger hot spot number determined by the two methods shall be the Trash Hot Spot assignment for a population-based Permittee. Each population-based Permittee shall select at least one Trash Hot Spot. The Permittees shall each submit selected Trash Hot Spots to the Water Board by July 1, 2010. The list should include photo documentation (one photo per 50 feet) and initial assessment results for the proposed hot spots. The minimum number of Trash Hot Spots per Permittee is included in Attachment J for population and non-population-based Permittees. The Permittees shall proceed with cleanup of selected Trash Hot Spots unless informed otherwise by the Water Board.

iii. **Hot Spot Assessments** – The Permittees shall quantify the volume of material removed from each Trash Hot Spot cleanup, and identify the dominant types of trash (e.g., glass, plastics, paper) removed and their sources to the extent possible. Documentation shall include the trash condition before and after clean up of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length. Trash Hot Spots may also be assessed using either the Rapid Trash Assessment (RTA v.8) or the SCVURPPP Urban RTA variation of that method.

C.10.c. Long-Term Trash Load Reduction

Each Permittee shall submit a Long-Term Trash Load Reduction Plan, including an implementation schedule, to the Water Board by February 1, 2014. The Plan shall describe control measures and best management practices, including any trash reduction ordinances, that are being implemented and the level of implementation and additional control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 70% trash load reduction from its MS4 by July 1, 2017, and 100% by July 1, 2022.

C.10.d. Reporting

i. In each Annual Report, each Permittee shall provide a summary of its trash load reduction actions (control measures and best management practices) including the types of actions and levels of implementation, the total trash loads and dominant types of trash removed by its actions, and the total trash loads and dominant types of trash for each type of action. The latter shall include each Trash Hot Spot selected pursuant to C.10.b. Beginning with the 2012 Annual

Report, each Permittee shall also report its percent annual trash load reduction relative to its Baseline Trash Load.

ii. The Permittees shall retain records for review providing supporting documentation of trash load reduction actions and the volume and dominant type of trash removed from full trash capture devices, from each Trash Hot Spot cleanup, and from additional control measures or best management practices implemented. Data may be combined for specific types of full trash capture devices deployed in the same drainage area. These records shall have the specificity required for the trash load reduction tracking method established pursuant to subsection C.10.a.iii.

C.11. Mercury Controls

The Permittees shall implement the following control programs for mercury. The Permittees shall perform the control measures and provide reporting on those control measures according to the provisions below. The purpose of this provision is to implement the urban runoff requirements of the San Francisco Bay mercury TMDL and reduce mercury loads to make substantial progress toward achieving the urban runoff mercury load allocation established for the TMDL. The aggregate, regionwide, urban runoff wasteload load allocation is 82 kg/yr. This allocation should be achieved by February 2028 and, as a way to measure progress, an interim loading milestone of 120 kg/yr, halfway between the current load and the allocation, should be achieved by February 2018. If the interim loading milestone is not achieved, the Permittees shall demonstrate reasonable and measurable progress toward achieving the milestone. The Permittees may comply with any requirement of this provision through a collaborative effort.

C.11.a. Mercury Collection and Recycling Implemented throughout the Region

i. **Task Description** – The Permittees shall promote, facilitate, and/or participate in collection and recycling of mercury containing devices and equipment at the consumer level (e.g., thermometers, thermostats, switches, bulbs).

ii. **Reporting** – The Permittees shall report on these efforts in their Annual Report, including an estimate of the mass of mercury collected.

C.11.b. Monitor Methylmercury

i. **Task Description** – The Permittees shall monitor methymercury in runoff discharges. The objective of the monitoring is to investigate a representative set of drainages and obtain seasonal information and to assess the magnitude and spatial/temporal patterns of methylmercury concentrations.

ii. **Implementation Level** – The Permittees shall analyze aqueous grab samples already being collected for total mercury analysis for methylmercury as specified in Provision C.8.f.

iii. **Reporting** – The Permittees shall report monitoring results annually beginning with their 2010 Annual Report.

C.11.c. Pilot Projects To Investigate and Abate Mercury Sources in Drainages, Including Public Rights-Of-Way, and Stormwater Conveyances with Accumulated Sediment that Contains Elevated Mercury Concentrations.

i. **Task Description** – The Permittees shall investigate and abate mercury sources in or to their storm drain systems in conjunction with the Water Board and other appropriate regulatory agencies with investigation and cleanup authorities. The purpose of this task is to implement and evaluate the benefit of a suite of abatement measures at five pilot project locations. The Permittees shall document the knowledge and experience gained through pilot implementation,

and this documentation will provide a basis for determining the scope of abatement implementation in subsequent permit terms. The Permittees shall also quantify and report the amount of mercury loads abated resulting from implementation of these measures.

ii. **Implementation Level** – Reducing loads of PCBs is the main pilot location selection factor for this Provision, and reducing loads of mercury is a secondary criterion. Accordingly, for PCB pilot project locations selected as part of Provision C.12.c, the Permittees shall conduct reconnaissance in the pilot project drainage areas. The Permittees shall test sediments in storm drains and conveyances to characterize the extent and magnitude of mercury concentrations. They shall evaluate monitoring data and determine if a mercury sediment abatement program would reduce mercury loading significantly. If so determined, the Permittees shall cause abatement activities to be conducted at those sites under Permittee jurisdiction with identified remedial activities. When contamination is located on private property, a Permittee must either exercise direct authority to require cleanup or notify and request other appropriate authorities to exercise their cleanup authority.

iii. **Reporting** – Report on mercury-related aspects of work and loads abated as part of reporting requirements for Provision C.12.c.

C.11.d. Pilot Projects to Evaluate and Enhance Municipal Sediment Removal and Management Practices

i. **Task Description** – The Permittees shall jointly evaluate ways to enhance mercury load reduction benefits of operation and maintenance actives that remove or manage sediment. The purpose of this task is to implement these management practices at the pilot scale in five drainages during this permit term. The knowledge and experience gained through pilot implementation will be used to determine the implementation scope of enhanced sediment removal and management practices in subsequent permit terms. The Permittees shall document the knowledge and experience gained through pilot implementation, and this documentation will provide a basis for determining the implementation scope of enhanced sediment removal management practices in subsequent permit terms. The Permittees shall also quantify and report the amount of mercury loads removed or avoided resulting from implementation of these measures.

ii. **Implementation Level** – In all pilot program drainages selected as part of Provision C.12.c, the Permittees shall jointly evaluate ways to enhance existing sediment removal and management practices such as municipal street sweeping, curb clearing parking restrictions, inlet cleaning, catch basin cleaning, stream and stormwater conveyance system maintenance, and pump station cleaning via increased effort and/or retrofits for the control of mercury. This evaluation shall also include consideration of street flushing and capture, collection, or routing to the sanitary sewer (in coordination and consultation with local sanitary sewer agencies) as a potential enhanced management practice in coordination and consultation with local sanitary sewer agencies.

Beginning July 1, 2011, the Permittees shall implement pilot studies for the most potentially effective measures(s) based on the evaluation of Provision C.11.d.ii in all drainages for which PCB pilot projects are being conducted.

iii. Reporting

(1) The Permittees shall present a progress report on the results of the evaluation in their 2010 Annual Report and the final evaluation results in their 2011 Annual Report.

(2) In their March 15, 2014 Integrated Monitoring Report, the Permittees shall report the effectiveness of enhanced practices pilot implementation, report estimates of loads reduced, and present a plan and schedule for possible expanded implementation for subsequent permit terms.

C.11.e. Conduct Pilot Projects to Evaluate On-Site Stormwater Treatment via Retrofit

i. Task Description – The Permittees shall evaluate and quantify the removal of mercury by on-site treatment systems via retrofit of such systems into existing storm drain systems. The purpose of this task is to implement on-site treatment projects at the pilot scale in ten locations during this permit term. The Permittees shall document the knowledge and experience gained through pilot implementation, and this documentation will provide a basis for determining the implementation scope of on-site treatment retrofits in subsequent permit terms. The Permittees shall also quantify and report the amount of mercury loads removed or avoided resulting from implementation of these measures.

ii. Implementation Level – The Permittees, working collaboratively, shall identify at least ten locations throughout the Permittees' jurisdictions that present opportunities to install and evaluate[50] on-site treatment systems (e.g., detention basins, bioretention units, sand filters, infiltration basins, treatment wetlands) and shall assess best treatment options for those locations. Every county (San Mateo, Contra Costa, Alameda, Santa Clara, and Solano) should have at least one location. This effort shall identify potential locations draining a variety of land uses; evaluate technical feasibility; and discuss economical feasibility. The pilot locations may be the same as those chosen for Provision C.12.e, but consideration should be given to areas of elevated mercury concentrations.

On the basis of the Provision C.11.e.ii report, the Permittees shall select sites to perform pilot studies and shall conduct pilot studies in ten selected locations. Pilot studies shall span treatment types and drainage characteristics.

iii. Reporting –

(1) In their 2011 Annual Report, the Permittees shall report on candidate locations and types of treatment retrofit for each location. The report shall include assessment of at least ten locations.

[50] Permittees may evaluate a maximum of two pre-existing treatment systems of the ten total required systems to be evaluated provided that these existing treatment systems are applicable to the intent of this provision..

(2) In their March 15, 2014 Integrated Monitoring Report, the Permittees shall report status, results, mercury removal effectiveness, and lessons learned from the ten pilot studies and their plan for implementing this type of treatment on an expanded basis throughout their jurisdictions during the next permit term.

C.11.f. Diversion of Dry Weather and First Flush Flows to Publicly Owned Treatment Works (POTWs)

i. **Task Description** – The Permittees shall evaluate the reduced loads of mercury from diversion of dry weather and first flush stormwater flows to sanitary sewers. The Permittees shall document the knowledge and experience gained through pilot implementation, and this documentation will provide a basis for determining the implementation scope of urban runoff diversion projects in subsequent permit terms. The Permittees shall also quantify and report the amount of mercury loads removed or avoided resulting from implementation of these measures.

ii. **Implementation Level** – The Permittees shall implement pilot projects to divert dry weather and first flush flows to POTWs to address these flows as a source of PCBs and mercury to receiving waters. The Permittees are strongly encouraged to make use of stormwater pump stations in this effort because pump station characterization work performed pursuant to Provisions C.2 and C.10, addressing dissolved oxygen depletion and trash impacts, may be efficiently leveraged for the initial phase of these diversion pilot projects. The objectives of this Provision are to: implement five pilot projects for urban runoff diversion from stormwater pump stations to POTWs; evaluate the reduced loads of mercury and PCBs resulting from each diversion; and gather information to guide the selection of additional diversion projects in future permits. Collectively, the Permittees shall select five stormwater pump stations and five alternates by evaluating drainage characteristics and the feasibility of diverting flows to the sanitary sewer.

(1) The Permittees should work with local POTWs on a watershed, county, or regional level to evaluate feasibility and to establish cost sharing agreements. The feasibility evaluation shall include, but not be limited to, costs, benefits, and impacts on the stormwater and wastewater agencies and the receiving waters relevant to the diversion and treatment of the dry weather and first flush flows.

(2) From this feasibility evaluation, the Permittees shall select five pump stations and five alternates for pilot diversion studies. At least one urban runoff diversion pilot project shall be implemented in each of the five counties (San Mateo, Contra Costa, Alameda, Santa Clara, and Solano). The pilot and alternate locations should be located in industrially-dominated catchments where elevated PCB concentrations are documented.

(3) The Permittees shall implement flow diversion to the sanitary sewer at five pilot pump stations. As part of the pilot studies, the Permittees shall monitor, measure, and report mercury load reduction.

iii. Reporting

(1) The Permittees shall summarize the results of the feasibility evaluation in their 2010 Annual Report, including:

- Selection criteria leading to the identification of the five candidate and five alternate pump stations for pilot studies.
- Time schedules for conducting the pilot studies.
- A proposed method for distributing mercury load reductions to participating wastewater and stormwater agencies.

(2) The Permittees shall report annually on the status of the pilot studies in each subsequent Annual Report.

(3) The Permittees shall include in their March 15, 2014 Integrated Monitoring Report:

- Evaluation of pilot program effectiveness.
- Mercury loads reduced.
- Updated feasibility evaluation procedures to guide future diversion project selection.

C.11.g. Monitor Stormwater Mercury Pollutant Loads and Loads Reduced

i. Task Description – The Permittees shall develop and implement a monitoring program to quantify mercury loads and loads reduced through source control, treatment and other management measures as required in Provision C.8.f.

ii. Implementation Level – The Permittees shall demonstrate progress toward (a) the interim loading milestones, or (b) attainment of the program area allocations, by using the following methods:

(1) Quantify through estimates the annual average mercury load reduced by implementing pollution prevention, source control and treatment control efforts required by the provisions of this permit or other relevant efforts; or

(2) Quantify the mercury load as a rolling five-year annual average using data on flow and water column mercury concentrations; or

(3) Quantitatively demonstrate that the mercury concentration of suspended sediment that best represents sediment discharged with urban runoff is below the target of 0.2 mg mercury/kg dry weight.

iii. Reporting

(1) The Permittees shall report in their 2010 Annual Report methods used to assess progress toward meeting WLA goals and a full description of the

measurement and estimation methodology and rationale for the approaches.

(2) The Permittees shall report in their March 15, 2014 Integrated Monitoring Report results of chosen monitoring/measurement approach concerning loads assessment and estimation of loads reduced.

C.11.h. Fate and Transport Study of Mercury in Urban Runoff

i. **Task Description** – The Permittees shall conduct or cause to be conducted studies aimed at better understanding the fate, transport, and biological uptake of mercury discharged in urban runoff to San Francisco Bay and tidal areas.

ii. **Implementation Level** – The specific information needs include understanding the in-Bay transport of mercury discharged in urban runoff, the influence of urban runoff on the patterns of food web mercury accumulation, and the identification of drainages where urban runoff mercury is particularly important in food web accumulation.

iii. **Reporting** – The Permittees shall submit in their 2010 Annual Report a work plan describing the specific manner in which these information needs will be accomplished and describing the studies to be performed with a schedule. The Permittees shall report on status of these studies in their 2010, 2011, and 2012 Annual Reports. In the March 15, 2014 Integrated Monitoring Report, the Permittees shall report the findings and results of the studies completed, planned, or in progress as well as implications of studies on potential control measures to be investigated, piloted or implemented in future permit cycles.

C.11.i. Development of a Risk Reduction Program Implemented Throughout the Region.

i. **Task Description** – The Permittees shall develop and implement or participate in effective programs to reduce mercury-related risks to humans and quantify the resulting risk reductions from these activities.

ii. **Implementation Level** – The risk reduction activities shall include investigating ways to address public health impacts of mercury in San Francisco Bay/Delta fish, including activities that reduce actual and potential exposure of health impacts to those people and communities most likely to be affected by mercury in San Francisco Bay-caught fish, such as subsistence fishers and their families. Such strategies should include public participation in developing effective programs in order to ensure their effectiveness. The Permittees may include studies needed to establish effective exposure reduction activities and risk communication messages as part of their planning. The risk reduction activities may be performed by a third party if the Permittees wish to provide funding for this purpose. This requirement may be satisfied by a combination of related efforts through the Regional Monitoring Program or other similar collaborative efforts.

iii. **Reporting** – The Permittees shall submit in their 2010 Annual Report the specific manner in which these risk reduction activities will be accomplished and describe the studies to be performed with a schedule. The Permittees shall report on the status of the risk reduction efforts in their 2011 and 2012 Annual Reports. The Permittees shall report the findings and results of the studies completed, planned, or in progress as well as the status of other risk reduction actions in their March 15, 2014 Integrated Monitoring Report.

C.11.j. Develop Allocation Sharing Scheme with Caltrans.

i. **Task Description** – The wasteload allocations for urban stormwater developed through the San Francisco Bay mercury TMDL implicitly include California Department of Transportation (Caltrans) roadway and non-roadway facilities within the geographic boundaries of urban runoff management agencies. Consistent with the TMDL, the Permittees are required to develop an equitable mercury allocation-sharing scheme in consultation with Caltrans to address the Caltrans facilities in the program area, and report the details to the Water Board. Alternatively, Caltrans may choose to implement mercury load reduction actions on a watershed or regionwide basis in lieu of sharing a portion of an urban runoff management agencies' mercury allocation. In such a case, the Water Board will consider a separate allocation for Caltrans for which it may demonstrate progress toward attaining an allocation or load reduction in the same manner as municipal programs.

ii. **Reporting** – The Permittees shall report on the status of the efforts to develop this allocation sharing scheme in their 2010, 2011, and 2012 Annual Reports. The Permittees shall submit in their March 15, 2014 Integrated Monitoring Report the manner in which the urban runoff mercury TMDL allocation will be shared between the Permittees and Caltrans.

C.12. Polychlorinated Biphenyls (PCBs) Controls

The Permittees shall implement the following control programs for PCBs. The Permittees shall perform the control measures and provide reporting on those control measures according to the provisions below. The purpose of these provisions is to implement the urban runoff requirements of the PCBs TMDL and reduce PCBs loads to make substantial progress toward achieving the urban runoff PCBs load allocation. The Permittees may comply with any requirement of this Provision through a collaborative effort.

C.12.a. Implement Project throughout Region to Incorporate PCBs and PCB-Containing Equipment Identification into Existing Industrial Inspections

i. **Task Description** – The Permittees shall develop training materials and train municipal industrial building inspectors to identify, in the course of their existing inspections, PCBs or PCB-containing equipment. The Permittees shall incorporate such PCB identification into industrial inspection programs.

ii. **Implementation Level** – Where inspectors identify during inspections PCBs or PCB-containing equipment, the Permittees shall document incidents in inspection reports and refer to appropriate regulatory agencies (e.g. county health departments, Department of Toxic Substances Control, California Department of Public Health, and the Water Board) as necessary.

iii. **Reporting** – The Permittees shall report the results of training in their 2010 Annual Report and report on both ongoing training development and inspections for PCB identification in their 2011, and following, Annual Reports.

C.12.b. Conduct Pilot Projects to Evaluate Managing PCB-Containing Materials and Wastes during Building Demolition and Renovation (e.g., Window Replacement) Activities

i. **Task Description** – The Permittees shall evaluate potential presence of PCBs at construction sites, current material handling and disposal regulations/programs (e.g., municipal ordinances, RCRA, TSCA) and current level of implementation.

ii. **Implementation Level** –

(1) The Permittees shall develop a sampling and analysis plan to evaluate PCBs at construction sites that involve demolition activities (including research on when, where, and which materials potentially contained PCBs).

(2) The Permittees shall implement a sampling and analysis plan at a minimum of 10 sites distributed throughout the combined Permittees' jurisdiction areas.

(3) The Permittees shall develop/select BMPs to reduce or prevent discharges of PCBs during demolition/remodeling. The BMPs will focus on methods

to identify, handle, contain, transport and dispose of PCB-containing building materials.

(4) The Permittees shall develop model ordinances or policies, train and deploy inspectors, and pilot test BMPs at 5 sites.

iii. Reporting –

(1) In their 2010 Annual Report, the Permittees shall submit the sampling and analysis plan (of Provision C.12.b.ii.).

(2) In their 2010 Annual Report, the Permittees shall submit a status report on sampling and analysis along with whatever sampling results are available.

(3) In their 2011 Annual Report, the Permittees shall submit the results of the evaluation (Provision C.12.b.i.) of current regulations, level of implementation, and regulatory gaps as well as the final sampling and analysis report, a list of appropriate BMPs, BMP training program, and model ordinances and policies to prevent PCB discharges from building demolition and improvement activities.

(4) In the March 15, 2014 Integrated Monitoring Report, the Permittees shall submit the results of pilot program effectiveness evaluation.

C.12.c. Pilot Projects to Investigate and Abate On-land Locations with Elevated PCB Concentrations, Including Public Rights-of-way, and Stormwater Conveyances with Accumulated Sediments with Elevated PCBs Concentrations.

i. Task Description – The Permittees shall investigate and abate PCBs sources in or to their storm drain systems in conjunction with the Water Board and other appropriate regulatory agencies with investigation and cleanup authorities. The purpose of this task is to implement and evaluate the benefit of a suite of abatement measures at five pilot project locations. The Permittees shall document the knowledge and experience gained through pilot implementation, and this documentation will provide a basis for determining the implementation scope of abatement projects in subsequent permit terms. The Permittees shall also quantify and report the amount of PCBs loads abated resulting from implementation of these measures.

ii. Implementation Level –

(1) The Permittees, working collaboratively, shall identify 5 drainage areas that contain high levels of PCBs and conduct pilot projects to investigate and abate these high PCB concentrations. To accomplish this, the Permittees shall interview municipal staff and review municipal databases, data collected or compiled through grant-funded efforts, other agency files, and other available information to identify potential PCB source areas and areas where PCB-contaminated sediment accumulates, including within stormwater conveyances. The Permittees shall qualitatively rank and map potential PCB source areas within each drainage. Investigation of mercury (Provision C.11.c.) shall be included in these efforts unless not

appropriate. When contamination is located on private property, the Permittees must either exercise direct authority to require cleanup or notify and request other appropriate authorities to exercise their cleanup authority.

(2) The Permittees shall conduct reconnaissance surveys of the identified drainages and gather information concerning past or current use of PCBs to further identify potential source areas and determine whether runoff from such locations is likely to convey soils/sediments with PCBs to municipal stormwater conveyances.

(3) The Permittees shall validate existence of elevated PCB concentrations through surface soil/sediment sampling and analysis where visual inspections and/or other information suggest potential source areas within each drainage.

Where data confirm significantly elevated PCB concentrations in surface soils/sediments within the subject pilot drainage, the Permittees shall provide available information on current site conditions and owner/operators and other potentially responsible parties to Water Board and other appropriate regulatory agencies to facilitate their issuance of orders for further investigation and remediation of subject sites. The Permittees shall assist the Water Board and other appropriate agencies to identify/evaluate funding to perform abatement and/or responsible parties and abatement options.

(4) The Permittees shall identify areas for expedited abatement on the basis of loading potential including factors such as PCB concentration, mass of sediment, and mobilization potential and/or human health protection thresholds, such as California Human Health Screening Levels.

(5) The Permittees shall conduct an abatement program in portions of drainages under their jurisdiction in conjunction with the Water Board and other appropriate agencies.

iii. Reporting

(1) The Permittees shall report on the identified suspect drainage areas [Provision C.12.c.ii (1)] in their 2010 Annual Report and results of the surveys [Provision C.12.c.ii.(2)] in their 2011 Annual Report.

(2) The Permittees shall report sampling and chemical analysis results at pilot locations [Provision C.12.c.ii.(3)] in their 2011 Annual Reports.

(3) The Permittees shall report on proposed abatement opportunities and activities [Provision C.12.c.ii.(4) and (5)], responsible parties, funding, agency oversight, and schedules in their 2012 Annual Report.

(4) The Permittees shall report results of abatement program effectiveness and estimates of loads reduced (see C.11.g) in the March 15, 2014 Integrated Monitoring Report.

C.12.d. Conduct Pilot Projects to Evaluate and Enhance Municipal Sediment Removal and Management Practices

i. **Task Description** – The Permittees shall jointly evaluate ways to enhance PCBs load reduction benefits of operation and maintenance activities that remove or manage sediment. The purpose of this task is to implement these management practices at the pilot scale in five drainages during this permit term. The Permittees shall document the knowledge and experience gained through pilot implementation, and this documentation will provide a basis for determining the implementation scope of enhanced sediment removal and management practices in subsequent permit terms. The Permittees shall also quantify and report the amount of PCBs loads removed or avoided resulting from implementation of these measures.

ii. **Implementation Level** – In all pilot program drainages selected as part of Provision C.12.c, the Permittees shall jointly evaluate ways to enhance existing sediment removal and management practices such as municipal street sweeping, curb clearing parking restrictions, inlet cleaning, catch basin cleaning, stream and stormwater conveyance system maintenance, and pump station cleaning via increased effort and/or retrofits. This evaluation shall also include consideration of street flushing and capture, collection, or routing to the sanitary sewer (in coordination and consultation with local sanitary sewer agency) as a potential enhanced management practice. The Permittees shall also jointly evaluate existing information on high-efficiency street sweepers. The goal is to evaluate the cost-effectiveness of high-efficiency street sweeping relative to reducing pollutant loads. The Permittees shall develop recommendations for follow-up studies to be conducted.

iii. **Reporting** – The Permittees shall submit a progress report on the results of these two evaluations in their 2010 Annual Report and the final evaluation results in their 2011 Annual Report.

iv. Beginning July 1, 2011, the Permittees shall implement pilot studies for the most potentially effective measure(s) based on the evaluation of Provision C.12.d. ii. throughout the region.

v. **Reporting** – The Permittees shall report effectiveness of enhanced practices pilot implementation in the March 15, 2014 Integrated Monitoring Report, and their plan for implementing enhanced practices in the next permit term.

C.12.e. Conduct Pilot Projects to Evaluate On-Site Stormwater Treatment via Retrofit

i. **Task Description** – The Permittees shall evaluate and quantify the removal of PCBs by on-site treatment systems via retrofit of such systems into existing storm drain systems. The purpose of this task is to implement on-site treatment projects at the pilot scale in ten locations during this permit term. The Permittees shall document the knowledge and experience gained through pilot implementation, and this documentation will provide a basis for determining the implementation scope of on-site treatment retrofits in subsequent permit terms.

ii. **Implementation Level** – The Permittees, working collaboratively, shall identify at least 10 locations throughout the Permittees' jurisdictions that present opportunities to install and evaluate[51] on-site treatment systems (e.g., detention basins, bioretention units, sand filters, infiltration basins, treatment wetlands) and shall assess the best treatment options for those locations. Every county (San Mateo, Contra Costa, Alameda, Santa Clara, and Solano) should have at least one location. This assessment shall identify potential locations draining a variety of land uses, discuss technical feasibility, and discuss economical feasibility. The Permittees shall choose pilot study locations primarily on the basis of elevated PCBs concentrations with additional consideration to mercury concentrations.

iii. On the basis of the Provision C.12.e.ii. report, the Permittees shall select sites to perform pilot studies and shall conduct pilot studies in selected locations. Taken as a group, these 10 pilot study locations should span treatment types and drainage characteristics.

iv. **Reporting** –

(1) In their 2011 Annual Report, the Permittees shall report on candidate locations with types of treatment retrofit for each location. The report shall include assessment of at least 10 locations.

(2) In the March 15, 2014 Integrated Monitoring Report, the Permittees shall report status, results, PCBs-removal effectiveness, and lessons learned from the pilot studies and their plan for implementing this type of treatment on an expanded basis throughout the region during the next permit term.

C.12.f. Diversion of Dry Weather and First Flush Flows to POTWs

i. **Task Description** – The Permittees shall evaluate the reduced loads of PCBs from diversion of dry weather and first flush stormwater flows to sanitary sewers. The knowledge and experience gained through pilot implementation will be used to determine the implementation scope of urban runoff diversion in subsequent permit terms. The Permittees shall document the knowledge and experience gained through pilot implementation, and this documentation will provide a basis for determining the implementation scope of urban runoff diversion projects in subsequent permit terms.

ii. **Implementation Level** – The Permittees shall implement pilot projects to address the role of pump stations as a source of pollutants of concern (primarily PCBs and secondarily mercury). This work is in addition to Provisions C.2 and C.10 that address dissolved oxygen depletion and trash impacts in receiving waters. The objectives of this provision are: to implement five pilot projects for urban runoff diversion from stormwater pump stations to POTWs; evaluate the reduced loads of mercury and PCBs resulting from the diversion; and gather

[51] The Permittees may evaluate a maximum of two pre-existing treatment systems of the ten total required systems to be evaluated provided that these existing treatment systems are applicable to the intent of this provision.

information to guide the selection of additional diversion projects required in future permits. Collectively, the Permittees shall select 5 stormwater pump stations and 5 alternates by evaluating drainage characteristics and the feasibility of diverting flows to the sanitary sewer.

(1) The Permittees should work with the local POTW on a watershed, program, or regional level to evaluate feasibility and to establish cost sharing agreements. The feasibility evaluation shall include, but not be limited to, costs, benefits, and impacts on the stormwater and wastewater agencies and the receiving waters relevant to the diversion and treatment of the dry weather and first flush flows.

(2) From this feasibility evaluation, the Permittees shall select 5 pump stations and 5 alternates for pilot diversion studies. At least one urban runoff diversion pilot project shall be implemented in each of the five counties (San Mateo, Contra Costa, Alameda, Santa Clara, and Solano). The pilot and alternate locations should be located in industrially dominated catchments where elevated PCB concentrations are documented.

(3) The Permittees shall implement flow diversion to the sanitary sewer at the 5 pilot pump stations. As part of the pilot studies, they shall monitor and measure PCBs load reduction.

iii. Reporting –

(1) The Permittees shall summarize the results of the feasibility evaluation in their 2010 Annual Report, including:

- Selection criteria leading to the identification of the 5 candidate and 5 alternate pump station for pilot studies.
- Time schedules for conducting the pilot studies.
- A proposed method for distributing PCBs load reductions to participating wastewater and stormwater agencies.

(2) The Permittees shall report annually on the status of the pilot studies in each subsequent annual report.

(3) The March 15, 2014 Integrated Monitoring Report shall include:

- Evaluation of pilot program effectiveness.
- PCBs loads reduced.
- Updated feasibility evaluation procedures to guide future diversion project selection.

C.12.g. Monitor Stormwater PCB Pollutant Loads and Loads Reduced

The Permittees shall develop and implement a monitoring program as required in Provision C.8.f to quantify PCBs loads and loads reduced (see C.11.g for details) through the source control, treatment and other management measures implemented as part of the pilot studies of C.12.a through C.12.f.

C.12.h. Fate and Transport Study of PCBs in Urban Runoff

i. **Task Description** – The Permittees shall conduct or cause to be conducted studies aimed at better understanding the fate, transport, and biological uptake of PCBs discharged in urban runoff.

ii. **Implementation Level** – The specific information needs include understanding the in-Bay transport of PCBs discharged in urban runoff, the influence of urban runoff on the patterns of food web PCBs accumulation, and the identification of drainages where urban runoff PCBs are particularly important in food web accumulation.

iii. **Reporting** – The Permittees shall submit in their 2010 Annual Report a workplan describing the specific manner in which these information needs will be accomplished and describing the studies to be performed with a schedule. The Permittees shall report on status of the studies in their 2011 and 2012 Annual Reports. The Permittees shall report in the March 15, 2014 Integrated Monitoring Report the findings and results of the studies completed, planned, or in progress as well as implications of studies on potential control measures to be investigated, piloted or implemented in future permit cycles.

C.12.i. Development of a Risk Reduction Program Implemented throughout the Region

i. **Task Description** – The Permittees shall develop and implement or participate in effective programs to reduce PCBs-related risks to humans and quantify the resulting risk reductions from these activities.

ii. **Implementation Level** – The risk reduction activities shall include investigating ways to address public health impacts of PCBs in San Francisco Bay/Delta fish, including activities that reduce actual and potential exposure of health impacts to those people and communities most likely to be affected by PCBs in San Francisco Bay-caught fish, such as subsistence fishers and their families. Such strategies should include public participation in developing effective programs in order to ensure their effectiveness. The Permittees may include studies needed to establish effective exposure reduction activities and risk communication messages as part of their planning. The risk reduction activities may be performed by a third party if the Permittees wish to provide funding for this purpose. This requirement may be satisfied by a combination of related efforts through the Regional Monitoring Program or other similar collaborative efforts.

iii. **Reporting** – The Permittees shall submit in their 2010 Annual Report the specific manner in which these risk reduction activities will be accomplished and describe the studies to be performed with a schedule. The Permittees shall report on status of the studies in their 2011 and 2012 Annual Reports. The Permittees shall report the findings and results of the studies completed, planned, or in progress as well as the status of other risk reduction actions in the March 15, 2014 Integrated Monitoring Report.

C.13. Copper Controls

The control program for copper is detailed below. The Permittees shall implement the control measures and accomplish the reporting on those control measures according to the provisions below. The purpose of these provisions is to implement the control measures identified in the Basin Plan amendment necessary to support the copper site-specific objectives in San Francisco Bay. The Permittees may comply with any requirement of C.13 Provisions through a collaborative effort.

C.13.a. Manage Waste Generated from Cleaning and Treating of Copper Architectural Features, Including Copper Roofs, during Construction and Post-Construction.

i. **Task Description** – The Permittees shall ensure that local ordinance authority is established to prohibit the discharge of wastewater to storm drains generated from the installation, cleaning, treating, and washing of the surface of copper architectural features, including copper roofs to storm drains.

ii. **Implementation Level**

(1) The Permittees shall develop BMPs on how to manage the waste during and post-construction.

(2) The Permittees shall require use of appropriate BMPs when issuing building permits.

(3) The Permittees shall educate installers and operators on appropriate BMPs.

(4) The Permittees shall enforce against noncompliance.

iii. **Reporting**

(1) The Permittees shall certify adequate legal authority in their 2011 Annual Report or otherwise provide justification for schedule not to exceed one year to comply.

(2) The Permittees shall report annually, starting with their 2012 Annual Report, on training, permitting and enforcement activities.

(3) In their 2013 Annual Report, the Permittees shall evaluate the effectiveness of these measures, including BMP implementation and propose any additional measures to address this source.

C.13.b. Manage Discharges from Pools, Spas, and Fountains that Contain Copper-Based Chemicals

i. **Task Description** – By adopting local ordinances, the Permittees shall prohibit discharges to storm drains from pools, spas, and fountains that contain copper-based chemicals.

ii. **Implementation Level** – The Permittees shall either: 1) require installation of a sanitary sewer discharge connection for pools, spas, and fountains, including

connection for filter backwash, with a proper permit from the POTWs; or 2) require diversion of discharge for use in landscaping or irrigation.

iii. **Reporting** – The Permittees shall certify adequate legal authority in their 2011 Annual Report or otherwise provide justification for schedule not to exceed one year to comply.

C.13.c. Vehicle Brake Pads

i. **Task Description** – The Permittees shall engage in efforts to reduce the copper discharged from automobile brake pads to surface waters via urban runoff.

ii. **Implementation Level** – The Permittees shall participate in the Brake Pad Partnership (BPP) process to develop California legislation phasing out copper from certain automobile brake pads sold in California.

iii. **Reporting** – The Permittees shall report on legislation development and implementation status in Annual Reports during the permit term. In their 2013 Annual Report, the Permittees shall assess status of copper water quality issues associated with automobile brake pads and recommend brake pad-related actions for inclusion in subsequent permits if needed.

C.13.d. Industrial Sources

i. **Task Description** – The Permittees shall ensure industrial facilities do not discharge elevated levels of copper to storm drains by ensuring, through industrial facility inspections, that proper BMPs are in place.

ii. **Implementation Level** –

(1) As part of industrial site controls required by Provision C.4, the Permittees shall identify facilities likely to use copper or have sources of copper (e.g., plating facilities, metal finishers, auto dismantlers) and include them in their inspection program plans.

(2) The Permittees shall educate industrial inspectors on industrial facilities likely to use copper or have sources of copper and proper BMPs for them.

(3) As part of the industrial inspection, inspectors shall ensure that proper BMPs are in place at such facilities to minimize discharge of copper to storm drains, including consideration of roof runoff that might accumulate copper deposits from ventilation systems on-site.

iii. **Reporting**

The Permittees shall highlight copper reduction results in the industrial inspection component in the C.13 portion of each Annual Report beginning September 2010.

C.13.e. Studies to Reduce Copper Pollutant Impact Uncertainties

i. **Task Description** – The Permittees shall conduct or cause to be conducted technical studies to investigate possible copper sediment toxicity and technical studies to investigate sub-lethal effects on salmonids.

ii. **Implementation Level** – Technical uncertainties regarding copper effects in the Bay are described in the Basin Plan's implementation program for copper site-specific objectives. These uncertainties include toxicity to Bay benthic organisms possibly caused by high copper concentrations as well as possible impacts to the olfactory system of salmonids. The Permittees shall ensure that these studies are supported and conducted. Similar requirements are included in NPDES permits for wastewater discharges. The Permittees shall submit in their 2010 Annual Report the specific manner in which these information needs will be accomplished and describe the studies to be performed with a schedule. The Permittees shall report the findings and results of the studies completed, planned, or in progress in their 2012 Annual Report.

C.14. Polybrominated Diphenyl Ethers (PBDE), Legacy Pesticides and Selenium

The control program for PBDEs, legacy pesticides, and selenium is detailed below. The Permittees shall perform the control measures and accomplish the reporting on those control measures according to the provisions below. The purpose of these provisions is to gather concentration and loading information on a number of pollutants of concern (e.g., PBDEs, DDT, dieldrin, chlordane, selenium) for which TMDLs are planned or are in the early stages of development. The Permittees may comply with any requirement of C.14 Provisions through a collaborative effort.

C.14.a. Control Program for PBDEs, Legacy Pesticides, and Selenium.

i. **Task Description** – To determine if urban runoff is a conveyance mechanism associated with the possible impairment of San Francisco Bay for PBDEs, legacy pesticides (such as DDT, dieldrin, and chlordane), and selenium, the Permittees shall work with the other municipal stormwater management agencies in the Bay Region to implement a plan (PBDEs/Legacy Pesticides/Selenium Plans) to identify, assess, and manage controllable sources of PBDEs, legacy pesticides, and selenium found in urban runoff, if any. The Water Board recognizes that these three pollutants are distinct in terms of origin and transport, but they have been grouped into a single permit provision because the requirements are identical. The Water Board anticipates that some of the control measures that are developed for PCBs consistent with aforementioned efforts warrant consideration for the control of PBDEs and possibly legacy pesticides.

ii. **Implementation Level** – The PBDEs/Legacy Pesticides/Selenium Plan shall include actions to do the following:

Characterize the representative distribution of PBDEs, legacy pesticides, and selenium in the urban areas of the Bay Region covered by this permit to determine:

(1) If PBDEs, legacy pesticides, and selenium are present in urban runoff;

(2) If PBDEs, legacy pesticides, or selenium are distributed relatively uniformly in urban areas; and

(3) Whether storm drains or other surface drainage pathways are sources of PBDEs, legacy pesticides, or selenium in themselves, or whether there are specific locations within urban watersheds where prior or current uses result in land sources contributing to discharges of PBDEs, legacy pesticides, or selenium to San Francisco Bay via urban runoff conveyance systems.

iii. Report on progress in 2010 and 2011 Annual Reports. Submit in the 2012 Annual Report a report with the results of the characterization of PBDEs, legacy pesticides, and selenium in urban areas throughout the Bay Region.

iv. Provide information to allow calculation of PBDEs, legacy pesticides, and selenium loads to San Francisco Bay from urban runoff conveyance systems.

v. Submit in the 2013 Annual Report a report with the information required to compute such loads to San Francisco Bay of PBDEs, legacy pesticides, and selenium from urban runoff conveyance systems throughout the Bay.

vi. Identify control measures and/or management practices to eliminate or reduce discharges of PBDEs, legacy pesticides, or selenium conveyed by urban runoff conveyance systems.

vii. Submit in the 2013 Annual Report a report identifying such control measures/management practices.

C.15. Exempted and Conditionally Exempted Discharges

The objective of this provision is to exempt unpolluted non-stormwater discharges from Discharge Prohibition A.1 and to conditionally exempt non-stormwater discharges that are potential sources of pollutants. In order for non-stormwater discharges to be conditionally exempted from Discharge Prohibition A.1, the Permittees must identify appropriate BMPs, monitor the non-stormwater discharges where necessary, and ensure implementation of effective control measures – as listed below – to eliminate adverse impacts to waters of the State consistent with the discharge prohibitions of the Order.

C.15.a. Exempted Non-Stormwater Discharges (Exempted Discharges):

i. **Discharge Type** – In carrying out Discharge Prohibition A.1, the following unpolluted discharges are exempted from prohibition of non-stormwater discharges:

(1) Flows from riparian habitats or wetlands;

(2) Diverted stream flows;

(3) Flows from natural springs;

(4) Rising ground waters;

(5) Uncontaminated and unpolluted groundwater infiltration;

(6) Single family homes' pumped groundwater, foundation drains, and water from crawl space pumps and footing drains;

(7) Pumped groundwater from drinking water aquifers; and

(8) NPDES permitted discharges (individual or general permits).

ii. **Implementation Level** – The non-stormwater discharges listed in Provision C.15.a.i above are exempted unless they are identified by the Permittees or the Executive Officer as sources of pollutants to receiving waters. If any of the above categories of discharges, or sources of such discharges, are identified as sources of pollutants to receiving waters, such categories or sources shall be addressed as conditionally exempted discharges in accordance with Provision C.15.b below.

C.15.b. Conditionally Exempted Non-Stormwater Discharges:

The following non-stormwater discharges are also exempt from Discharge Prohibition A.1 if they are either identified by the Permittees or the Executive Officer as not being sources of pollutants to receiving waters, or if appropriate control measures to eliminate adverse impacts of such sources are developed and implemented in accordance with the tasks and implementation levels of each category of Provision C.15.b.i-viii below.

i. **Discharge Type** – Pumped Groundwater, Foundation Drains, and Water from Crawl Space Pumps and Footing Drains

(1) **Pumped Groundwater from Non Drinking Water Aquifers** – Groundwater pumped from monitoring wells, used for groundwater basin management, which are owned and/or operated by the Permittees who pump groundwater as drinking water. These aquifers tend to be shallower, when compared to drinking water aquifers.

(a) **Implementation Level** – Twice a year (once during the wet season and once during the dry season), representative samples shall be taken from each aquifer that potentially will discharge or has discharged into a storm drain. Samples collected and analyzed for compliance in accordance with self-monitoring requirements of other NPDES permits or sample data collected for drinking water regulatory compliance may be submitted to comply with this requirement as long as they meet the following criteria:

(i) The water samples shall meet water quality standards consistent with the existing effluent limitations in the Water Board's NPDES General Permits, such as NPDES Nos. CAG912002 and CAG912003 for Discharge or Reuse of Extracted and Treated Groundwater Resulting from the Cleanup of Groundwater Polluted by fuel and VOCs, respectively, and NPDES No. CAG912004 for discharges of low-level, incidental, and potentially contaminated groundwater.

(ii) The water samples shall be analyzed using approved USEPA Methods (e.g., (a) USEPA Method 160.2 for total suspended solids; (b) USEPA Method 8015 Modified for total petroleum hydrocarbons; (c) USEPA Method 8260B and 8270C or equivalent for volatile and semi-volatile organic compounds; and (d) USEPA Method 3005 for metals.

(iii) The water samples shall be analyzed for pH and turbidity.

(iv) If a Permittee is unable to comply with the above criteria, the Permittee shall notify the Water Board upon becoming aware of the compliance issue.

(b) **Required BMPs** – When uncontaminated (meeting the criteria in C.15.b.i.(1)(a)(i)) groundwater is discharged from these monitoring wells, the following shall be implemented:

(i) Discharges shall be properly controlled and maintained to prevent erosion at the discharge point and at a rate that avoids scouring of banks and excess sedimentation in the receiving waterbody.

(ii) Appropriate BMPs shall be implemented to remove total suspended solids and silt to allowable discharge levels. Appropriate BMPs may include filtration, settling, coagulant application with no residual coagulant discharge, minor odor or color removal with activated carbon, small scale peroxide addition, or other minor treatment.

(iii) Turbidity of the discharged groundwater shall be maintained below 50 NTUs for discharges to dry creeks, 110 percent of the

ambient stream turbidity for a flowing stream with turbidities greater than 50 NTU, or 5 NTU above ambient turbidity for flowing streams with turbidities less than or equal to 50 NTU.

(iv) pH of the discharged groundwater shall be maintained within the range of 6.5 to 8.5.

(c) **Reporting** – The Permittees shall maintain records of these discharges, BMPs implemented, and any monitoring data collected.

(2) **Pumped[52] Groundwater, Foundation Drains, and Water from Crawl Space Pumps and Footing Drains**

(a) Proposed new discharges of uncontaminated groundwater at flows of 10,000 gallons/day or more and all new discharges of potentially contaminated groundwater shall be reported to the Water Board so that they can be subject to NPDES permitting requirements.

(b) Proposed new discharges of uncontaminated groundwater at flows of less than 10,000 gallons/day shall be encouraged to discharge to a landscaped area or bioretention unit that is large enough to accommodate the volume.

(c) If the discharge options in C.15.b.i.(2)(b) above are not feasible and these discharges must enter a storm drain, sampling shall be done to verify that the discharge is uncontaminated.

(i) The discharge shall meet water quality standards consistent with the existing effluent limitations in the Water Board's NPDES General Permits, such as NPDES Nos. CAG912002 and CAG912003 for Discharge or Reuse of Extracted and Treated Groundwater Resulting from the Cleanup of Groundwater Polluted by fuel and VOCs, respectively, and NPDES No. CAG912004 for discharges of low-level, incidental, and potentially contaminated groundwater.

(ii) The Permittees shall require that water samples from these discharge types be analyzed using approved USEPA Methods (e.g., (a) USEPA Method 160.2 for total suspended solids; (b) USEPA Method 8015 Modified for total petroleum hydrocarbons; (c) USEPA Method 8260B and 8270C or equivalent for volatile and semi-volatile organic compounds; and (d) USEPA Method 3005 for metals.

(d) **Required BMPs** – When the discharge has been verified as uncontaminated per sampling completed in C.15.b.i.(2)(c) above, the Permittees shall require the following during discharge:

(i) Proper control and maintain to prevent erosion at the discharge point and at a rate that avoids scouring of banks and excess sedimentation in the receiving waterbody.

(ii) Appropriate BMPs to render pumped groundwater free of pollutants and therefore exempted from prohibition may include

[52] Pumped groundwater not exempted in C.15.a or conditionally exempted in C.15.b.i.(1).

the following: filtration, settling, coagulant application with no residual coagulant discharge, minor odor or color removal with activated carbon, small scale peroxide addition, or other minor treatment.

(iii) Testing of water samples for turbidity and pH on the first two consecutive days of dewatering.

(iv) Turbidity of discharged groundwater shall be maintained below 50 NTU for discharges to dry creeks, 110 percent of the ambient stream turbidity for a flowing stream with turbidities greater than 50 NTU, or 5 NTU above ambient turbidity for a flowing stream with turbidities less than or equal to 50 NTU.

(v) pH of discharged water shall be maintained within the range of 6.5 to 8.5.

(e) If a Permittee determines that a discharger or a project proponent is unable to comply with the above criteria, the discharger shall be directed to obtain approval or permits directly from the Water Board.

(f) **Reporting** – The Permittees shall maintain records of these discharges, BMPs implemented, and any monitoring data collected.

ii. Discharge Type – Air Conditioning Condensate

Required BMPs – Condensate from air conditioning units shall be directed to landscaped areas or the ground. Discharge to a storm drain system may be allowed if discharge to landscaped areas or the ground is not feasible.

iii. Discharge Types – Planned,[53] Unplanned,[54] and Emergency Discharges of the Potable Water System

(1) **Planned Discharges** – Planned discharges are routine operation and maintenance activities in the potable water distribution system that can be scheduled in advance, such as disinfecting water mains, testing fire hydrants, storage tank maintenance, cleaning and lining pipe sections, routine distribution system flushing, reservoir dewatering, and water main dewatering activities. The following requirements only apply to those Permittees that are water purveyors and pertain to their planned discharges of potable water to their storm drain systems.

(a) **Required BMPs**[55] – The Permittees shall implement appropriate BMPs for dechlorination, and erosion and sediment controls for all planned potable water discharges.

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[53] Planned discharges typically result from required routine operation and maintenance activities that can be scheduled in advance. Planned discharges are easier to control than unplanned discharges, and the BMPs are significantly easier to plan and implement.

[54] Unplanned discharges are non-routine, the result of accidents or incidents that cannot be scheduled or planned for in advance.

[55] Reference for BMPs, monitoring methods: *Guidelines for the Development of Your BMP Manual for Drinking Water System Releases.* Developed by the California-Nevada Sections of the American Water Works Association (CA-NV AWWA), Environmental Compliance Committee (ECC) 2005.

(b) **Notification Requirements**

(i) The Permittees shall notify the Water Board staff at least one week in advance for planned discharges with a flow rate of 250,000 gallons per day or more, or a total volume of 500,000 gallons or more. The Permittees shall also notify other interested parties who may be impacted by planned discharges, such as flood control agencies, downstream jurisdictions, and non-governmental organizations such as creek groups, before discharge. The notification shall include the following information, but is not limited to: (1) project name; (2) type of discharges; (3) receiving waterbody(ies); (4) date of discharge; (5) time of discharge (in military time); (6) estimated volume (gallons); and (7) estimated flow rate (gallons per day); and (8) monitoring plan of the discharges and receiving water. If receiving water monitoring is infeasible or is not practicable, justification shall be provided.

(c) **Monitoring and Reporting Requirements**

(i) The Permittees shall monitor planned discharges for pH, chlorine residual, and turbidity.

(ii) The following discharge benchmarks shall be used to evaluate the effectiveness of BMPs for all planned discharges:

- Chlorine residual 0.05 mg/L using the field test (Standard Methods 4500-Cl F and F) or equivalent
- pH ranges between 6.5 and 8.5
- Turbidity of 50 NTU post-BMPs or limit increase in turbidity above background level as follows:

Receiving Water Background	Incremental Increase
Dry Creek	50 NTU
< 50 NTU	5 NTU
50–100 NTU	10 NTU
> 100 NTU	10% of background

(iii) The Permittees shall submit the following information with the Annual Report in tabular form for all planned discharges. Reporting content shall include, but is not limited to the following parameters: (1) project name; (2) type of discharge; (3) receiving waterbody(ies); (4) date of discharge; (5) duration of discharge (in military time); (6) estimated volume (gallons); (7) estimated flow rate (gallons per day); (8) chlorine residual (mg/L); (9) pH; (10) turbidity (NTU) for receiving water where feasible and point of discharge, and (11) description of implemented BMPs or corrective actions.

(2) **Unplanned Discharges** – Unplanned discharges are non-routine activities such as water line breaks, leaks, overflows, fire hydrant shearing, and emergency flushing. The following requirements only apply to those Permittees that are water purveyors and pertain to their unplanned discharges of potable water to their storm drain systems.

(a) **Required BMPs** – The Permittees shall implement appropriate BMPs for dechlorination and erosion and sediment control for all unplanned discharges upon containing the discharge and attaining safety of the discharge site.

(b) **Administrative BMPs** – In some instances, the Permittees shall implement Administrative BMPs, such as source control measures, managerial practices, operations and maintenance procedures, or other measures to reduce or prevent potential pollutants from being discharged during unplanned discharges upon containing the discharge and attaining safety of the discharge site.

(c) **Notification Requirements**

(i) The Permittees shall report to the State Office of Emergency Services as soon as possible, but no later than two hours after becoming aware of (1) any aquatic impacts (e.g., fish kill) as a result of the unplanned discharges, or (2) when the discharge might endanger or compromise public health and safety.

(ii) The Permittees shall report to Water Board staff, by telephone or email as soon as possible, but no later than 24 hours after becoming aware of any unplanned discharges, where the total chlorine residual is greater than 0.05 mg/L and the total volume is approximately 50,000 gallons or more.

- Within five working days after the 24-hour telephone or email report, the Permittees shall submit a report documenting the discharge and corrective actions taken to Water Board staff and other interested parties.

(d) Monitoring and Reporting Requirements

(i) The Permittees shall monitor at least 10% of their unplanned discharges for pH and chlorine residual, and visually assess each discharge for turbidity immediately downstream of implemented BMPs to demonstrate their effectiveness. After the implementation of appropriate BMPs, the discharge pH levels outside the discharge ranges (below 6.5 and above 8.5), chlorine residual above 0.05 mg/l, or moderate and high turbidity shall trigger BMP improvement. If the Permittees monitor more than 10% of the unplanned discharges, all monitoring results shall be included in the Annual Report.

(ii) The Permittees shall submit the following information with the Annual Report in tabular form for all unplanned discharges. The reporting format and content shall be as described in Provision C.15.b.ii.(1)(c)(iii) of the Planned Discharges above. In addition, these reports shall also state the time of discharge discovery, notification time, inspector arrival time, and responding crew arrival time.

(iii) After 18 months of consecutive data gathering, a Permittee may propose, to the Executive Officer, a reduced monitoring plan targeting specific "high-risk" or "environmentally sensitive"

areas (i.e., areas that are prone to erosion and excess sedimentation at high flows, support rare or endangered species, or provide aquatic habitat with proven effective BMPs). Until the Executive Officer approves the reduced monitoring plan, the Permittee shall continue the monitoring plan prescribed in C.15.b.iii.(2)(d)(i).

(3) **Emergency Discharges** – Emergency discharges are the result of firefighting, unauthorized hydrant openings, natural or man-made disasters (e.g., earthquakes, floods, wildfires, accidents, terrorist actions).

Required BMPs

(a) The Permittees shall implement or require fire fighting personnel to implement BMPs for emergency discharges. However, the BMPs should not interfere with immediate emergency response operations or impact public health and safety. BMPs may include, but are not limited to, the plugging of the storm drain collection system for temporary storage, the proper disposal of water according to jurisdictional requirements, and the use of foam where there may be toxic substances on the property the fire is located.

(b) During emergency situations, priority of efforts shall be directed toward life, property, and the environment (in descending order). The Permittees or fire fighting personnel shall control the pollution threat from their activities to the extent that time and resources allow.

(c) **Reporting Requirements** – Reporting requirements will be determined by Water Board staff on a case-by-case basis, such as for fire incidents at chemical plants.

iv. Discharge Type – Individual Residential Car Washing

Required BMPs

(1) The Permittees shall discourage through outreach efforts individual residential car washing within their jurisdictional areas that discharge directly into their MS4s.

(2) The Permittees shall encourage individuals to direct car wash waters to landscaped areas, use as little detergent as necessary, wash cars at commercial car wash facilities, etc.

v. Discharge Type – Swimming Pool, Hot Tub, Spa, and Fountain Water Discharges

(1) **Required BMPs**

(a) The Permittees shall prohibit discharge of water that contains chlorine residual, copper algaecide, filter backwash or other pollutants to storm drains or to waterbodies. Such polluted discharges from pools, hot tubs, spas, and fountains shall be directed to the sanitary sewer (with the local sanitary sewer agency's approval) or to landscaped areas that can accommodate the volume.

(b) Discharges from swimming pools, hot tubs, spas and fountains shall be allowed into storm drain collection systems only if there are no

other feasible disposal alternatives (e.g., disposal to sanitary sewer or landscaped areas) and if the discharge is properly dechlorinated to non-detectable levels of chlorine consistent with water quality standards.

(c) The Permittees shall require that new or rebuilt swimming pools, hot tubs, spas and fountains within their jurisdictions have a connection[56] to the sanitary sewer to facilitate draining events. The Permittees shall coordinate with local sanitary sewer agencies to determine the standards and requirements necessary for the installation of a sanitary sewer discharge location to allow draining events for pools, hot tubs, spas, and fountains to occur with the proper permits from the local sanitary sewer agency.

(d) The Permittees shall improve their public outreach and educational efforts and ensure implementation of the required BMPs and compliance in commercial, municipal, and residential facilities.

(e) The Permittees shall implement the Illicit Discharge Enforcement Response Plan from C.5.b for polluted (contains chlorine, copper algaecide, filter backwash, or other pollutants) swimming pool, hot tub, spa, or fountain waters that get discharged into the storm drain.

(2) **Reporting** – The Permittees shall keep records of the authorized major discharges of dechlorinated pool, hot tubs, spa and fountain water to the storm drain, including BMPs employed; such records shall be available for inspection by the Water Board.

vi. Discharge Type – Irrigation Water, Landscape Irrigation, and Lawn or Garden Watering

(1) **Required BMPs** – The Permittees shall promote measures that minimize runoff and pollutant loading from excess irrigation via the following:

(a) Promoting and/or working with potable water purveyors to promote conservation programs that minimize discharges from lawn watering and landscape irrigation practices;

(b) Promoting outreach messages regarding the use of less toxic options for pest control and landscape management;

(c) Promoting and/or working with potable water purveyors to promote the use of drought tolerant, native vegetation to minimize landscape irrigation demands;

(d) Promoting and/or working with potable water purveyors to promote outreach messages that encourage appropriate applications of water needed for irrigation and other watering practices; and,

(e) Implementing the Illicit Discharge Enforcement Response Plan from C.5.b, as necessary, for ongoing, large-volume landscape irrigation runoff to their MS4s.

[56] This connection could be a drain in the pool to the sanitary sewer or a sanitary sewer clean out located close enough to the pool so that a hose can readily direct the pool discharge into the sanitary sewer clean out.

(2) **Reporting** – The Permittees shall provide implementation summaries in their Annual Report.

vii. Additional Discharge Types –The Permittees shall identify and describe additional types and categories of discharges not yet listed in Provision C.15.b that they propose to conditionally exempt from Prohibition A.1 in periodic submissions to the Executive Officer. For each such category, the Permittees shall identify and describe, as necessary and appropriate to the category, either documentation that the discharges are not sources of pollutants to receiving waters or circumstances in which they are not found to be sources of pollutants to receiving waters. Otherwise, the Permittees shall describe control measures to eliminate adverse impacts of such sources, procedures and performance standards for their implementation, procedures for notifying the Water Board of these discharges, and procedures for monitoring and record management.

viii. Permit Authorization for Exempted Non-Stormwater Discharges

(1) Discharges of non-stormwater from sources owned or operated by the Permittees are authorized and permitted by this Permit, if they are in accordance with the conditions of this provision.

(2) The Water Board may require dischargers of non-stormwater, other than the Permittees, to apply for and obtain coverage under an NPDES permit and to comply with the control measures pursuant to Provision C.15.b. Non-stormwater discharges that are in compliance with such control measures may be accepted by a Permittee and are not subject to Prohibition A.1.

(3) The Permittees may propose, as part of their annual updates consistent with the requirements of Provision C.15.b of this Permit, additional categories of non-stormwater discharges with BMPs, to be included in the exemption to Prohibition A.1. Such proposals may be subject to approval by the Executive Officer as a minor modification of the Permit.

C.16. Annual Reports

C.16.a. The Permittees shall submit Annual Reports electronically and in paper copy upon request by September 15 of each year. Each Annual Report shall report on the previous fiscal year beginning July 1 and ending June 30. The annual reporting requirements are set forth in Provisions C.1 – C.15. The Permittees shall retain documentation as necessary to support their Annual Report. The Permittees shall make this supporting information available upon request within a timely manner, generally no more that ten business days unless otherwise agreed to by the Executive Officer.

C.16.b. The Permittees shall collaboratively develop a common annual reporting format for acceptance by the Executive Officer by April 1, 2010. The resulting Annual Report Form, once approved, shall be used by all Permittees. The Annual Report Form may be changed by April 1 of each year for the following annual report, to more accurately reflect the reporting requirements of Provisions C.1 – C.15, with the agreement of the Permittees and by the approval of the Executive Officer.

C.16.c. The Permittees shall certify in each Annual Report that they are in compliance with all requirements of the Order. If a Permittee is unable to certify compliance with a requirement, it must submit in the Annual Report the reason for failure to comply, a description and schedule of tasks necessary to achieve compliance, and an estimated date for achieving full compliance.

C.17. Modifications to this Order

This Order may be modified, or alternatively, revoked or reissued, before the expiration date as follows:

C.17.a. To address significant changed conditions identified in the technical or Annual Reports required by the Water Board, or through other means or communication, that were unknown at the time of the issuance of this Order;

C.17.b. To incorporate applicable requirements of statewide water quality control plans adopted by the State Board or amendments to the Basin Plan approved by the State Board; or

C.17.c. To comply with any applicable requirements, guidelines, or regulations issued or approved under section 402(p) of the CWA, if the requirement, guideline, or regulation so issued or approved contains different conditions or additional requirements not provided for in this Order. The Order as modified or reissued under this paragraph shall also contain any other requirements of the CWA then applicable.

C.18. Standard Provisions

Each Permittee shall comply with all parts of the Standard Provisions contained in Attachment K of this Order.

C.19. Expiration Date

This Order expires on November 30, 2014, five years from the effective date of this Order. The Permittees must file a Report of Waste Discharge in accordance with Title 23, California Code of Regulations, not later than 180 days in advance of such date as application for reissuance of waste discharge requirements.

C.20. Rescission of Old Orders

Order Nos. 99-058, 99-059, 01-024, R2-2003-0021, and R2-2003-0034 are hereby rescinded on the effective date of this Order, which shall be December 1, 2009, provided that the Regional Administrator of USEPA, Region IX, does not object.

C.21. Effective Date

The Effective Date of this Order and Permit shall be December 1, 2009, provided that the Regional Administrator of USEPA, Region IX, does not object.

I, Bruce H. Wolfe, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on October 14, 2009.

Bruce H. Wolfe
Executive Officer

Appendix I: Municipal Regional Stormwater Permit Fact Sheet
Attachment A: Provision C.3.b. Sample Reporting Table
Attachment B: Provision C.3.g. Alameda Permittees Hydromodification Requirements
Attachment C: Provision C.3.g. Contra Costa Permittees Hydromodification Requirements
Attachment D: Provision C.3.g. Fairfield-Suisun Permittees Hydromodification Requirements
Attachment E: Provision C.3.g. San Mateo Permittees Hydromodification Requirements
Attachment F: Provision C.3.g. Santa Clara Permittees Hydromodification Requirements
Attachment G: Provision C.3.h. Sample Reporting Table
Attachment H: Provision C.8. Status & Long-Term Monitoring Follow-up Analysis and Actions
Attachment I: Provision C.8. Standard Monitoring Provisions
Attachment J: Provision C.10. Minimum Trash Capture Areas and Minimum Number of Trash Hot Spots
Attachment K: Standard NPDES Stormwater Permit Provisions

ACRONYMS & ABBREVIATIONS

ACCWP	Alameda Countywide Clean Water Program
BAHM	Bay Area Hydrology Model
Basin Plan	Water Quality Control Plan for the San Francisco Bay Basin
BASMAA	Bay Area Stormwater Management Agencies Association
BMPs	Best Management Practices
CASQA	California Stormwater Quality Association
CCC	California Coastal Commission
CCCWP	Contra Costa Clean Water Program
CDFG	California Department of Fish and Game
CEQA	California Environmental Quality Act
CFR	Code of Federal Regulations
CSBP	California Stream Bioassessment Procedures
CWA	Federal Clean Water Act
CWC	California Water Code
DCIA	Directly Connected Impervious Area
ERP	Enforcement Response Plan
FR	Federal Register
GIS	Geographic information System
HBANC	Homebuilders Association of Northern California
HM	Hydromodification Management
HMP	Hydromodification Management Plan
IC/ID	Illicit Connections and Illicit Discharges
IPM	Integrated Pest Management
LID	Low Impact Development
MEP	Maximum Extent Practicable
MRP	Municipal Stormwater Regional Permit
MS4	Municipal Separate Storm Sewer System
MTC	Metropolitan Transportation Commission

NAFSMA	National Association of Flood & Stormwater Management Agencies
NOI	Notice of Intent
NPDES	National Pollutant Discharge Elimination System
NRDC	Natural Resources Defense Council
O&M	Operation and Maintenance
PBDE	Polybrominated Diphenyl Ether
POTW	Publicly Owned Treatment Works
RCRA	Resource Conservation and Recovery Act
RMP	Regional Monitoring Program
ROWD	Report of Waste Discharge
RTA	Rapid Trash Assessment
SARA	Superfund Amendments and Reauthorization Act
SCURTA	Santa Clara Urban Rapid Trash Assessment
SCVURPPP	Santa Clara Valley Urban Runoff Pollution Prevention Program
SFRWQCB	San Francisco Bay Regional Water Quality Control Board
SIC	Standard Industrial Classification
SMWPPP	San Mateo Countywide Water Pollution Prevention Program
SOP	Standard Operating Procedure
SWAMP	Surface Water Ambient Monitoring Program
SWPPP	Stormwater Pollution Prevention Plan
SWRCB	State Water Resources Control Board
TIE	Toxicity Identification Evaluation
TMDLs	Total Maximum Daily Loads
TSCA	Toxic Substances Control Act
USEPA	Unites States Environmental Protection Agency
Water Board	San Francisco Bay Regional Water Quality Control Board
WLAs	Wasteload Allocations

GLOSSARY

Arterial Roads	Freeways, multilane highways, and other important roadways that supplement the Interstate System. Arterial roads connect, as directly as practicable, principal urbanized areas, cities, and industrial centers.
Beneficial Uses	The uses of water of the state protected against degradation, such as domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation and preservation of fish and wildlife, and other aquatic resources or preserves.
Collector Roads	Major and minor roads that connect local roads with arterial roads. Collector roads provide less mobility than arterial roads at lower speeds and for shorter distances.
Commercial Development	Development or redevelopment to be used for commercial purposes, such as office buildings, retail or wholesale facilities, restaurants, shopping centers, hotels, and warehouses.
Construction Site	Any project, including projects requiring coverage under the General Construction Permit, that involves soil disturbing activities including, but not limited to, clearing, grading, paving, disturbances to ground such as stockpiling, and excavation. Construction sites are all sites with disturbed or graded land area not protected by vegetation, or pavement, that are subject to a building or grading permit.
Conditionally Exempted Non-Stormwater Discharge	Non-stormwater discharges that are prohibited by A.1. of this permit, unless such discharges are authorized by a separate NPDES permit or are not in violation of water quality standards because appropriate BMPs have been implemented to reduce pollutants to the maximum extent practicable, consistent with Provision C.15.
Discharger	Any responsible party or site owner or operator within the Permittees' jurisdiction whose site discharges stormwater runoff, or a non-stormwater discharge
Detached Single-family Home Project	The building of one single new house or the addition and/or replacement of impervious surface associated with one single existing house, which is not part of a larger plan of development.
Development	Construction, rehabilitation, redevelopment, or reconstruction of any public or private residential project (whether single-family, multi-unit, or planned unit development); or industrial, commercial, retail or other nonresidential project, including public agency projects.
Estate Residential Development	Development zoned for a minimum 1 acre lot size
Emerging Pollutants	Pollutants in water that either: (1) May not have been thoroughly studied to date but are suspected by the scientific community to be a source of impairment of beneficial uses and/or present a health risk; or (2) Are not yet part of a monitoring program.
Erosion	The diminishing or wearing away of land due to wind, or water. Often the eroded debris (silt or sediment) becomes a pollutant via stormwater runoff. Erosion occurs

	naturally, but can be intensified by land disturbing and grading activities such as farming, development, road building, and timber harvesting.
Full Trash Capture Device	Full trash capture systems are defined as "any device or series of devices that traps all particles retained by a 5mm mesh screen and has a design treatment capacity of not less than the peak flow rate resulting from a one-year, one-hour, storm in the tributary drainage catchment area." Trash collection booms and sea curtains do not meet this definition, but are effective for removal of floating trash if properly maintained. Because these devices do not meet the Full Trash Capture Device definition, only ¼ of the catchment area treated by these measures is credited toward meeting the trash management area requirement of C.10.a.
General Permits	Waste Discharge Requirements or NPDES Permits containing requirements that are applicable to a class or category of dischargers. The State of California has general stormwater permits for construction sites that disturb soil of 1 acre or more; industrial facilities; `Phase II smaller municipalities (including nontraditional Small MS4s, which are governmental facilities, such as military bases, public campuses, and prison and hospital complexes); and small linear underground/overhead projects disturbing at least 1 acre, but less than 5 acres (including trenching and staging areas).
Grading	The cutting and/or filling of the land surface to a slope or elevation.
Hydrologic source control measures	Site design techniques that minimize and/or slow the rate of stormwater runoff from the site.
Hydromodification	The modification of a stream's hydrograph, caused in general by increases in flows and durations that result when land is developed (e.g., made more impervious). The effects of hydromodification include, but are not limited to, increased bed and bank erosion, loss of habitat, increased sediment transport and deposition, and increased flooding.
Illicit Discharge	Any discharge to a municipal separate storm sewer (storm drain) system (MS4) that is prohibited under local, state, or federal statutes, ordinances, codes, or regulations. The term *illicit discharge* includes all non-stormwater discharges not composed entirely of stormwater and discharges that are identified under Section A. (Discharge Prohibitions) of this Permit. The term illicit discharge does not include discharges that are regulated by an NPDES permit (other than the NPDES permit for discharges from the MS4) or authorized by the Regional Water Board Executive Officer.
Impervious Surface	A surface covering or pavement of a developed parcel of land that prevents the land's natural ability to absorb and infiltrate rainfall/stormwater. Impervious surfaces include, but are not limited to, roof tops; walkways; patios; driveways; parking lots; storage areas; impervious concrete and asphalt; and any other continuous watertight pavement or covering. Landscaped soil and pervious pavement, including pavers with pervious openings and seams, underlain with pervious soil or pervious storage material, such as a gravel layer sufficient to hold at least the C.3.d volume of rainfall runoff are not impervious surfaces. Open, uncovered retention/detention facilities shall not be considered as impervious surfaces for purposes of determining whether a project is a Regulated Project under

	Provisions C.3.b. and C.3.g. Open, uncovered retention/detention facilities shall be considered impervious surfaces for purposes of runoff modeling and meeting the Hydromodification Standard.
Industrial Development	Development or redevelopment of property to be used for industrial purposes, such as factories; manufacturing buildings; and research and development parks.
Infill Site	A site in an urbanized area where the immediately adjacent parcels are developed with one or more qualified urban uses or at least 75% of the perimeter of the site adjoins parcels that are developed with qualified urban uses and the remaining 25% of the site adjoins parcels that have previously been developed for qualified urban uses and no parcel within the site has been created within the past 10 years.
Infiltration Device	Any structure that is deeper than wide and designed to infiltrate stormwater into the subsurface, and, as designed, bypass the natural groundwater protection afforded by surface soil. These devices include dry wells, injection wells, and infiltration trenches (includes French drains).
Joint Stormwater Treatment Facility	A stormwater treatment facility built to treat the combined runoff from two or more Regulated Projects located adjacent to each other,
Local Roads	Roads that provide limited mobility and are the primary access to residential areas, businesses, farms, and other local areas. Local roads offer the lowest level of mobility and usually contain no bus routes. Service to through traffic movement usually is deliberately discouraged in local roads.
Maximum Extent Practicable (MEP)	A standard for implementation of stormwater management actions to reduce pollutants in stormwater. Clean Water Act (CWA) 402(p)(3)(B)(iii) requires that municipal stormwater 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 Administrator or the State determines appropriate for the control of such pollutants." Also see State Board Order WQ 2000-11.
Mixed-use Development or Redevelopment	Development or redevelopment of property to be used for two or more different uses, all intended to be harmonious and complementary. An example is a high-rise building with retail shops on the first 2 floors, office space on floors 3 through 10, apartments on the next 10 floors, and a restaurant on the top floor.
Municipal Separate Storm Sewer System (MS4)	A conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains), as defined in 40 CFR 122.26(b)(8): (1) Owned or operated by a state, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law...including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization or a designated and approved management agency under section 208 of the CWA) that discharges into waters of the United States; (2) Designed or used for collecting or conveying stormwater; (3) Which is not a combined sewer; and (4) Which is not part of a Publicly Owned Treatment Works (POTW), as defined in

	40 CFR 122.2.
Municipal Corporation Yards, Vehicle Maintenance/Material Storage Facilities/	Any Permittee-owned or -operated facility, or portion thereof, that: (1) Conducts industrial activity, operates or stores equipment, and materials; (2) Performs fleet vehicle service/maintenance including repair, maintenance, washing, or fueling; (3) Performs maintenance and/or repair of machinery/equipment;
National Pollutant Discharge Elimination System (NPDES)	A national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under sections 307, 402, 318, and 405 of the CWA.
Notice of Intent (NOI)	The application form by which dischargers seek coverage under General Permits, unless the General Permit requires otherwise.
Parking Lot	Land area or facility for the parking or storage of motor vehicles used for business, commerce, industry, or personal use.
Permittee/Permittees	Municipal agency/agencies that are named in and subject to the requirements of this Permit.
Permit Effective Date	The date at least 45 days after Permit adoption, provided the Regional Administrator of U.S. EPA Region 9 has no objection, whichever is later.
Pervious Pavement	Pavement that stores and infiltrates rainfall at a rate equal to immediately surrounding unpaved, landscaped areas, or that stores and infiltrates the rainfall runoff volume described in C.3.d.
Point Source	Any discernible, confined, and discrete conveyance including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operations, landfill leachate collection systems, vessel, or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural stormwater runoff.
Pollutants of Concern	Pollutants that impair waterbodies listed under CWA section 303(d), pollutants associated with the land use type of a development, including pollutants commonly associated with urban runoff. Pollutants commonly associated with stormwater runoff include, but are not limited to, total suspended solids; sediment; pathogens (e.g., bacteria, viruses, protozoa); heavy metals (e.g., copper, lead, zinc, and cadmium); petroleum products and polynuclear aromatic hydrocarbons; synthetic organics (e.g., pesticides, herbicides, and PCBs); nutrients (e.g., nitrogen and phosphorus fertilizers); oxygen-demanding substances (e.g., decaying vegetation and animal waste) litter and trash.
Potable Water	Water that is safe for domestic use, drinking, and cooking.
Pre-Project Runoff Conditions	Stormwater runoff conditions that exist onsite immediately before development activities occur. This definition is not intended to be interpreted as that period before any human-induced land activities occurred. This definition pertains to redevelopment as well as initial development.
Public Development	Any construction, rehabilitation, redevelopment or reconstruction of any public agency project, including but not limited to, libraries, office buildings, roads, and

	highways.
Redevelopment	Land-disturbing activity that results in the creation, addition, or replacement of exterior impervious surface area on a site on which some past development has occurred.
Regional Monitoring Program (RMP)	A monitoring program aimed at determining San Francisco Bay Region receiving water conditions. The program was established in 1993 through an agreement among the Water Board, wastewater discharger agencies, dredgers, Municipal Stormwater Permittees and the San Francisco Estuary Institute to provide regular sampling of Bay sediments, water, and organisms for pollutants. The program is funded by the dischargers and managed by San Francisco Estuary Institute.
Regional Project	A regional or municipal stormwater treatment facility that discharges into the same watershed that the Regulated Project does.
Regulated Projects	Development projects as defined in Provision C.3.b.ii.
Residential Housing Subdivision	Any property development of multiple single-family homes or of dwelling units intended for multiple families/households (e.g., apartments, condominiums, and town homes).
Retrofitting	Installing improved pollution control devices at existing facilities to attain water quality objectives.
Sediments	Soil, sand, and minerals washed from land into water, usually after rain.
Solid Waste	All putrescible and nonputrescible solid, semisolid, and liquid wastes as defined by California Government Code Section 68055.1 (h).
Source Control BMP	Land use or site planning practices, or structural or nonstructural measures, that aim to prevent runoff pollution by reducing the potential for contact with rainfall runoff at the source of pollution. Source control BMPs minimize the contact between pollutants and urban runoff.
Standard Industrial Classification (SIC)	A federal system for classifying establishments by the type of activity in which they are engaged using a four-digit code.
Stormwater Pumping Station	Mechanical device (or pump) that is installed in MS4s or pipelines to discharge stormwater runoff and prevent flooding.
Stormwater Treatment System	Any engineered system designed to remove pollutants from stormwater runoff by settling, filtration, biological degradation, plant uptake, media absorption/adsorption or other physical, biological, or chemical process. This includes landscape-based systems such as grassy swales and bioretention units as well as proprietary systems.
Surface Water Ambient Monitoring Program (SWAMP)	The State Water Board's program to monitor surface water quality; coordinate consistent scientific methods; and design strategies for improving water quality monitoring, assessment, and reporting.
Total Maximum Daily Loads (TMDLs)	The maximum amount of a pollutant that can be discharged into a waterbody from all sources (point and nonpoint) and still maintain water quality standards. Under CWA section 303(d), TMDLs must be developed for all waterbodies that do not meet water quality standards even after application of technology-based controls,

	more stringent effluent limitations required by a state or local authority, and other pollution control requirements such as BMPs.
Toxicity Identification Evaluation (TIE)	TIE is a series of laboratory procedures used to identify the chemical(s) responsible for toxicity to aquatic life. These procedures are designed to decrease, increase, or transform the bioavailable fractions of contaminants to assess their contributions to sample toxicity. TIEs are conducted separately on water column and sediment samples.
Trash and Litter	Trash consists of litter and particles of litter. California Government Code Section 68055.1 (g) defines litter as all improperly discarded waste material, including, but not limited to, convenience food, beverage, and other product packages or containers constructed of steel, aluminum, glass, paper, plastic, and other natural and synthetic materials, thrown or deposited on the lands and waters of the state, but not including the properly discarded waste of the primary processing of agriculture, mining, logging, sawmilling, or manufacturing.
Treatment	Any method, technique, or process designed to remove pollutants and/or solids from polluted stormwater runoff, wastewater, or effluent.
Waste Load Allocations (WLAs)	A portion of a receiving water's TMDL that is allocated to one of its existing or future point sources of pollution.
Water Quality Control Plan (Basin Plan)	The Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) is the Board's master water quality control planning document. It designates beneficial uses and water quality objectives for waters of the State within the Region, including surface waters and groundwater. It also includes programs of implementation to achieve water quality objectives and discharge prohibitions. The Basin Plan was duly adopted and approved by the State Water Resources Control Board, U.S. EPA, and the Office of Administrative Law where required. The latest version is effective as of December 22, 2006.
Water Quality Objectives	The limits or levels of water quality elements or biological characteristics established to reasonably protect the beneficial uses of water or to prevent pollution problems within a specific area. Water quality objectives may be numeric or narrative.
Water Quality Standards	State-adopted and USEPA-approved water quality standards for waterbodies. The standards prescribe the use of the waterbody and establish the water quality criteria that must be met to protect designated uses. Water quality standards also include the federal and state anti-degradation policy.
Wet Season	October 1 through April 30 of each year

APPENDIX I

MUNICIPAL REGIONAL STORMWATER PERMIT

FACT SHEET

FACT SHEET/RATIONALE
TECHNICAL REPORT

for

ORDER NO. R2-2009-0074

NPDES Permit No. CAS612008

Municipal Regional Stormwater NPDES Permit
and
Waste Discharge Requirements

for

The cities of Alameda, Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Piedmont, Pleasanton, San Leandro, and Union City, Alameda County, the Alameda County Flood Control and Water Conservation District, and Zone 7 of the Alameda County Flood Control and Water Conservation District, which have joined together to form the Alameda Countywide Clean Water Program

The cities of Clayton, Concord, El Cerrito, Hercules, Lafayette, Martinez, Orinda, Pinole, Pittsburg, Pleasant Hill, Richmond, San Pablo, San Ramon, and Walnut Creek, the towns of Danville and Moraga, Contra Costa County, and the Contra Costa County Flood Control and Water Conservation District, which have joined together to form the Contra Costa Clean Water Program

The cities of Campbell, Cupertino, Los Altos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, and Sunnyvale, the towns of Los Altos Hills and Los Gatos, the Santa Clara Valley Water District, and Santa Clara County, which have joined together to form the Santa Clara Valley Urban Runoff Pollution Prevention Program

The cities of Belmont, Brisbane, Burlingame, Daly City, East Palo Alto, Foster City, Half Moon Bay, Menlo Park, Millbrae, Pacifica, Redwood City, San Bruno, San Carlos, San Mateo, and South San Francisco, the towns of Atherton, Colma, Hillsborough, Portola Valley, and Woodside, the San Mateo County Flood Control District, and San Mateo County, which have joined together to form the San Mateo Countywide Water Pollution Prevention Program

The cities of Fairfield and Suisun City, which have joined together to form the Fairfield-Suisun Urban Runoff Management Program

The City of Vallejo and the Vallejo Sanitation and Flood Control District

Fact Sheet Table of Contents

I. CONTACT INFORMATION

Water Board Staff Contact: Dale Bowyer, 1515 Clay Street, Suite 1400, Oakland, CA 94612, 510-622-2323, 510-622-2501 (fax), email: dbowyer@waterboards.ca.gov

The Permit and other related documents can be downloaded from the Water Board website at: http://www.waterboards.ca.gov/sanfranciscobay/mrp.htm

Comments can be electronically submitted to mrp@waterboards.ca.gov.

All documents referenced in this Fact Sheet and in the Order are available for public review at the Water Board office, located at the address listed above. Public records are available for inspection during regular business hours, from 9:00 am to 4:00 pm, Monday through Friday, 12 - 1 pm excluded. Per the Governor's order calling for furloughs, the Water Board office will be closed the first three Fridays of each month through June 2010. To schedule an appointment to inspect public records, contact Melinda Wong at 510-622-2430.

II. PERMIT GOALS AND PUBLIC PROCESS

Goals

The Goals for the Municipal Regional Stormwater Permit (hereinafter, the Permit) Development Process include:

1. Consolidate six Phase I municipal stormwater NPDES permits into one consistent permit which is regional in scope.
2. Include more specificity in NPDES permit order language and requirements. Create (A) required stormwater management actions, (B) a specific level of implementation for each action or set of actions, and (C) reporting and effectiveness evaluation requirements for each action sufficient to determine compliance.
3. Incorporate the Stormwater Management Plan level of detail and specificity into the Permit. Stormwater Management Plans have always been considered integral to the municipal stormwater NPDES permits, but have not received the level of public review in the adoption process necessary relative to their importance in adequate stormwater pollutant management implementation.
4. Implement and enhance actions to control 303(d) listed pollutants, pollutants of concern, and achieve Waste Load Allocations adopted under Total Maximum Daily Loads.
5. Implement more specific and comprehensive stormwater monitoring, including monitoring for 303(d) listed pollutants.

Public Process

Water Board staff conducted a series of stakeholder meetings and workshops with the Permittees and other interested parties to develop this Permit over the past 3 years. These meetings included Water Board staff, representatives of the Permittees, representatives of

environmental groups, homebuilders, private citizens, and other interested parties. The following is a summary of the lengthy stakeholder process.

(2004–2005) Water Board staff and the Bay Area Stormwater Management Agencies Association (BASMAA) agreed to develop a municipal regional stormwater permit. Board staff and BASMAA held monthly meetings to agree on the regional permit approach and developed concepts and ground rules for a Steering Committee. The Steering Committee for the Permit began regular monthly meetings, and there was agreement to form work groups to develop options for permit program components in table format.

(2006) Water Board staff, BASMAA, and nongovernmental groups met and discussed the Performance Standard (i.e., actions, implementation levels, and reporting requirements) tables from six workgroups. In addition to the Steering Committee, Work Group Stakeholder meetings focused on the six program elements to complete the Performance Standard Tables and discuss other issues in preparation for creating the first Draft Permit Provisions. Two large public workshops were held in November with all interested stakeholders to discuss Work Group products.

(2007) The Water Board held a public workshop in March to receive public input. Board staff distributed an Administrative Draft Permit dated May 1, 2007, held multiple meetings and received comment.

(2007- 2008) On December 14, 2007, Board staff distributed the Tentative Order for a 77-day written public comment period ending February 29, 2008. A public hearing for oral testimony was held on March 11, 2008. During the remainder of 2008 there were additional meetings with stakeholders, and Board staff worked on revisions to the Tentative Order and produced responses to both written comments received by February 29, 2008, and oral comments received at the March 11, 2008, hearing. The Revised Tentative Order for the MRP was released on February 11, 2009, and a May 13, 2009, hearing before the Water Board was scheduled. Written comments on the revisions to the Tentative Order were received until April 3, 2009.

(2009) After the May 2009 MRP Public Hearing, Water Board staff held numerous meetings with the Permittees (via the Bay Area Stormwater Management Agencies Association) and other key stakeholders including Save the Bay, NRDC, the Northern California Homebuilders, S.F. BayKeeper and the U.S. EPA. These meetings have been focused on discussion of revisions to the MRP Tentative Order in response to comments received, in an effort to resolve issues primarily related to Provisions C.3 New Development, C.8 Monitoring, C.10 Trash Load Reduction, C.11 Mercury Controls, C.12 PCBs Controls, and C.15 Exempt Non-Stormwater Discharges.

Implementation

It is the Water Board's intent that this Permit shall ensure attainment of applicable water quality objectives and protection of the beneficial uses of receiving waters and associated habitat. This Permit requires that discharges shall not cause exceedances of water quality objectives nor shall they cause certain conditions to occur that create a condition of nuisance or water quality impairment in receiving waters. Accordingly, the Water Board is

requiring that these standard requirements be addressed through the implementation of technically and economically feasible control measures to reduce pollutants in stormwater discharges to the maximum extent practicable as provided in Provisions C.1 through C.15 of this Permit and section 402(p) of the CWA. Compliance with the Discharge Prohibitions, Receiving Water Limitations, and Provisions of this Permit is deemed compliance with the requirements of this Permit. If these measures, in combination with controls on other point and nonpoint sources of pollutants, do not result in attainment of applicable water quality objectives, the Water Board may invoke Provision C.1. and may reopen this Permit pursuant to Provisions C.1 and C.15 of this Permit to impose additional conditions that require implementation of additional control measures.

Each of the Permittees is individually responsible for adoption and enforcement of ordinances and policies, for implementation of assigned control measures or best management practices (BMPs) needed to prevent or reduce pollutants in stormwater, and for providing funds for the capital, operation, and maintenance expenditures necessary to implement such control measures/BMPs within its jurisdiction. Each Permittee is also responsible for its share of the costs of the area-wide component of the countywide program to which the Permittee belongs. Enforcement actions concerning non-compliance with the Permit will be pursued against individual Permittee(s) responsible for specific violations of the Permit.

III. BACKGROUND

Early Permitting Approach

The federal Clean Water Act (CWA) was amended in 1987 to address urban stormwater runoff pollution of the nation's waters. One requirement of the amendment was that many municipalities throughout the United States were obligated for the first time to obtain National Pollutant Discharge Elimination System (NPDES) permits for discharges of urban runoff from their Municipal Separate Storm Sewer Systems (MS4s). In response to the CWA amendment (and the pending federal NPDES regulations which would implement the amendment), the Water Board issued a municipal storm water Phase I permits in the early 1990s. These permits were issued to the entire county-wide urban areas of Santa Clara, Alameda, San Mateo and Contra Costa Counties, rather than to individual cities over 100,000 population threshold. The cities chose to collaborate in countywide groups, to pool resources and expertise, and share information, public outreach and monitoring costs, among other tasks.

During the early permitting cycles, the county-wide programs developed many of the implementation specifics which were set forth in their Stormwater Pollution Prevention Management Plans (Plans). The permit orders were relatively simple documents that referred to the stormwater Plans for implementation details. Often specific aspects of permit and Plan implementation evolved during the five year permit cycle, with relatively significant changes approved at the Water Board staff level without significant public review and comment.

Merging Permit Requirements and Specific Requirements Previously Contained in Stormwater Management Plans

US EPA stormwater rules for Phase I stormwater permits envisioned a process in which municipal stormwater management programs contained the detailed BMP and specific level of implementation information, and are reviewed and approved by the permitting agency before the municipal NPDES stormwater permits are adopted. The current and previous permits established a definition of a stormwater management program and required each Permittee to submit an urban runoff management plan and annual work plans for implementing its stormwater management program. An advantage to this approach was that it provided flexibility for Permittees to tailor their stormwater management programs to reflect local priorities and needs. However, Water Board staff found it difficult to determine Permittees' compliance with the current permits, due to the lack of specific requirements and measurable outcomes of some required actions. Furthermore, federal stormwater regulations require that modifications to stormwater management programs, such as annual revisions to urban runoff management plans, be approved through a public process.

Recent court decisions have reiterated that federal regulations and State law require that the implementation specifics of Municipal Stormwater NPDES permits be adopted after adequate public review and comment, and that no significant change in the permit requirements except minor modifications can occur during the permit term without a similar level of public review and comment.

This Permit introduces a modification to these previous approaches by establishing the stormwater management program requirements and defining up front, as part of the Permit Development Process, the minimum acceptable elements of the municipal stormwater management program. The advantages of this approach are that it satisfies the public involvement requirements of both the federal Clean Water Act and the State Water Code. An advantage for Permittees and the public of this approach is that the permit requirements are known at the time of permit issuance and not left to be determined later through iterative review and approval of work plans. While it may still be necessary to amend the Permit prior to expiration, any need to this should be minimized.

This Permit does not include approval of all Permittees' stormwater management programs or annual reports as part of the administration of the Permit. To do so would require significantly increased staff resources. Instead, minimum measures have been established to simplify assessment of compliance and allow the public to more easily assess each Permittee's compliance. Each Permit provision and its reporting requirements are written with this in mind. That is, each provision establishes the required actions, minimum implementation levels (i.e., minimum percentage of facilities inspected annually, escalating enforcement, reporting requirements for tracking projects, number of monitoring sites, etc.), and specific reporting elements to substantiate that these implementation levels have been met. Water Board staff will evaluate each individual Permittee's compliance through annual report review and the audit process.

The challenge in drafting the Permit is to provide the flexibility described above considering the different sizes and resources while ensuring that the Permit is still enforceable. To achieve this, the Permit frequently prescribes minimum measurable

outcomes, while providing Permittees with flexibility in the approaches they use to meet those outcomes. Enforceability has been found to be a critical aspect of the Permit. To avoid these types of situations, a balance between flexibility and enforceability has been crafted into the Permit.

Current Permit Approach

In the previous permit issuances, the detailed actions to be implemented by the Permittees were contained in Stormwater Management Plans, which were separate from the NPDES permits, and incorporated by reference. Because those plans were legally an integral part of the permits and were subject to complete public notice, review and comment, this permit reissuance incorporates those plan level details in the permit, thus merging the Permittees' stormwater management plans into the permit in one document. This Permit specifies the actions necessary to reduce the discharge of pollutants in stormwater to the maximum extent practicable, in a manner designed to achieve compliance with water quality standards and objectives, and effectively prohibit non-stormwater discharges into municipal storm drain systems and watercourses within the Permittees' jurisdictions. This set of specific actions is equivalent to the requirements that in past permit cycles were included in a separate stormwater management plan for each Permittee or countywide group of Permittees. With this permit reissuance, that level of specific compliance detail is integrated into permit language and is not a separate document.

The Permit includes requirements for the following components:

- Municipal Operations
- New Development and Redevelopment
- Industrial and Commercial Site Controls
- Illicit Discharge and Elimination
- Construction Site Controls
- Public Information and Outreach
- Water Quality Monitoring
- Pesticides Toxicity Controls
- Trash Reduction
- Mercury Controls
- PCBs Controls
- Copper Controls
- Polybrominated Diphenyl Ethers (PBDE), Legacy Pesticides, and Selenium
- Exempt and Conditionally Exempt Discharges

IV. ECONOMIC ISSUES

Economic discussions of urban runoff management programs tend to focus on costs incurred by municipalities in developing and implementing the programs. This is appropriate, and these costs are significant and a major issue for the Permittees. However, when considering the cost of implementing the urban runoff programs, it is also important

to consider the alternative costs incurred by not fully implementing the programs, as well as the benefits which result from program implementation.

It is very difficult to ascertain the true cost of implementation of the Permittees' urban runoff management programs because of inconsistencies in reporting by the Permittees. Reported costs of compliance for the same program element can vary widely from Permittee to Permittee, often by a very wide margin that is not easily explained.[57] Despite these problems, efforts have been made to identify urban runoff management program costs, which can be helpful in understanding the costs of program implementation.

In 1999, United States Environmental Protection Agency (USEPA) reported on multiple studies it conducted to determine the cost of urban runoff management programs. A study of Phase II municipalities determined that the annual cost of the Phase II program was expected to be $9.16 per household. USEPA also studied 35 Phase I municipalities, finding costs to be similar to those anticipated for Phase II municipalities, at $9.08 per household annually.[58]

A study on program cost was also conducted by the Los Angeles Regional Water Quality Control Board (LARWQCB), where program costs reported in the municipalities' annual reports were assessed. The LARWQCB estimated that average per household cost to implement the MS4 program in Los Angeles County was $12.50.

The State Water Resources Control Board (State Water Board) also commissioned a study by the California State University, Sacramento to assess costs of the Phase I MS4 program. This study is current and includes an assessment of costs incurred by the City of Encinitas in implementing its program. Annual cost per household in the study ranged from $18-46, with the City of Encinitas representing the upper end of the range.[59] The cost of the City of Encinitas' program is understandable, given the City's coastal location, reliance on tourism, and consent decree with environmental groups regarding its program. For these reasons, as well as the general recognition the City of Encinitas receives for implementing a superior program, the City's program cost can be considered as the high end of the spectrum for Permittee urban runoff management program costs.

It is important to note that 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 issued. For example, street sweeping and trash collection costs cannot be solely or even principally attributable to MS4 permit compliance, since these practices have long been implemented by municipalities. Therefore, true program cost resulting from MS4 permit requirements is some fraction of reported costs. The California State University, Sacramento study found that only 38% of program costs are new costs fully attributable to MS4 permits. The remainder of program costs were either pre-existing or resulted from enhancement of pre-exiting programs.[60] The County of Orange found that even lesser amounts of program costs are solely attributable to MS4 permit compliance, reporting that the amount attributable to implement its Drainage Area Management Plan, its municipal

[57] LARWQCB, 2003. Review and Analysis of Budget Data Submitted by the Permittees for Fiscal Years 2000-2003.p.2
[58] Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68791-68792.
[59] State Water Board, 2005. NPDES Stormwater Cost Survey. P. ii
[60] Ibid. P. 58.

stormwater permit requirements, is less than 20% of the total budget. The remaining 80% is attributable to pre-existing programs.[61]

It is also important to acknowledge that the vast majority of costs that will be incurred as a result of implementing the Order are not new. Urban runoff management programs have been in place in this region for over 15 years. Any increase in cost to the Permittees will be incremental in nature.

Urban runoff management programs cannot be considered in terms of their costs only. The programs must also be viewed in terms of their value to the public. For example, household willingness to pay for improvements in fresh water quality for fishing and boating has been estimated by USEPA to be $158-210.[62] This estimate can be considered conservative, since it does not include important considerations such as marine waters benefits, wildlife benefits, or flood control benefits. The California State University, Sacramento study corroborates USEPA's estimates, reporting annual household willingness to pay for statewide clean water to be $180.[63] When viewed in comparison to household costs of existing urban runoff management programs, these household willingness to pay estimates exhibit that per household costs incurred by Permittees to implement their urban runoff management programs remain reasonable.

Another important way to consider urban runoff management program costs is to consider the implementation cost in terms of costs incurred by not improving the programs. Urban runoff in southern California has been found to cause illness in people bathing near storm drains.[64] A study of south Huntington Beach and north Newport Beach found that an illness rate of about 0.8% among bathers at those beaches resulted in about $3 million annually in health-related expenses.[65] Extrapolation of such numbers to the beaches and other water contact recreation in San Francisco Bay and the tributary creeks of the region could result in huge expenses to the public.

Urban runoff and its impact on receiving waters also places a cost on tourism. the California Division of Tourism has estimated that each out-of-state visitor spends $101.00 a day. The experience of Huntington Beach provides an example of the potential economic impact of poor water quality. Approximately 8 miles of Huntington Beach were closed for two months in the middle of summer of 1999, impacting beach visitation and the local economy.

Finally, it is important to consider the benefits of urban runoff management programs in conjunction with their costs. A recent study conducted by USC/UCLA assessed the costs and benefits of implementing various approaches for achieving compliance with the MS4 permits in the Los Angeles Region. The study found that non-structural systems would cost $2.8 billion but provide $5.6 billion in benefit. If structural systems were determined to be needed, the study found that total costs would be $5.7 to $7.4 billion, while benefits could

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61 County of Orange, 2000. A NPDES Annual Progress Report. P. 60. More current data from the County of Orange is not used in this discussion because the County of Orange no longer reports such information.

62 Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68793.

63 State Water Board, 2005. NPDES Stormwater Cost Survey. P. iv.

64 Haile, R.W., et al, 1996. An Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay. Santa Monica Bay Restoration Project.

65 Los Angeles Times, May 2, 2005. Here's What Ocean Germs Cost You: A UC Irvine Study Tallies the Cost of Treatment and Lost Wages for Beachgoers Who Get Sick.

reach $18 billion.[66] Costs are anticipated to be borne over many years – probably ten years at least. As can be seen, the benefits of the programs are expected to considerably exceed their costs. Such findings are corroborated by USEPA, which found that the benefits of implementation of its Phase II storm water rule would also outweigh the costs.[67]

V. LEGAL AUTHORITY

The following statutes, regulations, and Water Quality Control Plans provide the basis for the requirements of Order No. R2-2009-0074: CWA, California Water Code (CWC), 40 CFR Parts 122, 123, 124 (National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, Final Rule), Part II of 40 CFR Parts 9, 122, 123, and 124 (National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule), Water Quality Control Plan – Ocean Waters of California (California Ocean Plan), Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan), 40 CFR 131Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California; Rule (California Toxics Rule), and the California Toxics Rule Implementation Plan.

The legal authority citations below generally apply to directives in Order No. R2-2009-0074, and provide the Water Board with ample underlying authority to require each of the directives of Order No. R2-2009-0074.. Legal authority citations are also provided with each permit provision in this Fact Sheet.

CWA 402(p)(3)(B)(ii) – The CWA requires in section 402(p)(3)(B)(ii) that permits for discharges from municipal storm sewers "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers."

CWA 402(p)(3)(B)(iii) – The CWA requires in section 402(p)(3)(B)(iii) that permits for discharges from municipal storm sewers "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."

40 CFR 122.26(d)(2)(i)(B,C,E, and F) – Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B,C,D,E, and F) require that each Permittee's permit application "shall consist of: (i) Adequate legal authority. A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [...] (B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer; (C) Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water; (D) Control through interagency agreements among co-applicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system; (E) Require compliance with condition in ordinances, permits, contracts or orders; and (F) Carry out all

[66] LARWQCB, 2004. Alternative Approaches to Stormwater Control.
[67] Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68791.

inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer."

40 CFR 122.26(d)(2)(iv) – Federal NPDES regulation 40 CFR 122.26(d)(2)(iv) requires "a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. [...] Proposed programs may impose controls on a system wide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. [...] Proposed management programs shall describe priorities for implementing controls."

40 CFR 122.26(d)(2)(iv)(A -D) – Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(A - D) require municipalities to implement controls to reduce pollutants in urban runoff from new development and significant redevelopment, construction, and commercial, residential, industrial, and municipal land uses or activities. Control of illicit discharges is also required.

CWC 13377 – CWC section 13377 requires that "Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the CWA, as amended, issue waste discharge requirements and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, together with anymore stringent effluent standards or limitation necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance."

Order No. R2-2009-0074 is an essential mechanism for achieving the water quality objectives that have been established for protecting the beneficial uses of the water resources in the San Francisco Bay Region. Federal NPDES regulation 40 CFR 122.44(d)(1) requires MS4 permits to include any requirements necessary to "achieve water quality standards established under CWA section 303, including State narrative criteria for water quality." The term "water quality standards" in this context refers to a water body's beneficial uses and the water quality objectives necessary to protect those beneficial uses, as established in the Basin Plan.

State Mandates

This Permit does not constitute an unfunded local government mandate subject to subvention under Article XIIIB, Section (6) of the California Constitution for several reasons, including, but not limited to, the following. First, this Permit implements federally mandated requirements under CWA section 402, subdivision (p)(3)(B). (33 U.S.C. § 1342(p)(3)(B).) This includes federal requirements to effectively prohibit non-stormwater discharges, to reduce the discharge of pollutants to the maximum extent practicable, and to include such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. Federal cases have held that these provisions require the development of permits and permit provisions on a case-by-case basis to satisfy federal requirements. (Natural Resources Defense Council, Inc. v. USEPA

(9th Cir. 1992) 966 F.2d 1292, 1308, fn. 17.) The authority exercised under this Permit is not reserved state authority under the CWA's savings clause (cf. Burbank v. State Water Resources Control Bd. (2005) 35 Cal.4th 613, 627-628 [relying on 33 U.S.C. § 1370, which allows a state to develop requirements that are not less stringent than federal requirements]), but instead, is part of a federal mandate to develop pollutant reduction requirements for MS4. To this extent, it is entirely federal authority that forms the legal basis to establish the permit provisions. (See, City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region (2006) 135 Cal.App.4th 1377, 1389; Building Industry Association of San Diego County v. State Water Resources Control Bd. (2004) 124 Cal.App.4th 866, 882-883.)

Likewise, the provisions of this Permit to implement total maximum daily loads (TMDLs) are federal mandates. The CWA requires TMDLs to be developed for waterbodies that do not meet federal water quality standards. (33 U.S.C. § 1313(d).) Once USEPA or a state develops a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions of any applicable WLA. (40 CFR 122.44(d)(1)(vii)(B).)

Second, the local agencies' (Permittees') obligations under this Permit are similar to, and in many respects less stringent than, the obligations of nongovernmental dischargers who are issued NPDES permits for stormwater discharges. With a few inapplicable exceptions, the CWA regulates the discharge of pollutants from point sources (33 U.S.C. § 1342) and the Porter-Cologne regulates the discharge of waste (Water Code, section 13263), both without regard to the source of the pollutant or waste. As a result, the costs incurred by local agencies to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and nongovernmental dischargers. (See County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 57-58 [finding comprehensive workers compensation scheme did not create a cost for local agencies that was subject to state subvention].)

The CWA and the Porter-Cologne Water Quality Control Act largely regulate stormwater with an even hand, but to the extent that there is any relaxation of this evenhanded regulation, it is in favor of the local agencies. Except for MS4s, the CWA requires point source dischargers, including discharges of stormwater associated with industrial or construction activity, to comply strictly with water quality standards. (33 U.S.C. § 1311(b)(1)(C), Defenders of Wildlife v. Browner (1999) 191 F.3d 1159, 1164-1165 [noting that industrial stormwater discharges must strictly comply with water quality standards].) As discussed in prior State Water Board decisions, this Permit does not require strict compliance with water quality standards. (SWRCB Order No. WQ 2001-15, p. 7.) The Permit, therefore, regulates the discharge of waste in municipal stormwater more leniently than the discharge of waste from nongovernmental sources.

Third, the Permittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Permit. The fact sheet demonstrates that numerous activities contribute to the pollutant loading in the MS4. Permittees can levy service charges, fees, or assessments on these activities, independent of real property ownership. (See, e.g., Apartment Association of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 842 [upholding inspection fees associated with renting property].) The ability of a local agency to defray the cost of a program without raising

taxes indicates that a program does not entail a cost subject to subvention. (County of Fresno v. State of California (1991) 53 Cal.3d 482, 487-488.)

Fourth, the Permittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in CWA section 301, subdivision (a) (33 U.S.C. § 1311(a)) and in lieu of numeric restrictions on their discharges. To the extent Permittees have voluntarily availed themselves of the Permit, the program is not a state mandate. (Accord County of San Diego v. State of California (1997) 15 Cal.4th 68, 107-108.) Likewise, the Permittees have voluntarily sought a program-based municipal stormwater permit in lieu of a numeric limits approach. (See City of Abilene v. USEPA (5th Cir. 2003) 325 F.3d 657, 662-663 [noting that municipalities can choose between a management permit or a permit with numeric limits].) The Permittees' voluntary decision to file a report of waste discharge proposing a program-based permit is a voluntary decision not subject to subvention. (See Environmental Defense Center v. USEPA (9th Cir. 2003) 344 F.3d 832, 845-848.)

Fifth, the Permittees' responsibility for preventing discharges of waste that can create conditions of pollution or nuisance from conveyances that are within their ownership or control under State law predates the enactment of Article XIIIB, Section (6) of the California Constitution.

This Permit is based on the federal CWA, the Porter-Cologne Water Quality Control Act (Division 7 of the CWC, commencing with Section 13000), applicable State and federal regulations, all applicable provisions of statewide Water Quality Control Plans and Policies adopted by the State Water Board, the Basin Plan, the California Toxics Rule, and the California Toxics Rule Implementation Plan.

Discussion: In 1987, Congress established CWA Amendments to create requirements for storm water discharges under the NPDES program, which provides for permit systems to regulate the discharge of pollutants. Under the Porter-Cologne Water Quality Control Act, the State Water Board and Regional Water Quality Control Boards (Water Boards) have primary responsibility for the coordination and control of water quality, including the authority to implement the CWA. Porter-Cologne (section 13240) directs the Water Boards to set water quality objectives via adoption of Basin Plans that conform to all state policies for water quality control. As a means for achieving those water quality objectives, Porter-Cologne (section 13243) further authorizes the Water Boards to establish waste discharge requirements (WDRs) to prohibit waste discharges in certain conditions or areas. Since 1990, the Water Board has issued area-wide MS4 NPDES permits. The Permit will re-issue Order Nos. 99-058, 99-059, 01-024, R2-2003-0021, R2-2003-0034 to comply with the CWA and attain water quality objectives in the Basin Plan by limiting the contributions of pollutants conveyed by urban runoff. Further discussions of the legal authority associated with the prohibitions and directives of the Permit are provided in section V. of this document.

This Permit supersedes NPDES Permit Nos. CAS029718, CAS029831, CAS029912, CAS029921, CAS612005, and CAS612006.

Basin Plan

The Urban Runoff Management, Comprehensive Control Program section of the Basin Plan requires the Permittees to address existing water quality problems and prevent new problems associated with urban runoff through the development and implementation of a comprehensive control program focused on reducing current levels of pollutant loading to storm drains to the maximum extent practicable. The Basin Plan comprehensive program requirements are designed to be consistent with federal regulations (40 CFR Parts 122-124) and are implemented through issuance of NPDES permits to owners and operators of MS4s. A summary of the regulatory provisions is contained in Title 23 of the California Code of Regulations at section 3912. The Basin Plan identifies beneficial uses and establishes water quality objectives for surface waters in the Region, as well as effluent limitations and discharge prohibitions intended to protect those uses. This Permit implements the plans, policies, and provisions of the Water Board's Basin Plan.

Statewide General Permits

The State Water Board has issued NPDES general permits for the regulation of stormwater discharges associated with industrial activities and construction activities. To effectively implement the New Development (and significant redevelopment) and Construction Controls, Illicit Discharge Controls, and Industrial and Commercial Discharge Controls components in this Permit, the Permittees will conduct investigations and local regulatory activities at industrial and construction sites covered by these general permits. However, under the CWA, the Water Board cannot delegate its own authority to enforce these general permits to the Permittees. Therefore, Water Board staff intends to work cooperatively with the Permittees to ensure that industries and construction sites within the Permittees' jurisdictions are in compliance with applicable general permit requirements and are not subject to uncoordinated stormwater regulatory activities.

Regulated Parties

Each of the Permittees listed in this Permit owns or operates a MS4, through which it discharges urban runoff into waters of the United States within the San Francisco Bay Region. These MS4s fall into one or more of the following categories: (1) a medium or large MS4 that services a population of greater than 100,000 or 250,000 respectively; or (2) a small MS4 that is "interrelated" to a medium or large MS4; or (3) an MS4 which contributes to a violation of a water quality standard; or (4) an MS4 which is a significant contributor of pollutants to waters of the United States.

Permit Coverage

The Permittees each have jurisdiction over and maintenance responsibility for their respective MS4s in the Region. Federal, State or regional entities within the Permittees' boundaries, not currently named in this Permit, operate storm drain facilities and/or discharge stormwater to the storm drains and watercourses covered by this Permit. The Permittees may lack jurisdiction over these entities. Consequently, the Water Board recognizes that the Permittees should not be held responsible for such facilities and/or discharges. The Water Board will consider such facilities for coverage under NPDES permitting pursuant to USEPA Phase II stormwater regulations. Under Phase II, the Water

Board intends to permit these federal, State, and regional entities through use of a Statewide Phase II NPDES General Permit.

Discussion: Section 402 of the CWA prohibits the discharge of any pollutant to waters of the United States from a point source, unless that discharge is authorized by a NPDES permit. Though urban runoff comes from a diffuse source, it is discharged through MS4s, which are point sources under the CWA. Federal NPDES regulation 40 CFR 122.26(a) (iii) and (iv) provide that discharges from MS4s, which service medium or large populations greater than 100,000 or 250,000 respectively, shall be required to obtain a NPDES permit. Federal NPDES regulation 40 CFR 122.26(a)(v) also provides that a NPDES permit is required for "A [storm water] discharge which the Director, or in States with approved NPDES programs, either the Director or the USEPA Regional Administrator, determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." Such sources are then designated into the program.

VI. PERMIT PROVISIONS

A. Discharge Prohibitions

Prohibition A.1. Legal Authority – CWA 402(p)(3)(B)(ii) – The CWA requires in section 402(p)(3)(B)(ii) that permits for discharges from municipal storm sewers "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers."

Prohibition A.2. Legal Authority – San Francisco Bay Basin Plan, 2006 Revision, Chapter 4 Implementation, Table 4-1, Prohibition 7.

B. Receiving Water Limitations

Receiving Water Limitation B.1. Legal Authority – Receiving Water Limitations are retained from previous Municipal Stormwater Runoff NPDES permits. They reflect applicable water quality standards from the Basin Plan.

Receiving Water Limitation B.2. Legal Authority – Receiving Water Limitations are retained from previous Municipal Stormwater Runoff NPDES permits. They reflect applicable water quality standards from the Basin Plan.

C. Provisions

C.1. Compliance with Discharge Prohibitions and Receiving Water Limitations

Legal Authority

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: The Water Board's Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) contains the following waste discharge prohibition: "The discharge of waste to waters of the state in a manner causing, or threatening to cause a condition of pollution, contamination, or nuisance as defined in California Water Code Section 13050, is prohibited."

California Water Code section 13050(l) states "(1) 'Pollution' means an alteration of the quality of waters of the state by waste to a degree which unreasonably affects either of the following: (A) The water for beneficial uses. (B) Facilities which serve beneficial uses. (2) 'Pollution' may include "contamination."

California Water Code section 13050(k) states "'Contamination' means an impairment of the quality of waters of the state by waste to a degree which creates a hazard to public health through poisoning or through the spread of disease. 'Contamination' includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected."

California Water Code section 13050(m) states "'Nuisance' means anything which meets all of the following requirements: (1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. (2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. (3) Occurs during, or as a result of, the treatment or disposal of wastes."

California Water Code section 13241 requires each water board to "establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance [...]."

California Water Code Section 13243 provides that a water board, "in a water quality control plan or in waste discharge requirements, may specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted."

California Water Code Section 13263(a) provides that waste discharge requirements prescribed by the water board implement the Basin Plan.

Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(A -D) require municipalities to implement controls to reduce pollutants in urban runoff from commercial, residential, industrial, and construction land uses or activities.

Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(A -D) require municipalities to have legal authority to control various discharges to their MS4.

Federal NPDES regulation 40 CFR 122.44(d)(1) requires municipal storm water permits to include any requirements necessary to "[a]chieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality."

Federal NPDES regulation 40 CFR 122.44(d)(1)(i) requires NPDES permits to include limitations to "control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality."

State Water Resources Control Board ("State Water Board") Order WQ 1999-05, is a precedential order requiring that municipal stormwater permits achieve water quality standards and water quality standard based discharge prohibitions through the implementation of control measures, by which Permittees' compliance with the permit can be determined. The State Water Board Order specifically requires that Provision C.1 include language that Permittees shall comply with water quality standards based discharge prohibitions and receiving water limitations through timely implementation of control measures and other actions to reduce pollutants in the discharges. State Water Board Order WQ 2001-15 refines Order 1999-05 by requiring an iterative approach to compliance with water quality standards that involves ongoing assessments and revisions.

C.2. Municipal Operations

Legal Authority

The following legal authority applies to Provision C.2:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), California Water Code (CWC) section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A)(1) requires, "A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A)(3) requires, "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A)(4) requires, "A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving waterbodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A)(5) requires, "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."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A)(6) requires, "A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications, and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities."

Federal NPDES regulation 40 CFR 122.44(d)(1)(i) requires NPDES permits to include limitations to "control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality."

Fact Sheet Findings in Support of Provision C.2

C.2-1 Municipal maintenance activities are potential sources of pollutants unless appropriate inspection, pollutant source control, and cleanup measures are implemented during routine maintenance works to minimize pollutant discharges to storm drainage facilities.

Sediment accumulated on paved surfaces, such as roads, parking lots, parks, sidewalks, landscaping, and corporation yards, is the major source of point source pollutants found in urban runoff. Thus, Provision C.2 requires the Permittees to designate minimum BMPs for all municipal facilities and activities as part of their ongoing pollution prevention efforts as set forth in this Permit. Such prevention measures include, but are not limited to, activities as described below. The work of municipal maintenance personnel is vital to minimize stormwater pollution, because personnel work directly on municipal storm drains and other municipal facilities. Through work such as inspecting and cleaning storm drain drop inlets and pipes and conducting municipal construction and maintenance activities upstream of the storm drain, municipal maintenance personnel are directly responsible for preventing and removing pollutants from the storm drain. Maintenance personnel also play an important role in educating the public and in reporting and cleaning up illicit discharges.

C.2-2 Road construction and other activities can disturb the soil and drainage patterns to streams in undeveloped areas, causing excess runoff and thereby erosion and the release of sediment. In particular, poorly designed roads can act as man-made drainages that carry runoff and sediment into natural streams, impacting water quality.

Provision C.2 also requires the Permittees to implement effective BMPs for the following rural works maintenance and support activities: (a) Road design, construction, maintenance, and repairs in rural areas that prevent and control road-related erosion and sediment transport; (b)Identification and prioritization of rural roads maintenance on the basis of soil erosion potential, slope steepness, and stream habitat resources; (c) Road and culvert construction designs that do not impact creek functions. New or replaced culverts shall not create a migratory fish passage barrier, where migratory fish are present, or lead to stream instability; (d) Development and implement an inspection program to maintain roads structural integrity and prevent impacts on water quality; (e) Provide adequate maintenance of rural roads adjacent to streams and riparian habitat to reduce erosion, replace damaging shotgun culverts, re-grade roads to slope outward where consistent with road engineering safety standards, and install water bars; and (f) When replacing existing culverts or redesigning new culverts or bridge crossings use measures to reduce erosion, provide fish passage and maintain natural stream geomorphology in a stable manner.

Road construction, culvert installation, and other rural maintenance activities can disturb the soil and drainage patterns to streams in undeveloped areas, causing excess runoff and thereby erosion and the release of sediment. Poorly

designed roads can act as preferential drainage pathways that carry runoff and sediment into natural streams, impacting water quality. In addition, other rural public works activities, including those the BMP approach would address, have the potential to significantly affect sediment discharge and transport within streams and other waterways, which can degrade the beneficial uses of those waterways. This Provision would help ensure that these impacts are appropriately controlled.

Specific Provision C.2 Requirements

Provision C.2.a-f. (Operation and Maintenance of Municipal Separate Storm Sewer Systems (MS4) facilities) requires that the Permittees implement appropriate pollution control measures during maintenance activities and to inspect and, if necessary, clean municipal facilities such as conveyance systems, pump stations, and corporation yards, before the rainy season. The requirements will assist the Permittees to prioritize tasks, implement appropriate BMPs, evaluate the effectiveness of the implemented BMPs, and compile and submit annual reports.

Provision C.2.d. (Stormwater Pump Stations) In late 2005, Board staff investigated the occurrence of low salinity and dissolved oxygen conditions in Old Alameda Creek (Alameda County) and Alviso Slough (Santa Clara County) in September and October of 2005. Board staff became aware of this problem in their review of receiving water and discharge sampling conducted by the U.S. Geological Survey as part of its routine monitoring on discharges associated with the former salt ponds managed by the U.S. Fish and Wildlife Service in Santa Clara County and the California Department of Fish and Game in Alameda County.

In the case of Old Alameda Creek, discharge of black-colored water from the Alvarado pump station to the slough was observed at the time of the data collection on September 7, 2005, confirming dry weather urban runoff as the source of the documented violations of the 5 mg/L dissolved oxygen water quality objective. Such conditions were measured again on September 21, 2005.

On October 17, 2005, waters in Alviso Slough were much less saline than the salt ponds and had the lowest documented dissolved oxygen of the summer, suggesting a dry weather urban runoff source. The dissolved oxygen sag was detected surface to bottom at 2.3 mg/L at a salinity of less than 1 part per thousand (ppt), mid-day, when oxygen levels should be high at the surface. The sloughs have a typical depth of 6 feet.

Board staff's investigations of these incidents, documented in a memorandum,[68] found that "storm water pump stations, universally operated by automatic float triggers, have been confirmed as the cause in at least one instance, and may represent an overlooked source of controllable pollution to the San Francisco Bay Estuary and its tidal sloughs. . . the discharges of dry weather urban runoff from these pump stations are not being

[68] Internal Water Board Memo dated December 2, 2005: "Dry Weather Urban Weather Urban Runoff Causing or Contributing to Water Quality Violations: Low Dissolved Oxygen (DO) in Old Alameda Creek and Alviso Slough"

managed to protect water quality, and [that] surveillance monitoring has detected measurable negative water quality consequences of this current state of pump station management."

Pump station discharges of dry weather urban runoff can cause violations of water quality objectives. These discharges are controllable point sources of pollution that are virtually unregulated. The Water Board needs a complete inventory of dry weather urban runoff pump stations and to require BMP development and implementation for these discharges now. In the long term, Water Board staff should prioritize the sites from the regional inventory for dry weather diversion to sanitary sewers and encourage engineering feasibility studies to accomplish the diversions in a cost-effective manner. Structural treatment alternatives should be explored for specific pump stations.

To address the short term goals identified in the previous paragraph, Provision C.2.g. requires the Permittees to implement the following measures to reduce pollutant discharges to stormwater runoff from Permittee-owned or operated pump stations:

1. Establish an inventory of pump stations within each Permittee's jurisdiction, including pump station locations and key characteristics, and inspection frequencies.
2. Inspect these pump stations regularly, but at least two times a year, to address water quality problems, including trash control and sediment and debris removal.
3. Inspect trash racks and oil absorbent booms at pump stations in the first business day after ¼-inch within 24 hours and larger storm events. Remove debris in trash racks and replace oil absorbent booms, as needed.

C.3. New Development and Redevelopment

Legal Authority

Broad Legal Authority: CWA Sections 402(p)(3)(B)(ii-iii), CWA Section 402(a), CWC Section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F), 40 CFR 131.12, and 40 CFR 122.26(d)(2)(iv).

Fact Sheet Findings in Support of Provision C.3

C.3-1 Urban development begins at the land use planning phase; therefore, this phase provides the greatest cost-effective opportunities to protect water quality in new development and redevelopment. When a Permittee incorporates policies and principles designed to safeguard water resources into its General Plan and development project approval processes, it has taken a critical step toward the preservation and most of local water resources for current and future generations.

C.3-2 Provision C.3. is based on the assumption that Permittees are responsible for considering potential stormwater impacts when making planning and land use decisions. The goal of Provision C.3. is for Permittees to use their planning authority to include appropriate source control, site design, and stormwater treatment measures to address both soluble and insoluble stormwater runoff pollutant discharges and prevent increases in runoff flow from new development and redevelopment projects. This goal is to be accomplished primarily through the implementation of low impact development (LID) techniques. Neither Provision C.3. nor any of its requirements are intended to restrict or control local land use decision-making authority.

C.3-3 Certain control measures implemented or required by Permittees for urban runoff management might create a habitat for vectors (e.g., mosquitoes and rodents) if not properly designed or maintained. Close collaboration and cooperative efforts among Permittees, local vector control agencies, Water Board staff, and the State Department of Public Health are necessary to minimize potential nuisances and public health impacts resulting from vector breeding.

C.3-4 The Water Board recognized in its Policy on the Use of Constructed Wetlands for Urban Runoff Pollution Control (Resolution No. 94-102) that urban runoff treatment wetlands that are constructed and operated pursuant to that Resolution and are constructed outside a creek or other receiving water are stormwater treatment systems and, as such, are not waters of the United States subject to regulation pursuant to Sections 401 or 404 of the federal Clean Water Act. Water Board staff is working with the California Department of Fish and Game (CDFG) and U.S. Fish and Wildlife Service (USFWS) to identify how maintenance for stormwater treatment controls required under permits such as this Permit can be appropriately streamlined, given CDFG and USFWS requirements, and particularly those that address special status species. This Permit requires Permittees to ensure that constructed wetlands installed by

Regulated Projects are consistent with Resolution No. 94-102 and the operation and maintenance requirements contained therein.

C.3-5 The Permit requires Permittees to ensure that onsite, joint, and offsite stormwater treatment systems and HM controls installed by Regulated Projects are properly operated and maintained for the life of the projects. In cases where the responsible parties for the treatment systems or HM controls have worked diligently and in good faith with the appropriate state and federal agencies to obtain approvals necessary to complete maintenance activities for the treatment systems or HM controls, but these approvals are not granted, the Permittees shall be considered by the Water Board to be in compliance with Provision C.3.h.iii. of the Permit.

Specific Provision C.3 Requirements

Provision C.3.a. (New Development and Redevelopment Performance Standard Implementation) sets forth essentially the same legal authority, development review and permitting, environmental review, training, and outreach requirements that are contained in the existing permits. This Provision also requires the Permittees to encourage all projects not regulated by Provision C.3., but that are subject to the Permittees' planning, building, development , or other comparable review, to include adequate source control and site design measures, which include discharge of appropriate wastestreams to the sanitary sewer, subject to the local sanitary agency's authority and standards. Lastly, this Provision requires Permittees to revise, as necessary, their respective General Plans to integrate water quality and watershed protection with water supply, flood control, habitat protection, groundwater recharge, and other sustainable development principles and policies. Adequate implementation time has been allocated to Provisions C.3.a.i.(6)-(8), which may be considered new requirements.

Provision C.3.b. (Regulated Projects) establishes the different categories of new development and redevelopment projects that Permittees must regulate under Provision C.3. These categories are defined on the basis of the land use and the amount of impervious surface created and/or replaced by the project because all impervious surfaces contribute pollutants to stormwater runoff and certain land uses contribute more pollutants. Impervious surfaces can neither absorb water nor remove pollutants as the natural, vegetated soil they replaced can. Also, urban development creates new pollution by bringing higher levels of car emissions that are aerially deposited, car maintenance wastes, pesticides, household hazardous wastes, pet wastes, and trash, which can all be washed into the storm sewer.

Provision C.3.b.ii.(1) lists Special Land Use Categories that are already regulated under the current stormwater permits. Therefore, extra time is not necessary for the Permittees to comply with this Provision, so the Permit Effective Date is set as the required implementation date. For these categories, the impervious surface threshold (for classification as a Regulated Project subject to Provision C.3.) will be decreased from the current 10,000 ft^2 to 5,000 ft^2 beginning two years from the Permit Effective Date. These special land use categories represent land use types

that may contribute more polluted stormwater runoff. Regulation of these special land use categories at the lower impervious threshold of 5,000 square feet is considered the maximum extent practicable and is consistent with State Board guidance, court decisions, and other Water Boards' requirements. In the precedential decision contained in its WQ Order No. 2000-11, the State Board upheld the SUSMP (Standard Urban Stormwater Mitigation Plan) requirements issued by the Los Angeles Water Board's Executive Officer on March 8, 2000, and found that they constitute MEP for addressing pollutant discharges resulting from Priority Development Projects. The State Board re-affirmed that SUSMP requirements constitute MEP in their Order WQ 2001-15. Provision C.3.b.ii.(1)'s requirement that development projects in the identified Special Land Use Categories adding and/or replacing > 5000 ft^2 of impervious surface shall install hydraulically sized stormwater treatment systems is consistent with the SUSMP provisions upheld by the State Board. Provision C.3.b.ii.(1) is also consistent with Order No. R9-2007-0001 issued by the San Diego Water Board, Order Nos. R4-2009-0057 and R4-2001-182 issued by the Los Angeles Water Board, Order No. 2009-0030 issued by the Santa Ana Water Board, and State Board's Order WQ 2003-0005 issued to Phase II MS4s. Under Order WQ 2003-0005, Phase II MS4s with populations of 50,000 and greater must apply the lower 5000 ft^2 threshold for requiring stormwater treatment systems by April 2008. The MRP allows two years from the MRP effective date for the Permittees to implement the lower 5000 ft^2 threshold for the special land use categories, three and half years later than the Phase II MS4s. However, the additional time is necessary for the Permittees to revise ordinances and permitting procedures and conduct training and outreach.

This Provision contains a "grandfathering" clause, which allows any private development project in a special land use category for which a planning application has been deemed complete by a Permittee on or before the Permit effective date to be exempted from the lower 5,000 square feet impervious surface threshold (for classification as a Regulated Project) as long as the project applicant is diligently pursuing the project. Diligent pursuance may be demonstrated by the project applicant's submittal of supplemental information to the original application, plans, or other documents required for any necessary approvals of the project by the Permittee. If during the time period between the Permit effective date and the required implementation date of December 1, 2011, for the 5000 square feet threshold, the project applicant has not taken any action to obtain the necessary approvals from the Permittee, the project will then be subject to the lower 5000 square feet impervious surface threshold specified in Provision C.3.b.ii.(1).

For any private development project in a special land use category with an application deemed complete after the Permit effective date, the lower 5000 square feet impervious surface threshold (for classification as a Regulated Project) shall not apply if the project applicant has received final discretionary approval for the project before the required implementation date of December 1, 2011 for the 5000 square feet threshold.

Previous stormwater permits also used the "application deemed complete" date as the date for determining Provision C.3. applicability, but it was tied to the implementation date for new requirements and not the Permit effective date. The Permit Streamlining Act requires that a public agency must determine whether a permit application is complete within 30 days after receipt; if the public agency does not make this determination, the application is automatically deemed complete after 30 days. Data we have collected from audits and file reviews as well as reported to us by Permittees confirm that in many cases, the development permit applications have indeed not been reviewed for compliance with Provision C.3. requirements and yet have automatically been deemed complete 30 days after the application submittal date. As soon as the Permit is adopted, there is certainty about any new requirements that must be implemented during the Permit term. Therefore, the "application deemed complete" date should only be used to exempt projects that have reached this milestone by the Permit effective date and not years later at a new requirement's implementation date. However, this change requires consideration of those applications that are deemed complete after the Permit effective date. Because there is certainty with regard to new requirements as soon as the Permit becomes effective, we have tied the "final discretionary approval" date to a new requirement's implementation date for determining whether to exempt the projects with applications deemed complete after the Permit effective date. After a project receives "final discretionary approval" it would be too late in the permitting process to implement new requirements, particularly since this type of approval requires actions by city councils or boards of supervisors. Therefore, the "grandfathering" language is a hybrid that makes use of both the "application deemed complete" date and the "final discretionary approval" date, two known and recognized milestones in development planning.

As for private projects, public projects should be far enough along in the design and approval process to warrant being grandfathered and essentially exempted from complying with the lower 5000 ft^2 threshold when it becomes effective. Previous stormwater permits grandfathered projects that only had funds committed by the new threshold's effective date, which was too early because projects can be held for years before design can begin, well after funding commitments have been made. Conversely, application of the grandfathering exemption to projects that have construction scheduled to begin by the threshold effective date (or 2 years after the MRP effective date) may be too late in the permitting process to implement new threshold requirements, particularly since this type of approval requires actions by city councils or boards of supervisors. Therefore, the Permit provides the grandfathering exemption for projects that have construction set to begin within 1 year of the threshold effective date (or 3 years after the MRP effective date).

Provisions C.3.b.ii.(2)-(3) describe land use categories that are already regulated under the current stormwater permits; therefore, extra time is not necessary for the Permittees to comply with these Provisions and the implementation date is the Permit effective date. Because the Vallejo Permittees do not have post-

construction requirements in their current stormwater permit, the Permit allows an extra year for them to comply with these Provisions.

Provision C.3.b.ii.(4) applies to road projects adding and/or replacing 10,000 ft^2 of impervious surface, which include the construction of new roads and sidewalks and bicycle lanes built as part of the new roads; widening of existing roads with additional traffic lanes; and construction of impervious trails that are greater than 10 feet wide or are creekside (within 50 feet of the top of bank). Although widening existing roads with bike lanes and sidewalks increases impervious surface and therefore increases stormwater pollutants because of aerial deposition, they have been excluded from this Provision because we recognize the greater benefit that bike lanes and sidewalks provide by encouraging less use of automobiles. Likewise, this Provision also contains specific exclusions for: sidewalks built as part of a new road and built to direct stormwater runoff to adjacent vegetated areas; bike lanes built as part of a new road but not hydraulically connected to the new road and built to direct stormwater runoff to adjacent vegetated areas; impervious trails built to direct stormwater runoff to adjacent vegetated areas, or other non-erodible permeable areas, preferably away from creeks or towards the outboard side of levees; and sidewalks, bike lanes, or trails constructed with permeable surfaces.

In the case of road widening projects where additional lanes of traffic are added, the 50% rule also applies. That is, the addition of traffic lanes resulting in an alteration of more than 50 percent of the impervious surface of an existing street or road that was not subject to Provision C.3, the entire project, consisting of all existing, new, and/or replaced impervious surfaces, must be included in the treatment system design (i.e., stormwater treatment systems must be designed and sized to treat stormwater runoff from the entire street or road that had additional traffic lanes added).

Where the addition of traffic lanes results in an alteration of less than 50 percent of the impervious surface of an existing street or road that was not subject to Provision C.3, only the new and/or replaced impervious surface of the project must be included in the treatment system design (i.e., stormwater treatment systems must be designed and sized to treat stormwater runoff from only the new traffic lanes). However, if the stormwater runoff from the existing traffic lanes and the added traffic lanes cannot be separated, any onsite treatment system must be designed and sized to treat stormwater runoff from the entire street or road. If an offsite treatment system is installed or in-lieu fees paid in accordance with Provision C.3.e., the offsite treatment system or in-lieu fees must address only the stormwater runoff from the added traffic lanes.

Because road widening and trail projects belong to a newly added category of Regulated Projects, adequate implementation time has been included as well as "grandfathering" language. (See discussion under Provision C.3.b.ii.(1).)

Provision C.3.b.iii. requires that the Permittees cumulatively complete 10 pilot "green street" projects within the Permit term. This Provision was originally intended to require stormwater treatment for road rehabilitation projects on

arterial roads that added and/or replaced > 10,000 ft^2 of impervious surface. We acknowledge the logistical difficulties in retrofitting roads with stormwater treatment systems as well as the funding challenges facing municipalities in the Bay Area. However, we are aware that some cities have or will have funding for "green street" retrofit projects that will provide water quality benefits as well as meet broader community goals such as fostering unique and attractive streetscapes that protect and enhance neighborhood livability, serving to enhance pedestrian and bike access, and encouraging the planting of landscapes and vegetation that contribute to reductions in global warming. Therefore, instead of requiring post-construction treatment for all road rehabilitation of arterial streets, this Provision requires the completion of 10 pilot "green street" projects by the Permittees within the Permit term. These projects must incorporate LID techniques for site design and treatment in accordance with Provision C.3.c. and provide stormwater treatment pursuant to Provision C.3.d. and must be representative of the three different types of streets: arterial, collector, and local. To ensure equity and an even distribution of projects, at least two pilot projects must be located in each of the following counties: Alameda, Contra Costa, San Mateo, and Santa Clara. Parking lot projects are acceptable as pilot projects as long as both parking lot and street runoff is addressed. Because these are pilot projects, we have not specified a minimum or maximum size requirement and the details of which cities will have these projects are to be determined by the Permittees.

Provision C.3.c (Low Impact Development (LID)) recognizes LID as a cost-effective, beneficial, holistic, integrated stormwater management strategy[69]. The goal of LID is to reduce runoff and mimic a site's predevelopment hydrology by minimizing disturbed areas and impervious cover and then infiltrating, storing, detaining, evapotranspiring, and/or biotreating stormwater runoff close to its source. LID employs principles such as preserving and recreating natural landscape features and minimizing imperviousness to create functional and appealing site drainage that treat stormwater as a resource, rather than a waste product. Practices used to adhere to these LID principles include measures such as preserving undeveloped open space, rain barrels and cisterns, green roofs, permeable pavement, and biotreatment through rain gardens, bioretention units, bioswales, and planter/tree boxes.

This Provision sets forth a three-pronged approach to LID with source control, site design, and stormwater treatment requirements. The concepts and techniques for incorporating LID into development projects, particularly for site design, have been extensively discussed in BASMAA's Start at the Source manual (1999) and its companion document, Using Site Design Techniques to Meet Development Standards for Stormwater Quality (May 2003), as well as in various other LID reference documents.

Provision C.3.c.i.(1) lists source control measures that must be included in all Regulated Projects as well as some that are applicable only to certain types of

[69] USEPA, *Reducing Stormwater Costs through Low Impact Development (LID) Strategies and Practices* (Publication Number EPA 841-F-07-006, December 2007) http://www.epa.gov/owow/nps/lid/costs07)

businesses and facilities. These measures are recognized nationwide as basic, effective techniques to minimize the introduction of pollutants into stormwater runoff. The current stormwater permits also list these methods; however, they are encouraged rather than required. By requiring these source control measures, this Provision sets a consistent, achievable standard for all Regulated Projects and allows the Board to more systematically and fairly measure permit compliance. This Provision retains enough flexibility such that Regulated Projects are not forced to include measures inappropriate, or impracticable, to their projects. This Provision does not preclude Permittees from requiring additional measures that may be applicable and appropriate.

Provision C.3.c.i.(2)(a) lists site design elements that must be implemented at all Regulated Projects. These design elements are basic, effective techniques to minimize pollutant concentrations in stormwater runoff as well as the volume and frequency of discharge of the runoff. On the basis of the Board staff's review of the Permittees' Annual Reports and CWA section 401 certification projects, these measures are already being done at many projects. One design element requires all Regulated Projects to include at least one site design measure from a list of six which includes recycling of roof runoff, directing runoff into vegetated areas, and installation of permeable surfaces instead of traditional paving. All these measures serve to reduce the amount of runoff and its associated pollutants being discharged from the Regulated Project.

Provision C.3.c.i.(2)(b) requires each Regulated Project to treat 100% of the Provision C.3.d. runoff with LID treatment measures onsite or with LID treatment measures at a joint stormwater treatment facility. LID treatment measures are harvesting and re-use, infiltration, evapotranspiration, or biotreatment. A properly engineered and maintained biotreatment system may be considered only if it is infeasible to implement harvesting and re-use, infiltration, or evapotranspiration at a project site. Infeasibility may result from conditions including the following:

- Locations where seasonal high groundwater would be within 10 feet of the base of the LID treatment measure.
- Locations within 100 feet of a groundwater well used for drinking water.
- Development sites where pollutant mobilization in the soil or groundwater is a documented concern.
- Locations with potential geotechnical hazards.
- Smart growth and infill or redevelopment sites where the density and/or nature of the project would create significant difficulty for compliance with the onsite volume retention requirement.
- Locations with tight clay soils that significantly limit the infiltration of stormwater.

This Provision recognizes the benefits of harvesting and reuse, infiltration and evapotranspiration and establishes these methods at the top of the LID treatment hierarchy. This Provision also acknowledges the challenges, both institutional and technical, to providing these LID methods at all Regulated Projects. There

are certainly situations where biotreatment is a valid LID treatment measure and this Provision allows Permittees the flexibility to make this determination so that Regulated Projects are not forced to include measures inappropriate or impracticable to the project sites. However, Permittees are required to submit a report within 18 months of the Permit effective date and prior to the required implementation date on the criteria and procedures that Permittees will employ to determine when harvesting and re-use, infiltration, or evapotranspiration is feasible and infeasible at a Regulated Project site. The Permittees are also required to submit a second report two years after implementing the new LID requirements that documents their experience with determining the feasibility and infeasibility of harvesting and reuse, infiltration, and evapotranspiration at Regulated Project sites. This report shall also discuss barriers, including institutional and technical site specific constraints, to implementation of infiltration, harvesting and reuse, or evapotranspiration and proposed strategies for removing these identified barriers.

This Provision specifies minimum specifications for biotreatment systems to be considered as LID treatment and requires Permittees to develop soil media specifications. Because this Provision recognizes green roofs as biotreatment systems for roof runoff, it also requires Permittees to develop minimum specifications for green roofs.

Provision C.3.c.ii. establishes the implementation date for the new LID requirements of Provision C.3.c.i. to be two years after the Permit effective date. Grandfathering language consistent with Provision C.3.b.ii.(1) has been included in this Provision to exempt private development projects (that are far along in their permitting and approval process) and public projects (that are far along in their funding and design) from the requirements of Provision C.3.c.i.

Provision C.3.d (Numeric Sizing Criteria for Stormwater Treatment Systems) lists the hydraulic sizing design criteria that the stormwater treatment systems installed for Regulated Projects must meet. The volume and flow hydraulic design criteria are the same as those required in the current stormwater permits. These criteria ensure that stormwater treatment systems will be designed to treat the optimum amount of relatively smaller-sized runoff-generating storms each year. That is, the treatment systems will be sized to treat the majority of rainfall events generating polluted runoff but will not have to be sized to treat the few very large annual storms as well. For many projects, such large treatment systems become infeasible to incorporate into the projects. Provision C.3.d. also adds a new combined flow and volume hydraulic design criteria to accommodate those situations where a combination approach is deemed most efficient.

Provision C.3.d.iv. defines infiltration devices and establishes limits on the use of stormwater treatment systems that function primarily as infiltration devices The intent of the Provision is to ensure that the use of infiltration devices, where feasible and safe from the standpoint of structural integrity, must also not cause or contribute to the degradation of groundwater quality at the project sites. This Provision requires infiltration devices to be located a minimum of 10 feet

(measured from the base) above the seasonal high groundwater mark and a minimum of 100 feet horizontally away from any known water supply wells, septic systems, and underground storage tanks with hazardous materials, and other measures to ensure that any potential threat to the beneficial uses of ground water is appropriately evaluated and avoided.

Provision C.3.e (Alternative or In-Lieu Compliance with Provision C.3.c.) recognizes that not all Regulated Projects may be able to install LID treatment systems onsite because of site conditions, such as existing underground utilities, right-of-way constraints, and limited space.

Provision C.3.e.i. In keeping with LID concepts and strategies, we expect new development projects to provide LID treatment onsite and to allocate the appropriate space for these systems because they do not have the site limitations of redevelopment and infill site development in the urban core. However, this Provision does not restrict alternative compliance to redevelopment and infill projects because the Permittees have requested flexibility to make the determination of when alternative compliance is appropriate. Based on the lack of offsite alternative compliance projects installed during the current stormwater permit terms, it seems that having to find offsite projects is already a great disincentive. Therefore, this Provision allows any Regulated Project to provide LID treatment for up to 100% of the required Provision C.3.d. stormwater runoff at an offsite location or pay equivalent in-lieu fees to provide LID treatment at a Regional Project, as long as the offsite and Regional Projects are in the same watershed as the Regulated Project.

For the LID Treatment at an Offsite Location alternative compliance option, offsite projects must be constructed by the end of construction of the Regulated Project. We acknowledge that a longer timeframe may be required to complete construction of offsite projects because of administrative, legal, and/or construction delays. Therefore, up to 3 years additional time is allowed for construction of the offsite project; however, to offset the untreated stormwater runoff from the Regulated Project that occurs while construction of the offsite project is taking place, the offsite project must be sized to treat an additional 10% of the calculated equivalent quantity of both stormwater runoff and pollutant loading for each year that it is delayed. Permittees have commented that for projects that are delayed, requiring treatment of an additional (10-30)% of stormwater runoff may result in costly re-design of treatment systems. In those cases, payment of in-lieu fees to provide the additional treatment at a Regional Project is a viable alternative.

For the Payment of In-Lieu Fees to a Regional Project alternative compliance option, the Regional Project must be completed within 3 years after the end of construction of the Regulated Project. We acknowledge that a longer timeframe may be required to complete construction of Regional Projects because they may involve a variety of public agencies and stakeholder groups and a longer planning and construction phase. Therefore, the timeline for completion of a Regional Project may be extended, up to 5 years after the completion of the Regulated

Project, with prior Water Board Executive Officer approval. Executive Officer approval will be granted contingent upon a demonstration of good faith efforts to implement the Regional Project, such as having funds encumbered and applying for the appropriate regulatory permits.

Provision C.3.e.ii. (Special Projects) When considered at the watershed scale, certain types of smart growth, high density, and transit-oriented development can either reduce existing impervious surfaces, or create less "accessory" impervious areas and auto-related pollutant impacts. Incentive LID treatment reduction credits approved by the Water Board may be applied to these types of Special Projects.

This Provision requires that by December 1, 2010, Permittees shall submit a proposal to the Water Board containing the following information:

- Identification of the types of projects proposed for consideration of LID treatment reduction credits and an estimate of the number and cumulative area of potential projects during the remaining term of this permit for each type of project..
- Identification of institutional barriers and/or technical site specific constraints to providing 100% LID treatment onsite that justify the allowance for non-LID treatment measures onsite.
- Specific criteria for each type of Special Project proposed, including size, location, minimum densities, minimum floor area ratios, or other appropriate limitations.
- Identification of specific water quality and environmental benefits provided by these types of projects that justify the allowance for non-LID treatment measures onsite.
- Proposed LID treatment reduction credit for each type of Special Project and justification for the proposed credits. The justification shall include identification and an estimate of the specific water quality benefit provided by each type of Special Project proposed for LID treatment reduction credit.
- Proposed total treatment reduction credit for Special Projects that may be characterized by more than one category and justification for the proposed total credit.

Provision C.3.f (Alternative Certification of Adherence to Numeric Sizing Criteria for Stormwater Treatment Systems) allows Permittees to have a third-party review and certify a Regulated Project's compliance with the hydraulic design criteria in Provision C.3.d. Some municipalities do not have the staffing resources to perform these technical reviews. The third-party review option addresses this staffing issue. This Provision requires Permittees to make a reasonable effort to ensure that the third-party reviewer has no conflict of interest with regard to the Regulated Project being reviewed. That is, any consultant, contractor or their employees hired to design and/or construct a stormwater treatment system for a Regulated Project can not also be the certifying third party.

Provision C.3.g. (Hydromodification Management, HM) requires that certain new development projects manage increases in stormwater runoff flow and volume so that post-project runoff shall not exceed estimated pre-project runoff rates and durations, where such increased flow and/or volume is likely to cause increased potential for erosion of creek beds and banks, silt pollutant generation, or other adverse impacts on beneficial uses due to increased erosive force.

Background for Provision C.3.g. Based on Hydrograph Modification Management Plans prepared by the Permittees, the Water Board adopted hydromodification management (HM) requirements for Alameda Permittees (March 2007), Contra Costa Permittees (July 2006), Fairfield-Suisun Permittees (March 2007), Santa Clara Permittees (July 2005), and San Mateo Permittees (March 2007). Within Provision C.3.g, the major common elements of these HM requirements are restated. Attachments B–F contain the HM requirements as adopted by the Water Board, with some changes to correct minor errors and to provide consistency across the Region. Attachment F contains updated HM requirements for the Santa Clara Permittees. Permittees will continue to implement their adopted HM requirements; where Provision C.3.g. contradicts the Attachments, Provision C.3.g. shall be implemented. Additional requirements and/or options contained in the Attachments, above and beyond what is specified in Provision C.3.g., remain unaltered by Provision C.3.g. In all cases, the HM Standard must be achieved.

The Alameda, Santa Clara and San Mateo Permittees have adapted the Western Washington Hydrology Model[70] for modeling runoff from development project sites, sizing flow duration control structures, and determining overall compliance of such structures and other HM control structures (HM controls) in controlling runoff from the project sites to manage hydromodification impacts as described in the Permit. The adapted model is called the Bay Area Hydrology Model (BAHM).[71] All Permittees may use the BAHM if its inputs reflect actual conditions at the project site and surrounding area, including receiving water conditions. As Permittees gain experience in designing and operating HM controls, the Programs may make adjustments in the BAHM to improve its function in controlling excess runoff and managing hydromodification impacts. Notification of all such changes shall be given to the Water Board and the public through such mechanism as an electronic email list.

The Contra Costa Permittees have developed sizing charts for the design of flow duration control devices. Attachment C requires the Contra Costa Permittees to conduct a monitoring program to verify the performance of these devices. Following the satisfactory conclusion of this monitoring program, or conclusion of other study(s) that demonstrate devices built according to Attachment C specifications satisfactorily protect streams from excess erosive flows, the Water Board intends to allow the use of the Contra Costa sizing charts, when tailored to local conditions, by other stormwater programs and Permittees. Similarly, any other control strategies or criteria approved by the Board would be made available across the Region. This would be accomplished

[70] http://www.ecy.wa.gov/programs/wq/stormwater/wwhm_training/wwhm/wwhm_v2/instructions_v2.html
[71] See www.bayareahydrologymodel.org , Resources.

through Permit amendment or in another appropriate manner following appropriate public notification and process.

The Fairfield-Suisun Permittees have developed design procedures, criteria, and sizing factors for infiltration basins and bioretention units. These procedures, criteria, and sizing factors have been through the public review process already, and are not subject to public review at this time. Water Board staff's technical review found that the procedures, criteria, and sizing factors are acceptable in all ways except one: they are based on an allowable low flow rate that exceeds the criteria established in this Permit. Fairfield-Suisun Permittees may choose to change the design criteria and sizing factors to the allowable criterion of 20 percent of the 2-year peak flow, and seek Executive Officer approval of the modified sizing factors. This criterion, which is greater than the criterion allowed for other Bay Area Stormwater Countywide Programs, is based on data collected from Laurel and Ledgewood Creeks and technical analyses of these site-specific data. Following approval by the Executive Officer and notification of the public through such mechanism as an email list-serve, project proponents in the Fairfield-Suisun area may meet the HM Standard by using the Fairfield-Suisun Permittees' design procedures, criteria, and sizing factors for infiltration basins and/or bioretention units.

Attachments B and F allow the Alameda and Santa Clara Permittees to prepare a user guide to be used for evaluating individual receiving waterbodies using detailed methods to assess channel stability and watercourse critical flow. This user guide would reiterate and collate established stream stability assessment methods that have been presented in these Programs' HMPs, which have undergone Water Board staff review and been made available for public review. After the Programs have collated their methods into user guide format, received approval of the user guide from the Executive Officer, and informed the public through such process as an email list-serve, the user guide may be used to guide preparation of technical reports for: implementing the HM standard using in-stream or regional measures; determining whether certain projects are discharging to a watercourse that is less susceptible (from point of discharge to the Bay) to hydromodification (e.g., would have a lower potential for erosion than set forth in this Permit); and/or determining if a watercourse has a higher critical flow and project(s) discharging to it are eligible for an alternative Qcp[72] for the purpose of designing on-site or regional measures to control flows draining to these channels (i.e., the actual threshold of erosion-causing critical flow is higher than 10 percent of the 2-year pre-project flow).

The Water Board recognizes that the collective knowledge of management of erosive flows and durations from new and redevelopment is evolving, and that the topics listed below are appropriate topics for further study. Such a study may be initiated by Water Board staff, or the Executive Officer may request that all Bay Region municipal stormwater Permittees jointly conduct investigations as appropriate. Any future

[72] Qcp is the allowable low flow discharge from a flow control structure on a project site. It is a means of apportioning the critical flow in a stream to individual projects that discharge to that stream, such that cumulative discharges do not exceed the critical flow in the stream.

proposed changes to the Permittees' HM provisions may reflect improved understanding of these issues:

- Potential incremental costs, and benefits to waterways, from controlling a range of flows up to the 35- or 50-year peak flow, versus controlling up to the 10-year peak flow, as required by this Permit;
- The allowable low-flow (also called Qcp and currently specified as 10–20 percent of the pre-project 2-year runoff from the site) from HM controls;
- The effectiveness of self-retaining areas for management of post-project flows and durations; and/or
- The appropriate basis for determining cost-based impracticability of treating stormwater runoff and controlling excess runoff flows and durations.

Within Attachments B-F, this Permit allows for alternative HM compliance when on-site and regional HM controls and in-stream measures are not practicable. Alternative HM compliance includes contributing to or providing mitigation at other new or existing development projects that are not otherwise required by this Permit or other regulatory requirements to have HM controls. The Permit provides flexibility in the type, location, and timing of the mitigation measure. The Board recognizes that handling mitigation funds may be difficult for some municipalities because of administrative and legal constraints. The Board intends to allow flexibility for project proponents and/or Permittees to develop new or retrofit stormwater treatment or HM control projects within a broad area and reasonable time frame. Toward the end of the Permit term, the Board will review alternative projects and determine whether the impracticability criteria and options should be broadened or made narrower.

Provision C.3.g.i. defines the subset of Regulated Projects that must install hydromodification controls (HM controls). This subset, called HM Projects, are Regulated Projects that create and/or replace one acre or more of impervious surface and are not specifically excluded within Attachments B–F of the Permit. Within these Attachments, the Permittees have identified areas where the potential for single-project and/or cumulative development impacts to creeks is minimal, and thus HM controls are not required. Such areas include creeks that are concrete-lined or significantly hardened (e.g., with concrete) from point of discharge and continuously downstream to their outfall into San Francisco Bay; underground storm drains discharging to the Bay; and construction of infill projects in highly developed watersheds.[73]

Provision C.3.g.ii. establishes the standard hydromodification controls must meet. The HM Standard is based largely on the standards proposed by Permittees in their Hydrograph Modification Management Plans. The method for calculating post-project runoff in regards to HM controls is standard practice in Washington State and is equally applicable in California.

[73] Within the context of Provision C.3.g., "highly developed watersheds; refer to catchments or sub-catchments that are 65 percent impervious or more.

Provision C.3.g.iii. identifies and defines three methods of hydromodification management.

Provision C.3.g.iv. sets forth the information on hydromodification management to be submitted in the Permittees' Annual Reports.

Provision C.3.g.v. requires the Vallejo Permittees to develop a Hydromodification Management Plan (HMP), because the Vallejo Permittees have not been required to address HM impacts to date. Vallejo's current permit was issued by USEPA and does not require the Vallejo Permittees' to develop an HMP. The Vallejo Permittees may choose to adopt and implement one or a combination of the approaches in Attachments B–F.

Provision C.3.h (Operation and Maintenance of Stormwater Treatment Systems) establishes permitting requirements to ensure that proper maintenance for the life of the project is provided for all onsite, joint, and offsite stormwater treatment systems installed. The Provision requires Permittees to inspect at least 20% of these systems annually, at least 20% of all vault-based systems annually, and every treatment system at least once every 5 years. Requiring inspection of at least 20% of the total number of treatment and HM controls serves to prevent failed or improperly maintained systems from going undetected until the 5th year. We have the additional requirement to inspect at least 20% of all installed vault-based systems because they require more frequent maintenance and problems arise when the appropriate maintenance schedules are not followed. Also, problems with vault systems may not be as readily identified by the projects' regular maintenance crews. Neither of these inspection frequency requirements interferes with the Permittees' current ability to prioritize their inspections based on factors such as types of maintenance agreements, owner or contractor maintained systems, maintenance history, etc. This Provision also requires the development of a database or equivalent tabular format to track the operation and maintenance inspections and any necessary enforcement actions against Regulated Projects and submittal of Reporting Table C.3.h., which requires standard information that should be collected on each operation and maintenance inspection. We require this type of information to evaluate a Permittee's inspection and enforcement program and to determine compliance with the Permit. Summary data alone without facility-specific inspection findings does not allow us to determine whether Permittees are doing timely follow-up inspections at problematic facilities and taking appropriate enforcement actions.

Stormwater treatment system maintenance has been identified as a critical aspect of addressing urban runoff from Regulated Projects by many prominent urban runoff authorities, including CASQA, which states that "long-term performance of BMPs [stormwater treatment systems] hinges on ongoing and proper maintenance."[74] USEPA also stresses the importance of BMP [stormwater treatment system] maintenance,

[74] California Stormwater Quality Association, 2003. Stormwater Best Management Practice Handbook – New Development and Redevelopment, p. 6-1.

stating that "Lack of maintenance often limits the effectiveness of stormwater structure controls such as detention/retention basins and infiltration devices."[75]

Provision C.3.i. (Required Site Design Measures for Small Project and Detached Single-Family Homes Projects) introduces new requirements on single-family home projects that create and/or replace 2500 square feet or more of impervious surface and small development projects that create and/or replace > 2500 ft^2 to <10,000 ft^2 impervious surface (collectively over the entire project). A detached single-family home project is defined as the building of one single new house or the addition and/or replacement of impervious surface to one single existing house, which is not part of a larger plan of development.

This Provision requires these projects to select and implement one or more stormwater site design measures from a list of six. These site design measures are basic methods to reduce the amount and flowrate of stormwater runoff from projects and provide some pollutant removal treatment of the runoff that does leave the projects. Under this Provision, only projects that already require approvals and/or permits under the Permittees' current planning, building, or other comparable authority are regulated. Hence this Provision does not require Permittees to regulate small development and single-family home projects that would not otherwise be regulated under the Permittees' current ordinances or authorities. Water Board staff recognizes that the stormwater runoff pollutant and volume contribution from each one of these projects may be small; however, the cumulative impacts could be significant. This Provision serves to address some of these cumulative impacts in a simple way that will not be too administratively burdensome on the Permittees. To assist these small development and single-family home projects, this Provision also requires the Permittees to develop standard specifications for lot-scale site design and treatment measures.

[75] USEPA. 1992. *Guidance Manual for the Preparation of Part II of the NPDES Permit Application for Discharges from Municipal Separate Storm Sewer Systems*. EPA 833-B-92-002.

C.4. Industrial and Commercial Site Controls

Legal Authority

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, D, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(C) requires, "A description of a program to monitor and control pollutants in storm water discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system."

Specific Provision C.4. Requirements

Provision C.4.a (Legal Authority for Effective Site Management)

Federal NPDES regulation 40 CFR 122.26(d)(2)(i)(A) provides that each Permittee must demonstrate that it can control "through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from site of industrial activity." This section also describes requirements for effective follow-up and resolution of actual or threatened discharges of either polluted non-stormwater or polluted stormwater runoff from industrial/commercial sites.

Provision C.4.b (Inspection Plan)

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(C)(1) provides that Permittees must "identify priorities and procedures for inspections and establishing and implementing control measures for such discharges." The Permit requires Permittees to implement an industrial and commercial site controls program to reduce pollutants in runoff from all industrial and commercial sites/sources.

Provision C.4.b.ii.(1) (Commercial and Industrial Source Identification)

Federal NPDES regulation 40 CFR 122.26(d)(2)(ii) provides that Permittees "Provide an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by each facility which may discharge, to the municipal separate storm sewer, storm water associated with industrial activity."

USEPA requires "measures to reduce pollutants in storm water discharges to municipal separate storm sewers from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of

1986 (SARA)."[76] USEPA "also requires the municipal storm sewer Permittees to describe a program to address industrial dischargers that are covered under the municipal storm sewer permit."[77] To more closely follow USEPA's guidance, this Permit also includes operating and closed landfills, and hazardous waste treatment, disposal, storage and recovery facilities.

The Permit requires Permittees to identify various industrial sites and sources subject to the General Industrial Permit or other individual NPDES permit. USEPA supports the municipalities regulating industrial sites and sources that are already covered by an NPDES permit:

> Municipal operators of large and medium municipal separate storm sewer systems are responsible for obtaining system-wide or area permits for their system's discharges. These permits are expected to require that controls be placed on storm water discharges associated with industrial activity which discharge through the municipal system. It is anticipated that general or individual permits covering industrial storm water discharges to these municipal separate storm sewer systems will require industries to comply with the terms of the permit issued to the municipality, as well as other terms specific to the Permittee.[78]

And:

> Although today's rule will require industrial discharges through municipal storm sewers to be covered by separate permit, USEPA still believes that municipal operators of large and medium municipal systems have an important role in source identification and the development of pollutant controls for industries that discharge storm water through municipal separate storm sewer systems is appropriate. Under the CWA, large and medium municipalities are responsible for reducing pollutants in discharges from municipal separate storm sewers to the maximum extent practicable. Because storm water from industrial facilities may be a major contributor of pollutants to municipal separate storm sewer systems, municipalities are obligated to develop controls for storm water discharges associated with industrial activity through their system in their storm water management program.[79]

Provision C.4.b.ii.(5) (Inspection Frequency)
USEPA guidance[80] says, "management programs should address minimum frequency for routine inspections." The USEPA Fact Sheet—Visual Inspection[81] says, "To be effective, inspections must be carried out routinely."

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[76] *Federal Register*. Vol. 55, No. 222, Friday, November 16, 1990. Rules and Regulations. P. 48056.
[77] Ibid.
[78] *Federal Register*. Vol. 55, No. 222, Friday, November 16, 1990, Rules and Regulations. P. 48006.
[79] Ibid. P. 48000
[80] USEPA. 1992. Guidance 833-8-92-002, section 6.3.3.4 "Inspection and Monitoring".
[81] USEPA. 1999. 832-F-99-046, "Storm Water Management Fact Sheet – Visual Inspection".

Provision C.4.c (Enforcement Response Plan) requires the Permittees to establish an Enforcement Response Plan (ERP) that ensures timely response to actual or potential stormwater pollution problems discovered in the course of industrial/commercial stormwater inspections. The ERP also provides for progressive enforcement of violations of ordinances and/or other legal authorities. The ERP will provide guidance on the appropriate use of the various enforcement tools, such as verbal and written notices of violation, when to issue a citations, and require cleanup requirements, cost recovery, and pursue administrative or and criminal penalties. All violations must be corrected in a timely manner with the goal of correcting them before the next rain event but no longer than 10 business days after the violations are discovered.

Provision C.4.d (Staff Training) section of the Permit requires the Permittees to conduct annual staff trainings for inspectors. Trainings are necessary to keep inspectors current on enforcement policies and current MEP BMPs for industrial and commercial stormwater runoff discharges.

C.5. Illicit Discharge Detection and Elimination

Legal Authority

The following legal authority applies to section C.5:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, D, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulations 40 CFR 122.26(d)(1)(iii)(B)(1) provides that the Permittee shall include in their application, "the location of known municipal storm sewer system outfalls discharging to waters of the United States."

Federal NPDES regulations 40 CFR 122.26(d)(1)(iii)(B)(5) provides that the Permittee shall include in their application, "The location of major structural controls for storm water discharge (retention basins, detention basins, major infiltration devices, etc."

Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B) provides that the Permittee shall have, "adequate legal authority to prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer."

Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B) provides that the Permittee shall, "Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer."

Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(B) requires, "shall be based on a description of a program, including a schedule, to detect and remove (or require the discharger to the municipal storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(1) requires, "a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal storm sewer system."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(2) 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."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(3) requires, "procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water."

Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(B)(4) requires, "a description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer."

Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(B)(5) requires, "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."

Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(B)(7) requires, "a description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary."

Fact Sheet Findings in Support of Provision C.5

C.5-1 Illicit and inadvertent connections to MS4 systems result in the discharge of waste and chemical pollutants to receiving waters. Every Permittee must have the ability to discover, track, and clean up stormwater pollution discharges by illicit connections and other illegal discharges to the MS4 system.

C.5-2 Illicit discharges to the storm drain system can be detected in several ways. Permittee staff can detect discharges during their course of other tasks, and business owners and other aware citizens can observe and report suspect discharges. The Permittee must have a direct means for these reports of suspected polluted discharges to receive adequate documentation, tracking, and response through problem resolution.

Specific Provision C.5 Requirements

Provision C.5.a (Legal Authority) requires each Permittee have adequate legal authority to effectuate cessation, abatement, and/or clean up of non-exempt non-stormwater discharges per Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B). Illicit and inadvertent connections to MS4 systems result in the discharge of waste and chemical pollutants to receiving waters. Every Permittee must have the ability to discover, track, and clean up stormwater pollution discharges by illicit connections and other illegal discharges to the MS4 system.

Provision C.5.b (ERP) requires Permittees to establish an ERP that ensures timely response to illicit discharges and connections to the MS4 and provides progressive enforcement of violations of ordinances and/or other legal authorities. This section also requires Permittees to establish criteria for triggering follow-up investigations. Additional language has been added to this section to clarify the minimum level of effort and time frames for follow-up investigations when violations are discovered. Timely investigation and follow up when action levels are exceeded is necessary to identify sources of illicit discharges, especially since many of the discharges are transitory. The requirements for all violations to be corrected before the next rain event but no longer than 10 business days when there is evidence of illegal non-stormwater discharge, dumping, or illicit connections having reached municipal storm drains is necessary to ensure timely response by Permittees.

Provision C.5.c (Spill and Dumping Response, Complaint Response, and Frequency of Inspections) Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(B)(4) requires, "a description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer." This Provision of the Permit requires the Permittees to establish and maintain a central point of contact including phone numbers for spill and complaint reporting. Reports from the public are an essential tool in discovering and investigating illicit discharge activities. Maintaining contact points will help ensure that there is effective reporting to assist with the discovery of prohibited discharges. Each Permittee must have a direct means for these reports of suspected polluted discharges to receive adequate documentation, tracking, and response through problem resolution.

Provision C.5.d (Control of Mobile Sources) requires each Permittee to develop and implement a program to reduce the discharge of pollutants from mobile businesses. The purpose of this section is to establish oversight and control of pollutants associated with mobile business sources to the MEP.

Provision C.5.e (Collection System Screening and MS4 Map Availability) Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(3) requires, "procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water." This Provision of the Permit requires the Permittees to conduct follow up investigations and inspect portions of the MS4 for illicit discharges and connections. Permittees shall implement a program to actively seek and eliminate illicit connections and discharges during their routine collection system screening and during screening surveys at strategic check points. Additional wording has been added to this section to clarify and ensure that all appropriate municipal personnel are used in the program to observe and report these illicit discharges and connections when they are working the system.

This section also requires the Permittees to develop or obtain a map of their entire MS4 system and drainages within their jurisdictions and provide the map to the public for review. As part of the permit application process federal NPDES regulations 40 CFR 122.26(d)(1)(iii)(B)(1) and 40 CFR 122.26(d)(1)(iii)(B)(5) specify that dischargers must identify the location of any major outfall that discharges to waters of the United States, as well as the location of major structural controls for stormwater discharges. A major outfall is any outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent (discharge from a single conveyance other than a circular pipe which is associated with a drainage area of more than 50 acres) or; for areas zoned for industrial activities, any pipe with a diameter of 12 inches or more or its equivalent (discharge from other than a circular pipe associated with a drainage area of 2 acres or more). The permitting agency may not process a permit until the applicant has fully complied with the application requirements.[82] If, at the time of application, the information is unavailable, the Permit must require implementation of a program to meet the application requirements.[83] The requirement in this Provision of the Permit for

[82] 40 CFR 124.3 (applicable to state programs, see section 123.25).
[83] 40 CFR. 122.26(d)(1)(iv)(E).

Permittees to prepare maps of the MS4 system will help ensure that Permittees comply with federal NPDES permit application requirements that are more than 10 years old.

Provision C.5.f (Tracking and Case Follow-up) section of the Permit requires Permittees to track and monitor follow-up for all incidents and discharges reported to the complaint/spill response system that could pose a threat to water quality. This requirement is included so Permittees can demonstrate compliance with the ERP requirements of Section C.5.b and to ensure that illicit discharge reports receive adequate follow up through to resolution.

C.6. Construction Site Control

Legal Authority

The following legal authority applies to section C.6:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, D, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(D) requires, "A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(D)(1) requires, "A description of procedures for site planning which incorporate consideration of potential water quality impacts."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(D)(2) requires, "A description of requirements for nonstructural and structural best management practices."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(D)(3) requires, "A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(D)(4) requires, "A description of appropriate educational and training measures for construction site operators."

Federal NPDES regulation 40 CFR 122.26(d)(2)(i)(A) provides that each Permittee must demonstrate that it can control, "through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from site of industrial activity."

Federal NPDES regulation 40 CFR 122.26(b)(14) provides that, "The following categories of facilities are considered to be engaging in 'industrial activity' for the purposes of this subsection: [...] (x) Construction activity including cleaning, grading and excavation activities [...]."

Federal NPDES regulation 40 CFR 122.44(d)(1)(i) requires NPDES permits to include limitations to, "control all pollutants or pollutant parameters (either conventional, non-conventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute

to an excursion above any State water quality standard, including State narrative criteria for water quality."

Fact Sheet Findings in Support of Provision C.6.

C.6-1 Vegetation clearing, mass grading, lot leveling, and excavation expose soil to erosion processes and increase the potential for sediment mobilization, runoff and deposition in receiving waters. Construction sites without adequate BMP implementation result in sediment runoff rates that greatly exceed natural erosion rates of undisturbed lands, causing siltation and impairment of receiving waters.

C.6-2 Excess sediment can cloud the water, reducing the amount of sunlight reaching aquatic plants, clog fish gills, smother aquatic habitat and spawning areas, and impede navigation in our waterways. Sediment also transports other pollutants such as nutrients, metals, and oils and grease. Permittees are on-site at local construction sites for grading and building permit inspections, and also have in many cases dedicated construction stormwater inspectors with training in verifying that effective BMPs are in place and maintained. Permittees also have effective tools available to achieve compliance with adequate erosion control, such as *stop work* orders and citations.

C.6-3 Mobilized sediment from construction sites can flow into receiving waters. According to the 2004 National Water Quality Inventory[84], States and Tribes report that sediment is one of the top 10 causes of impairment of assessed rivers and streams, next to pathogens, habitat alteration, organic enrichment or oxygen depletion, nutrients, metals, etc.. Sediment impairs 35,177 river and stream miles (14% of the impaired river and stream miles). Sources of sedimentation include agriculture, urban runoff, construction, and forestry. Sediment runoff rates from construction sites, however, are typically 10 to 20 times greater than those of agricultural lands, and 1,000 to 2,000 times greater than those of forest lands. During a short period of time, construction sites can contribute more sediment to streams than can be deposited naturally during several decades.[85]

Specific Provision C.6 Requirements

Provision C.6.a. Legal Authority for Effective Site Management. Federal NPDES regulation 40 CFR 122.26(d)(2)(i)(A) requires that each Permittee demonstrate that it can control "through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from site of industrial activity." This section of the Permit requires each Permittee to have the

[84] http://www.epa.gov/owow/305b/2004report/2004_305Breport.pdf

[85] USEPA. December 2005. *Stormwater Phase II Final Rule Fact Sheet Series – Construction Site Runoff Control Minimum Control Measure*. EPA 833-F-00-008. Fact Sheet 2.6.

authority to require year-round, seasonally and phase appropriate effective erosion control, run-on and runoff control, sediment control, active treatment systems, good site management, and non stormwater management through all phases of site grading, building, and finishing of lots. All Permittees should already have this authority. Permittees shall certify adequacy of their respective legal authority in the 2010 Annual Report.

Inspectors should have the authority to take immediate enforcement actions when appropriate. Immediate enforcement will get the construction site's owner/operator to quickly implement corrections to violations, thereby minimizing and preventing threats to water quality. When inspectors are unable to take immediate enforcement actions, the threat to water quality continues until an enforcement incentive is issued to correct the violation. In its Phase II Compliance Assistance Guidance, USEPA says that, "Inspections give the MS4 operator an opportunity to provide additional guidance and education, issue warnings, or assess penalties."[86] To issue warnings and assess penalties during inspections, inspectors must have the legal authority to conduct enforcement.

Provision C.6.b. Enforcement Response Plan (ERP). This section requires each Permittee to develop and implement an escalating enforcement process that serves as reference for inspection staff to take consistent actions to achieve timely and effective corrective compliance from all public and private construction site owners/operators. Under this section, each Permittee develops its own unique ERP tailored for the specific jurisdiction; but all ERPs must make it a goal to correct all violations before the next rain event but no longer than 10 business days after the violations are discovered. In a few cases, such as slope inaccessibility, it may require longer than 10 days before crews can safely access the eroded area. The Permittees' tracking data need to provide a rationale for the longer compliance timeframe.

Water Board staff has noted deficiencies in the Permittees' enforcement procedures and implementation during inspections. The most common issues found were that enforcement was not firm and appropriate to correct the violation, and that repeat violations did not result in escalated enforcement procedures. USEPA supports enforcement of ordinances and permits at construction sites stating, "Effective inspection and enforcement requires [...] penalties to deter infractions and intervention by the municipal authority to correct violations."[87] In addition, USEPA expects permits issued to municipalities to address "weak inspection and enforcement."[88] For these reasons, the enforcement requirements in this section have been established, while providing sufficient flexibility for each Permittee's unique stormwater program.

Provision C.6.c. Best Management Practices Categories. This section requires all Permittees to require all construction sites to have year-round seasonally appropriate effective Best Management Practices (BMPs) in the following six categories: (1)

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[86] USEPA. 2000. 833-R-00-002, Storm Water Phase II Compliance Assistance Guide, P.4-31
[87] USEPA. 1992. Guidance 833-8-92-002. Section 6.3.2.3.
[88] *Federal Register*. Vol. 55, No. 222, Friday, November 16, 1990. Rules and Regulations. p. 48058.

erosion control, (2) run-on and runoff control, (3) sediment control, (4) active treatment systems, (5) good site management, and (6) non stormwater management. These BMP categories are listed in the State General NPDES Permit for Stormwater Discharges Associated with Construction Activities (General Construction Permit). The Water Board staff decided it was too prescriptive and inappropriate to require a specific set of BMPs that are to be applicable to all sites. Every site is different with regards to terrain, soil type, soil disturbance, and proximity to a waterbody. The General Construction Permit recognizes these different factors and requires site specific BMPs through the Storm Water Pollution Prevention Plan that addresses the six specified BMP categories. This Permit allows Permittees the flexibility to determine if the BMPs for each construction site are effective and appropriate. This Permit also allows the Permittees and the project proponents the necessary flexibility to make immediate decisions on appropriate, cutting-edge technology to prevent the discharge of construction pollutants into stormdrains, waterways, and right-of-ways. Appropriate BMPs for the different site conditions can be found in different handbooks and manuals. Therefore, this Permit is consistent with the General Construction Permit in its requirements for BMPs in the six specified categories.

Vegetation clearing, mass grading, lot leveling, and excavation expose soil to erosion processes and increase the potential for sediment mobilization, runoff and deposition in receiving waters. Construction sites without adequate BMP implementation result in sediment runoff rates that greatly exceed natural erosion rates of undisturbed lands, causing siltation and impairment of receiving waters. This can even occur in conjunction with unexpected rain events during the so-called *dry-season*. Although rare, significant rains can occur in the San Francisco Bay Region during the dry season. Therefore, Permittees should ensure that construction sites have materials on hand for rapid rain response during the dry season.

Normally, stormwater restrictions on grading should be implemented during the wet season from October 1st through April 30th. Section C.6.c.ii.(1).d of the Permit requires, "project proponents to minimize grading during the wet season and scheduling of grading with seasonal dry weather periods to the extent feasible." If grading does occur during the wet season, Permittees shall require project proponents to (1) implement additional BMPs as necessary, (2) keep supplies available for rapid response to storm events, and (3) minimize wet-season, exposed, and graded areas to the absolute minimum necessary.

Slope stabilization is necessary on all active and inactive slopes during rain events regardless of the season, except in areas implementing advanced treatment. Slope stabilization is also required on inactive slopes throughout the rainy season. These requirements are needed because unstabilized slopes at construction sites are significant sources of erosion and sediment discharges during rainstorms. "Steep slopes are the most highly erodible surface of a construction site, and require special attention."[89] USEPA emphasizes the importance of slope stabilization when it states, "slope length

[89] Schueler, T., and H. Holland. 2000. *Muddy Water In—Muddy Water Out*? The Practice of Watershed Protection. p. 6.

and steepness are key influences on both the volume and velocity of surface runoff. Long slopes deliver more runoff to the base of slopes and steep slopes increase runoff velocity; both conditions enhance the potential for erosion to occur."[90] In lieu of vegetation preservation or replanting, soil stabilization is the most effective measure in preventing erosion on slopes. Research has shown that effective soil stabilization can reduce sediment discharge concentrations up to six times, as compared to soils without stabilization.[91] Slope stabilization at construction sites for erosion control is already the consensus among the regulatory community and is found throughout construction BMP manuals and permits. For these reasons, Permittees must ensure that slope stabilization is implemented on sites, as appropriate.

It is also necessary that Permittees ensure that construction sites are revegetated as early as feasible. Implementation of revegetation reduces the threat of polluted stormwater discharges from construction sites. Construction sites should permanently stabilize disturbed soils with vegetation at the conclusion of each phase of construction.[92] A survey of grading and clearing programs found one-third of the programs without a time limit for permanent revegetation, "thereby increasing the chances for soil erosion to occur."[93] USEPA states "the establishment and maintenance of vegetation are the most important factors to minimizing erosion during development."[94]

To ensure the MEP standard and water quality standards are met, advanced treatment systems may be necessary at some construction sites. In requiring the implementation of advanced treatment for sediment at construction sites, Permittees should consider the site's threat to water quality. In evaluating the threat to water quality, the following factors shall be considered: (1) soil erosion potential; (2) the site's slopes; (3) project size and type; (4) sensitivity of receiving waterbodies; (5) proximity to receiving waterbodies; (6) non-stormwater discharges; and (7) any other relevant factors. Advanced treatment is a treatment system that employs chemical coagulation, chemical flocculation, or electro coagulation in order to reduce turbidity caused by fine suspended sediment.[95] Advanced treatment consists of a three part treatment train of coagulation, sedimentation, and polishing filtration. Advanced treatment has been effectively implemented extensively in the other states and in the Central Valley Region of California.[96] In addition, Water Board's inspectors have observed advanced treatment being effectively implemented at both large sites greater than 100 acres, and at small, 5-acre sites. Advanced treatment is often necessary for Permittees to ensure that discharges from construction sites are not causing or contributing to a violation of water quality standards.

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[90] USEPA. 1990. *Sediment and Erosion Control: An Inventory of Current Practices*. p. II-1.
[91] Schueler, T., and H. Holland. 2000. "Muddy Water In—Muddy Water Out?" *The Practice of Watershed Protection*. p. 5.
[92] Ibid.
[93] Ibid. p. 11.
[94] USEPA. 1990. *Sediment and Erosion Control: An Inventory of Current Practices*. p. II-1.
[95] SWCRB. September 2, 2009. *NPDES General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities – Order No. 2009-0009-DWQ.*
[96] SWRCB. 2004. Conference on Advanced Treatment at Construction Sites.

Provision C.6.d. Plan Approval Process. This section of the Permit requires the Permittees to review project proponents' stormwater management plans for compliance with local regulations, policies, and procedures. USEPA states that it is often easier and more effective to incorporate stormwater quality controls during the site plan review process or earlier.[97] In the Phase I stormwater regulations, USEPA states that a primary control technique is good site planning.[98] USEPA goes on to say that the most efficient controls result when a comprehensive stormwater management system is in place.[99] To determine if a construction site is in compliance with construction and grading ordinances and permits, USEPA states that the "MS4 operator should review the site plans submitted by the construction site operator before ground is broken."[100] Site plan review aids in compliance and enforcement efforts since it alerts the "MS4 operator early in the process to the planned use or non-use of proper BMPs and provides a way to track new construction activities."[101]

Provision C.6.e. (Inspections) The Water Board allows flexibility on the exact legal authority language, ERP, and BMPs required on a site. This section of the Permit pulls together the accountability of the whole Provision through regular inspections, consistent enforcement, and meaningful tracking. These three elements will help ensure that effective construction pollutant controls are in place in order to minimize construction polluted runoff to the stormdrain and waterbodies.

Currently, Annual Reports show that some Permittees provide no information on its construction inspection and enforcement programs; some Permittees only provide information on pre rainy season inspections; another group of Permittees conduct inspections through December and provide just the date each site was inspected; yet another group of Permittees provides a very brief summary of their respective overall inspection program; and there is a small group of Permittees who report meaningful inspection and enforcement information. Inspections of construction sites by Water Board staff have noted deficiencies in stormwater inspections and enforcement. Therefore, this section clearly identifies the level of effort necessary by all Permittees to minimize construction pollutant runoff into stormdrains and ultimately, waterbodies.

This section requires monthly inspections during the wet season of all construction sites disturbing one or more acre of land and at all high priority sites as determined by the Permittee or the Water Board as significant threats to water quality. Inspections shall focus on the adequacy and effectiveness of the site specific BMPs implemented for the six BMP categories. Permittees shall implement its ERP and require timely corrections of all actual and potential problems observed. All violations must be corrected in a timely manner with the goal of correcting them before the next rain event but no longer

[97] USEPA. 2000. *Storm Water Phase II Compliance Assistance Guide*. EPA 833-R-00-002. Section 6.3.2.1.
[98] *Federal Register*. Vol. 55, No. 222, Friday, November 16, 1990. Rules and Regulations. p. 48034.
[99] Ibid.
[100] USEPA. 2000. *Storm Water Phase II Compliance Assistance Guide*. EPA 833-R-00-002. Section 4.6.2.4, pp. 4–30.
[101] Ibid. pp. 4–31.

than 10 business days after the violations are discovered. All inspections shall be recorded on a written or electronic inspection form, and also tracked in an electronic database or tabular format. The tracked information provides meaningful data for evaluating compliance. An example tabular format is included as Table 6 – Construction Inspection Data. Submittal of this Table is not required in each Annual Report but encouraged. Each Permittee will need to use the information in the electronic database or tabular format to compile its Annual Reports. The Executive Officer may require that the tracked information be submitted electronically or in a tabular format. When required, Permittees shall submit that data within 10-working days of the requirement. The recommended submittal format is in Table 6 – Construction Inspection Data.

Provision C.6.f. Staff Training. This section of the Permit requires Permittees to conduct annual staff trainings for municipal staff. These trainings have been found to be extremely effective means to educate inspectors and to inform them of any changes to local ordinances and state laws. Trainings provide valuable opportunity for Permittees to network and share strategies used for effective enforcement and management of erosion control practices.

Table 6 – Construction Inspection Data

Facility/Site Inspected	Inspection Date	Weather During Inspection	Inches of Rain Since Last Inspection	Enforcement Response Level	Problem(s) Observed							Specific Problem(s)	Resolution			Comments/ Rationale for Longer Compliance Time
					Erosion Control	Run-on and Runoff Control	Sediment Control	Active Treatment System	Good Site Management	Non Stormwater Management	Illicit Discharge		Problems Fixed	Need More Time	Escalate Enforcement	
Panoramic Views	9/30/08	Dry	0	Written Notice			x					Driveway not stabilized				
Panoramic Views	10/15/08	Dry	0.5										x			50' of driveway rocked.
Panoramic Views	11/15/08	Rain	3	Stop Work	x		x				x	Uncovered graded lots eroding; Sediment entering a stormdrain that didn't have adequate protection.				
Panoramic Views	11/15/08	Drizzling	0.25										x			Lots blanketed. Storm drains pumped. Street cleaned.
Panoramic Views	12/1/08	Dry	4	Verbal Warning					x			Porta potty next to stormdrain.	x			Porta potty moved away from stormdrain.
Panoramic Views	1/15/08	Rain	3.25	Written Warning	x					x		Fiber rolls need maintenance; Tire wash water flowing into street				
Panoramic Views	1/25/09	Dry	0										x			Fiber rolls replaced.

Facility/Site Inspected	Inspection Date	Weather During Inspection	Inches of Rain Since Last Inspection	Enforcement Response Level	Problem(s) Observed							Specific Problem(s)	Resolution			Comments/ Rationale for Longer Compliance Time
					Erosion Control	Run-on and Runoff Control	Sediment Control	Active Treatment System	Good Site Management	Non Stormwater Management	Illicit Discharge		Problems Fixed	Need More Time	Escalate Enforcement	
Panoramic Views	2/28/09	Rain	2.4	Stop Work	x		x				x	Slope erosion control failed. Fiber rolls at the bottom of the hill flattened. Sediment laden discharge skipping protected stormdrains and entering unprotected stormdrains.				
Panoramic Views	2/28/09	Rain	0.1											x		Fiber rolls replaced. Silt fences added. More stormdrains protected. Streets cleaned. Slope too soggy to access.
Panoramic Views	3/15/09	Dry	1	Citation with Fine					x		x	Paint brush washing not designated	x			Street and storm drains cleaned. Slopes blanketed.
Panoramic Views	4/1/09	Dry	0.5	Citation with Fine							x	Concrete washout overflowed; Evidence of illicit discharge				
Panoramic Views	4/15/09	Dry	0										x			Concrete washout replaced; Storm drain and line cleaned.

C.7. Public Information and Outreach

Legal Authority

The following legal authority applies to section C.7:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A)(6) requires, "A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications, and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(5) requires , "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."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(6) requires, "A description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials."

Fact Sheet Finding in Support of Provision C.7.

C.7-1 An informed and knowledgeable community is critical to the success of a stormwater program since it helps ensure greater support for the program as the public gains a greater understanding of stormwater pollution issues.

C.7-2 An informed community also ensures greater compliance with the program as the public becomes aware of the personal responsibilities expected of them and others in the community, including the individual actions they can take to protect or improve the quality of area waters.

C.7-3 The public education programs should use a mix of appropriate local strategies to address the viewpoints and concerns of a variety of audiences and communities, including minority and disadvantaged communities, as well as children.[102]

[102] USEPA. 2000. Storm Water Phase II Compliance Assistance Guide. EPA 833-R-00-002.

C.7-4 Target audiences should include (1) government agencies and official to achieve better communication, consistency, collaboration, and coordination at the federal, state, and local levels and (2) K-12/Youth Groups.103

C.7-5 Citizen involvement events should make every effort to reach out and engage all economic and ethnic groups.[104]

Specific Provision C.7 Requirements

Provision C.7.a. Storm Drain Inlet Marking. Storm drain inlet marking is a long-established program of outreach to the public on the nature of the storm drain system, providing the information that the storm drain system connects directly to creeks and the Bay and does not receive treatment. Past public awareness surveys have demonstrated that this BMP has achieved significant impact in raising awareness in the general public and meets the MEP standard as a required action. Therefore, it is important to set a goal of ensuring that all municipally-maintained inlets are legible labeled with a no dumping message. If storm drain marking can be conducted as a volunteer activity, it has additional public involvement value.

Provision C.7.b. Advertising Campaigns. Use of various electronic and/or print media on trash/litter in waterways and pesticides. Advertising campaigns are long-established outreach management practices. Specifically, the Bay Area Management Agencies Association (BASMAA) already implements an advertising campaign on behalf of the Permittees. While the Permittees have been successful at reaching certain goals for its Public Information/Participation programs, it must continue to increase public awareness of specific stormwater issues. This Permit also requires a pre-campaign survey and a post-campaign survey. These two surveys will help identify and quantify the audiences' knowledge, trends, and attitudes and/or practices; and to measure the overall population awareness of the messages and behavioral changes.

Provision C.7.c. Media Relations. Public service media time is available and allows the Permittees to leverage expensive media purchases to achieve broader outreach goals.

Provision C.7.d. Stormwater Point of Contact. As the public has become more aware, citizens are more frequently calling their local jurisdictions to report spills and other polluting behavior impacting stormwater runoff and causing non-stormwater prohibited discharges. Permittees are required to have a centralized, easily accessible point of contact both for citizen reports and to coordinate reports of problems identified by Permittee staff, permitting follow-up and pollution cleanup or prevention. Often the follow-up, cleanup, and/or prevention provide the opportunity to educate the immediate neighborhood through established public outreach mechanisms such as distributing door hangers in the neighborhood describing the remedy for the problem discovered. Permittees already have existing published stormwater point of contacts.

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103 State Water Board. 1994. Urban Runoff Technical Advisory Committee Report and Recommendations. Nonpoint Source Management Program.

104 USEPA. 2000. Storm Water Phase II Compliance Assistance Guide. EPA 833-R-00-002.

Provision C.7.e. Public Outreach Events. Staffing tables or booths at fairs, street fairs or other community events are a long-established outreach mechanism employed by Permittees to reach large numbers of citizens with stormwater pollution prevention information in an efficient and convenient manner. These have been ongoing in the Region for several municipal stormwater permit cycles and are MEP outreach actions. Permittees shall continue with such outreach events utilizing appropriate outreach materials, such as printed materials, newsletter/journal articles, and videos. Permittees shall also utilize existing community outreach events such as the Bringing Back the Natives Garden Tour.

Provision C.7.f. Watershed Stewardship Collaborative Efforts. Watershed and Creek groups are comprised of active citizens, but they often need support from the local jurisdiction and certainly need to coordinate actions with Permittees such as flood districts and cities.

Provision C.7.g. Citizen Involvement Events. Citizen involvement and volunteer efforts both accomplish needed creek cleanups and restorations, and serve to raise awareness and provide outreach opportunities. These have been ongoing in the Region for several municipal stormwater permit cycles and are MEP outreach actions.

In previous municipal stormwater permits, Public Information/Participation encompassed both Citizen Involvement Events and Public Outreach Events. Citizen Involvement Events are important because they provide the community opportunities to actively practice being good stewards of our environment. Therefore, this Permit separates out the Public Outreach Events from the Citizen Involvement Events to ensure that citizens in all Bay Area communities are given the opportunity to be involved. In addition, the Permit allows Permittees to claim both Public Outreach and Citizen Involvement credits if the event contains significant elements of both. The combined specified number of events for Public Outreach and Citizen Involvement are very close to current performance standards and/or level of effort for respective Public Information/Participation Programs.

Provision C.7.h. School-Age Children Outreach. Outreach to school children has proven to be a particularly successful program with an enthusiastic audience who are efficient to reach. School children also take the message home to their parents, neighbors, and friends. In addition, they are the next generation of decision makers and consumers.

Provision C.7.i. Outreach to Municipal Officials. It is important for Permittee staff to periodically inform Municipal Officials of the permit requirements and also future planning and resource needs driven by the permit and stormwater regulations.

C.8. Water Quality Monitoring

Legal Authority

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii); CWC section 13377; Federal
NPDES regulations 40 CFR 122.26(d)(2)(iv)

Specific Legal Authority: Permittees must conduct a comprehensive monitoring program as required under Federal NPDES regulations 40 CFR 122.48, 40 CFR 122.44(i), 40 CFR 122.26.(d)(1)(iv)(D), and 40 CFR 122.26(d)(2)(ii)-(iv).

Fact Sheet Findings in Support of Provision C.8

C.8-1 In response to questions regarding the type of water quality-based effluent limitations that are most appropriate for NPDES stormwater permits, and because of the nature of stormwater discharges, USEPA established the following approach to stormwater monitoring:

> Each storm water permit should include a coordinated and cost-effective monitoring program to gather necessary information to determine the extent to which the permit provides for attainment of applicable water quality standards and to determine the appropriate conditions or limitations for subsequent permits. Such a monitoring program may include ambient monitoring, receiving water assessment, discharge monitoring (as needed), or a combination of monitoring procedures designed to gather necessary information.[105]

According to USEPA, the benefits of stormwater runoff monitoring include, but are not limited to, the following:

- Providing a means for evaluating the environmental risk of stormwater discharges by identifying types and amounts of pollutants present;
- Determining the relative potential for stormwater discharges to contribute to water quality impacts or water quality standard violations;
- Identifying potential sources of pollutants; and
- Eliminating or controlling identified sources more specifically through permit conditions.[106]

C.8-2 Provision C.8 requires Permittees to conduct water quality monitoring, including monitoring of receiving waters, in accordance with 40 CFR 122.44(i) and 122.48. One purpose of water quality monitoring is to demonstrate the effectiveness of the Permittees' stormwater management

[105] USEPA. 1996. Interim Permitting Approach for Water Quality-Based Effluent Limitations in Stormwater Permits. Sept. 1, 1996. http://www.epa.gov/npdes/pubs/swpol.pdf

[106] USEPA. 1992. NPDES Storm Water Sampling Guidance Document. EPA/833-B-92-001.

actions pursuant to this Permit and, accordingly, demonstrate compliance with the conditions of the Permit. Other water quality monitoring objectives under this Permit include:

- Assess the chemical, physical, and biological impacts of urban runoff on receiving waters;
- Characterize stormwater discharges;
- Assess compliance with Total Maximum Daily Loads (TMDLs) and Wasteload Allocations (WLAs) in impaired waterbodies;
- Assess progress toward reducing receiving water concentrations of impairing pollutants;
- Assess compliance with numeric and narrative water quality objectives and standards;
- Identify sources of pollutants;
- Assess stream channel function and condition, as related to urban stormwater discharges;
- Assess the overall health and evaluate long-term trends in receiving water quality; and
- Measure and improve the effectiveness of the Permittees' urban runoff control programs and the Permittees' implemented BMPs.

C.8-3 Monitoring programs are an essential element in the improvement of urban runoff management efforts. Data collected from monitoring programs can be assessed to determine the effectiveness of management programs and practices, which is vital for the success of the iterative approach, also called the "continuous improvement" approach, used to meet the MEP standard. When water quality data indicate that water quality standards or objectives are not being met, particular pollutants, sources, and drainage areas can be identified and targeted for urban runoff management efforts. The iterative process in Provision C.1, Water Quality Standards Exceedances, could potentially be triggered by monitoring results. Ultimately, the results of the monitoring program must be used to focus actions to reduce pollutant loadings to comply with applicable WLAs, and protect and enhance the beneficial uses of the receiving waters in the Permittees' jurisdictions and the San Francisco Bay.

C.8-4 Water quality monitoring requirements in previous permits were less detailed than the requirements in this Permit. Under previous permits, each program could design its own monitoring program, with few permit guidelines. A decision by the California Superior Court[107] regarding two of the programs' permits stated:

Federal law requires that all NPDES permits specify "[r]equired monitoring including type, intervals, and frequency sufficient to yield

[107] San Francisco Baykeeper vs. Regional Water Quality Control Board, San Francisco Bay Region, Consolidated Case No. 500527, filed Nov. 14, 2003.

data which are representative of the monitored activity." 40 C.F.R. § 122.48(b). Here, there is no monitoring program set forth in the Permit. Instead, an annual Monitoring Program Plan 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 be set forth including the types, intervals, and frequencies of the monitoring.

The water quality monitoring requirements in Provision C.8 comply with 40 CFR 122.44(i) and 122.48(b), and the Superior Court decision.

C.8-5 The Water Quality Monitoring Provision is intended to provide answers to five fundamental management questions, outlined below. Monitoring is intended to progress as iterative steps toward ensuring that the Permittees' can fully answer, through progressive monitoring actions, each of the five management questions:

- Are conditions in receiving waters protective, or likely to be protective, of beneficial uses?
- What is the extent and magnitude of the current or potential receiving water problems?
- What is the relative urban runoff contribution to the receiving water problem(s)?
- What are the sources of urban runoff that contribute to receiving water problem(s)?
- Are conditions in receiving waters getting better or worse?

C.8-6 On April 15, 1992, the Water Board adopted Resolution No. 92-043 directing the Executive Officer to implement the Regional Monitoring Program for San Francisco Bay. Subsequent to a public hearing and various meetings, Board staff requested major permit holders in the Region, under authority of CWC section 13267, to report on the water quality of the Estuary. These permit holders, including the Permittees, responded to this request by participating in a collaborative effort through the San Francisco Estuary Institute. This effort has come to be known as the San Francisco Estuary Regional Monitoring Program for Trace Substances (RMP). The RMP involves collection and analysis of data on pollutants and toxicity in water, sediment and biota of the Estuary. The Permittees are required to continue to report on the water quality of the Estuary, as presently required. Compliance with the requirement through participation in the RMP is considered to be adequate compliance.

C.8-7 The Surface Water Ambient Monitoring Program (SWAMP) is a statewide monitoring effort, administered by the State Water Board, designed to assess the conditions of surface waters throughout California. One purpose of SWAMP is to integrate existing water quality monitoring activities of the State Water Board and the Regional Water Quality Control Boards, and to coordinate with other monitoring programs. Provision C.8 contains a

framework, referred to as a regional monitoring collaborative, within which Permittees can elect to work cooperatively with SWAMP to maximize the value and utility of both the Permittees' and SWAMP's monitoring resources.

C.8-8 In 1998 BASMAA published *Support Document for Development of the Regional Stormwater Monitoring Strategy*,[108] a document describing a possible strategy for coordinating the monitoring activities of BASMAA member agencies. The document states:

> BASMAA's member agencies are connected not only by geography but also by an overlapping set of environmental issues and processes and a common regulatory structure. It is only natural that the evolution of their individual stormwater management programs has led toward increasing amounts of information sharing, cooperation, and coordination.
>
> This same concept is found in the optional provision for Permittees to form a regional monitoring collaborative. Such a group is meant to provide efficiencies and economies of scale by performing certain tasks (e.g., planning, contracting, data quality assurance, data management and analysis, and reporting) at the regional level. Further benefits are expected from closer cooperation between this group, the Regional Monitoring Program, and SWAMP.

C.8-9 This Permit includes monitoring requirements to verify compliance with adopted TMDL WLAs and to provide data needed for TMDL development and/or implementation. This Permit incorporates the TMDLs' WLAs adopted by the Water Board as required under CWA section 303(d).

C.8-10 SB1070 (California Legislative year 2005/2006) found that there is no single place where the public can go to get a look at the health of local waterbodies. SB1070 also states that all information available to agencies shall be made readily available to the public via the Internet. This Permit requires water quality data to be submitted in a specified format and uploaded to a centralized Internet site so that the public has ready access to the data.

Specific Provision C.8 Requirements

Each of the components of the monitoring provision is necessary to meet the objectives and answer the questions listed in the findings above. Justifications for each monitoring component are discussed below.

Provision C.8.a. Compliance Options. Provision C.8.a. provides Permittees options for obtaining monitoring data through various organizational structures, including use of data obtained by other parties. This is intended to

[108] EcoAnalysis, Inc. & Michael Drennan Assoc., Inc., *Support Document for Development of the Regional Stormwater Monitoring Strategy*, prepared for Bay Area Stormwater Management Agencies Association, March 2, 1998.

- Promote cost savings through economies of scale and elimination of redundant monitoring by various entities;
- Promote consistency in monitoring methods and data quality;
- Simplify reporting; and
- Make data and reports readily publicly available.

In the past, each Stormwater Countywide Program has conducted water quality monitoring on behalf of its member Permittees, and some data were collected by wider collaboratives, such as the Regional Monitoring Program. In this Permit, all the Stormwater Countywide Programs are encouraged to work collaboratively to conduct all or most of the required monitoring and reporting on a region-wide basis. For each monitoring component that is conducted collaboratively, one report would be prepared on behalf of all contributing Permittees; separate reports would not be required from each Program. Cost savings could result also from reduced contract and oversight hours, fewer quality assurance/quality control samples, shared sampling labor costs, and laboratory efficiencies.

Provision C.8.b. San Francisco Estuary Receiving Water Monitoring. The San Francisco Estuary is the ultimate receiving water for most of the urban runoff in this region. For this reason and because of the high value of its beneficial uses, Provision C.8.b requires focused monitoring on the Estuary to continue. Since the mid-1990s, Permittees have caused this monitoring to be conducted by contributing financially and with technical expertise, to the San Francisco Estuary Regional Monitoring Program for Trace Substances. Provision C.8.b requires such monitoring to continue.

Provisions C.8.c. & C.8.e.ii. Status Monitoring and Long-Term Monitoring. Status Monitoring and Long-Term Monitoring serve as surrogates to monitoring the discharge from all major outfalls, of which the Permittees have many. 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 causing or contributing to the problem. In short, Status and Long-Term Monitoring are needed to identify water quality problems and assess the health of streams; they are the first step in identifying sources of pollutants and an important component in evaluating the effectiveness of an urban runoff management program.

Provisions C.8.c.i. and C.8.e.iii. Parameters and Methods
Status & Long-Term parameters and methods reflect current accepted practices, based on the knowledge and experience of personnel responsible for water quality monitoring, including state and Regional SWAMP managers, Permittee representatives, and citizen monitors. Many Status and Long-Term Monitoring parameters are consistent with parameters the Permittees have been monitoring to date. The following parameters are new for some of the Permittees:

- Biological Assessment—to provide site-specific information about the health and diversity of freshwater benthic communities within a specific reach of a creek, using standard procedures developed and/or used by the State Water

Resources Control Board Surface Water Ambient Monitoring Program.[109] It consists of collecting samples of benthic communities and conducting a taxonomic identification to measure community abundance and diversity, which is then compared to a reference creek to assess benthic community health. This monitoring can also provide information on cumulative pollutant exposure/impacts because pollutant impacts to the benthic community accumulate and occur over time.

- Chlorine—to detect a release of potable water or other chlorinated water sources, which are toxic to aquatic life.
- Nutrients—recent monitoring data indicate nutrients, which can increase algal growth and decrease dissolved oxygen concentrations, are present in significant concentrations in Bay area creeks.
- Toxicity and Pollutants in Bedded Sediment—to determine the presence of, and identify, chemicals and compounds that bind to sediment in a creek bed and are toxic to aquatic life.
- Pathogen Indicators—to detect pathogens in waterbodies that could be sources of impairment to recreational uses at or downstream of the sampling location.
- Stream Survey (stream walk and mapping)—to assess the overall physical health of the stream and to gain information potentially useful in interpreting monitoring results.

In consideration of economic impacts to Permittees, the minimum number of Status & Long-Term samples ("Minimum # Sample Sites" columns in Tables 8.1 and 8.3) reflects the Programs' populations, not waterbody size. Permittees must select exact sample locations that will yield adequate information on the status of their waterbodies; in some cases, additional sampling above the minimum might be necessary.

Provisions C.8.c.ii. and C.8.e.iii. Frequency

Status Monitoring continues to be an annual requirement for the Permittees, except for two much smaller Permittees, Fairfield-Suisun and Vallejo. In considering costs, the frequency of Status Monitoring is established at twice per Permit term for Fairfield-Suisun, and once per Permit term for Vallejo. It is common for Permit terms to be extended through a lengthy Permit reissuance process. Thus, these frequencies are considered the minimum; costs are minimized while data necessary for successful stormwater management are obtained.

Long-Term Monitoring is required every second year (biennially), rather than annually, in order to balance data needs and Permittee costs. To further reduce costs, the Fairfield-Suisun and Vallejo Permittees have no Long-Term Monitoring requirements.

Provisions C.8.c.iii. and C.8.e.ii. Locations

Status Monitoring is to be conducted on a rotating-watershed basis, in similar fashion to the Statewide SWAMP. Provision C.8.c.iii. identifies the major waterbodies, and Permittees are to select which of these waterbodies will be sampled during the Permit

[109] Ode, P.R. 2007. Standard Operating Procedures for Collecting Macroinvertebrate Samples and Associated Physical and Chemical Data for Ambient Bioassessments in California, California State Water Resources Control Board Surface Water Ambient Monitoring Program (SWAMP), as subsequently revised.

term. The exact sample locations within each waterbody are critical in terms of determining the monitoring program's effectiveness. If correctly sited, the stations are expected to be very useful in answering the monitoring program's management questions and meeting its goals. For this reason, Provision C.8.c.iii. requires sample locations to be based on surrounding land use, likelihood of urban runoff impacts, existing data gaps, and similar considerations. This will help maximize the utility of the sample locations, while also providing the Permittees with adequate flexibility to ultimately choose practical Status Monitoring locations.

Long-Term Monitoring is to be conducted at fixed stations, which are intended to be lower reaches of urban creeks. This monitoring is intended to help assess progress toward reducing receiving water concentrations of impairing pollutants, among other purposes. Provision C.8.e.ii. establishes the waterbodies on which to locate fixed stations, and suggests that fixed stations be co-located with SWAMP fixed stations so that Permittees can use SWAMP data to fulfill some of their monitoring requirements. However, Permittees may select alternate locations based on their knowledge of such factors as site access and stream characteristics and provided that similar data types, data quality, and data quantity are collected.

Provision C.8.d. Monitoring Projects. Monitoring Projects are necessary to meet several water quality monitoring objectives under this Permit, including characterize stormwater discharges; identify sources of pollutants; identify new or emerging pollutants; assess stream channel function and condition; and measure and improve the effectiveness of Stormwater Countywide Programs and implemented BMPs. In consideration of economic impacts to Permittees, the number of Monitoring Projects required reflects the Permittees' populations.

Provision C.8.d.i. Stressor/Source Identification
Minimizing sources of pollutants that could impair water quality is a central purpose of urban runoff management programs. Monitoring which enables the Permittees to identify sources of water quality problems aids the Permittees in focusing their management efforts and improving their programs. In turn, the Permittees' programs can abate identified sources, which will improve the quality of urban runoff discharges and receiving waters. This monitoring is needed to address the management question, "What are the sources to urban runoff that contribute to receiving water problems?"

When Status or Long-Term Monitoring results indicate an exceedance of a water quality objective, toxicity threshold, or other "trigger", Permittees must identify the source of the problem and take steps to reduce any pollutants discharged from or through their municipal storm sewer systems. This requirement conforms to the process, outlined in Provision C.1., of complying with the Discharge Prohibition and Receiving Water Limitations. If multiple "triggers" are identified through monitoring, Permittees must focus on the highest priority problems; a cap on the total number of source identification projects conducted within the Permit term is provided to cap Permittees' potential costs.

Provision C.8.d.ii. BMP Effectiveness Investigation
U.S. EPA's stated approach to NPDES stormwater permitting uses BMPs in first-round permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards.[110] The purpose of this monitoring project is to investigate the effectiveness of one currently in-use BMP to determine how it might be improved. Permittees may choose the particular stormwater treatment or hydromodification control BMP to investigate. As with other monitoring requirements, Permittees may work collaboratively to conduct one investigation on a region-wide basis, or each stormwater countywide program may conduct an investigation.

Provision C.8.d.iii. Geomorphic Project
The physical integrity of a stream's bed, bank and riparian area is integral to the stream's capacity to withstand the impacts of discharged pollutants, including chemical pollutants, sediment, excess discharge volumes, increased discharge velocities, and increased temperatures. At present, various efforts are underway to improve geomorphic conditions in creeks, primarily through local watershed partnerships. In addition, local groups are undertaking *green stormwater projects* with the goal of minimizing the physical and chemical impacts of stormwater runoff on the receiving stream. Such efforts ultimately seek to improve the integrity of the waterbodies that receive urban stormwater runoff.

The purpose of the Geomorphic Project is to contribute to these ongoing efforts in each Stormwater Countywide Program area. Permittees may select the geomorphic project from three categories specified in the Permit.

C.8.e. Pollutants of Concern[111] Monitoring. Federal CWA section 303(d) TMDL requirements, as implemented under the CWC, require a monitoring plan designed to measure the effectiveness of the TMDL point and nonpoint source control measures and the progress the waterbody is making toward attaining water quality objectives. Such a plan necessarily includes collection of water quality data. Provision C.8.e. establishes a monitoring program to measure of the effectiveness of TMDL control measures in progressing toward WLAs. Locations, parameters, methods, protocols, and sampling frequencies for this monitoring are specified. A sediment delivery estimate/budget is also required to improve the Permittees' estimates of their loading estimates. In addition, a workplan is required for estimating loads and analyzing sources of emerging pollutants, which are likely to be present in urban runoff, in the next Permit term.

C.8.f. Citizen Monitoring and Participation. CWA section 101(e) and 40 CFR Part 25 broadly require public participation in all programs established pursuant to the CWA, to foster public awareness of environmental issues and decision-making processes. Provision C.8.f. is intended to do the following:

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[110] USEPA. 1996. *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Stormwater Permits*. Sept. 1, 1996. http://www.epa.gov/npdes/pubs/swpol.pdf

[111] See section C.9, C.11, C.12, and C.13 of this Fact Sheet for more information on Pollutants of Concern.

- Support current and future creek stewardship efforts by providing a framework for citizens and Permittees to share their collective knowledge of creek conditions; and
- Encourage Permittees to use and report data collected by creek groups and other third-parties when the data are of acceptable quality.

C.8.g. Reporting. CWC section 13267 provides authority for the Water Board to require technical water quality reports. Provision C.8.g. requires Permittees to submit electronic and comprehensive reports on their water quality monitoring activities 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 analyses of the data, including for the CWA section 303(d) listing process.

C.9. – C.14. Pollutants of Concern including Total Maximum Daily Loads

Provisions C.9 through C.14 pertain to pollutants of concern, including those for which TMDLs are being developed or implemented.

Legal Authority

The following legal authority applies to provisions C.9 through C.14:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.44(d)(1) requires municipal stormwater permits to include any requirements necessary to, "[a]chieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality."

Federal NPDES regulation 40 CFR 122.44(d)(1)(i) requires NPDES permits to include limitations to, "control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality."

Basin Plan Requirements: Section 4.8 of the Region's Water Quality Control Plan (Basin Plan) requires that stormwater permits include requirements to prevent or reduce discharges of pollutants that cause or contribute to violations of water quality objectives. In the first phase, the Water Board requires implementation of technically and economically feasible control measures to reduce pollutants in stormwater to the MEP. If this first phase does not result in attainment of water quality objectives, the Water Board will consider permit conditions that might require implementation of additional control measures. For example, the control measures required as a result of TMDLs may go beyond the measures required in the first phase of the program.

General Strategy for Sediment-Bound Pollutants (Mercury, PCBs, legacy pesticides, PBDEs)

The control measures for mercury are intended to implement the urban runoff requirements stemming from TMDLs for this pollutant. The control measures required for PCBs are intended to implement those that are consistent with control measures in the PCBs TMDL implementation plan that has been approved by the Water Board and is pending approval by the State Board, the Office of Administrative Law, and U.S. EPA. The urban runoff management requirements in the PCBs TMDL implementation plan call for permit-term requirements based on an assessment of controls to reduce

PCBs to the MEP, and that is the intended approach of the required provisions for all pollutants of concern. Many of the control actions addressing PCBs and mercury will result in reductions of a host of sediment-bound pollutants, including legacy pesticides, mercury, PBDEs, and PCBs. The strategy for these pollutants is to use PCBs control guide decisions concerning where to focus effort, but implementation of the control efforts would taken into account the benefits for controlling other pollutants of concern. Further, because many of the control strategies addressing these pollutants of concern are relatively untested, the Water Board will implement control measures in the following modes:

1. Full-scale implementation throughout the region.
2. Focused implementation in areas where benefits are most likely to accrue.
3. Pilot-testing in a few specific locations.
4. Other: This may refer to experimental control measures, Research and Development, desktop analysis, laboratory studies, and/or literature review.

The logic of such categorization is that, as actions are tested and confidence is gained regarding level of experience and confidence in the control measure's effectiveness, the control measure may be implemented with a greater scope. For example, an untested control measure for which the effectiveness is uncertain may be implemented as a pilot project in a few locations during this permit term. If benefits result, and the action is deemed effective, it will be implemented in subsequent permit terms in a focused fashion in more locations or perhaps fully implemented throughout the Region, depending upon the nature of the measure. On the other hand there may be some control measures in which there is sufficient confidence, on the basis of prior experience, that the control action should be implemented in all applicable locations and/or situations. By conducting actions in this way and gathering information about effectiveness and cost, we will advance our understanding and be able to perform an updated assessment of the suite of actions that will constitute MEP for the following permit term. In fact, in additional to implementing control measures, gathering the necessary information about control measure effectiveness is a vital part of what needs to be accomplished by Permittees during this permit term. In the next permit term, control measures will be implemented on the basis of what we learn in this term, and we will, thus, achieve iterative refinement and improvement through time.

Background on Specific Provisions: Provisions C.9 through C.14 contain both technology-based requirements to control pollutants to the MEP and water quality based requirements to prevent or reduce discharges of pollutants that may cause or contribute to violations of water quality standards. Provisions C.9 and C.11 of the Permit incorporate requirements for the two TMDLs that have been fully approved and are effective for the Permittees. These TMDLs are for pesticide-related toxicity in urban creeks and mercury in San Francisco Bay. Additionally, Provision C.12 contains measures that address PCBs. The Regional Water Board has adopted a PCB TMDL, but it is still pending approval by State Board, the Office of Administrative Law, and U.S. EPA. This PCBs TMDL includes requirements that would be consistent with this

provision. Finally, Provision C.13 contains measures to implement the copper site-specific objective in San Francisco Bay.

Where a TMDL has been approved, NPDES permits must contain effluent limitations and conditions consistent with the requirements and assumptions in the TMDL.[112] Effluent limitations are generally expressed in numerical form. However, USEPA recommends that for NPDES-regulated municipal and small construction stormwater discharges, effluent limitations should be expressed as BMPs or other similar requirements rather than as numeric effluent limitations.[113] Consistent with USEPA's recommendation, this section implements 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.

[112] 40 CFR 122.44(d)(1)(vii)(B)
[113] USEPA, 2002. Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs. P. 4.

C.9. Pesticides Toxicity Control

Fact Sheet Findings in Support of Provision C.9.

C.9-1 This Permit fulfills the Basin Plan amendments the Water Board adopted that establish a Water Quality Containment Strategy and TMDL for diazinon and pesticide-related toxicity for Bay Area urban creeks on November 16, 2005, and approved by the State Water Board on November 15, 2006. The Water Quality Containment Strategy requires urban runoff management agencies to minimize their own pesticide use, conduct outreach to others, and lead monitoring efforts. Control measures implemented by urban runoff management agencies and other entities (except construction and industrial sites) shall reduce pesticides in urban runoff to the MEP.

C.9-2 **(Allocations):** The TMDL is allocated to all urban runoff, including urban runoff associated with MS4s, Caltrans facilities, and industrial, construction, and institutional sites. The allocations are expressed in terms of toxic units and diazinon concentrations.

Specific Provision C.9 Requirements

C.9 provisions fully implement the TMDL for Urban Creeks Pesticide Toxicity. All C.9 provisions are stated explicitly in the implementation plan for this TMDL. Permittees are encouraged to coordinate activities with the Urban Pesticide Pollution Prevention Project, the Urban Pesticide Committee, and other agencies and organizations. The Urban Pesticide Pollution Prevention (UP3) Project has been funded by a grant from the State Water Board and its goal is to prevent water pollution from urban pesticide use. The Urban Pesticides Committee serves as an information clearinghouse and as a forum for coordinating pesticide TMDL implementation.

The UP3 Project provides resources and information on integrated pest management (IPM) and tools to municipalities to support their efforts to reduce municipal pesticide use and to conduct outreach to their communities on less-toxic methods of pest control. In addition, it provides technical assistance to municipalities to encourage the U.S. Environmental Protection Agency and the California Department of Pesticide Regulation to prevent water quality problems from pesticides. It also maintains and manages the Urban Pesticides Committee, a statewide network of agencies, nonprofits, industry, and other stakeholders that are working to solve water quality problems from pesticides.

Specific tools provided by the UP3 Project that relate to permit requirements include:

- Guidance and resources to help agencies create contracts and bid documents for structural pest management services that help them meet their integrated pest management goals
- IPM policies and ordinances
- IPM training workshops and materials

- Outreach program design resources
- Resources for evaluating effectiveness

Provisions C.9.a through C.9.d are designed to insure that integrated pest management (IPM) is adopted and implemented as policy by all municipalities. IPM is a pest control strategy that uses an array of complementary methods: natural predators and parasites, pest-resistant varieties, cultural practices, biological controls, various physical techniques, and pesticides as a last resort. If implemented properly, it is an approach that can significantly reduce or eliminate the use of pesticides. The implementation of IPM will be assured through training of municipal employees and the requirement that municipalities only hire IPM-certified contractors.

Provision C.9.e requires that municipalities (through cooperation or participation with BASMAA) track and participate in pesticide regulatory processes like the USEPA pesticide evaluation and registration activities related to surface water quality, and the California Department of Pesticide Regulation (DPR) pesticide evaluation activities. The goal of these efforts is to encourage both the state and federal pesticide regulatory agencies to accommodate water quality concerns within the pesticide regulation or registration process. Through these efforts, it could be possible to prevent pesticide-related water quality problems from happening by affecting which products are brought to market.

Provision C.9.g is critical to the success of municipal efforts to control pesticide-related toxicity. Future permits must be based on an updated assessment of what is working and what is not. With every provision comes the responsibility to assess its effectiveness and report on these findings through the permit. The particulars of assessment will depend on the nature of the control measure.

Provision C.9.h directs the municipalities to conduct outreach to consumers at point of purchase and provide targeted information on proper pesticide use and disposal, potential adverse impacts on water quality, and less toxic methods of pest prevention and control. One way in which this can be accomplished is for the Permittees to participate in and provide resources for the "Our Water, Our World" program (www.ourwaterourworld.org) or a functionally equivalent pesticide use reduction outreach program. The "Our Water, Our World" program has developed a Web site with many resources, "to assist consumers in managing home and garden pests in a way that helps protect" the environment.

C.10. Trash Load Reduction

Legal Authority

The following legal authority applies to section C.10:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, D, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(B) requires, "shall be based on a description of a program, including a schedule, to detect and remove (or require the discharger to the municipal storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(2) 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."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(3) requires, "a description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water."

Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(B)(4) requires, "a description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer."

San Francisco Bay Basin Plan, Chapter 4 – Implementation, Table 4-1 Prohibitions, Prohibition 7, which is consistent with the State Water Board's Enclosed Bays and Estuaries Policy, Resolution 95-84, 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. This prohibition was adopted by the Water Board in the 1975 Basin Plan, primarily to protect recreational uses such as boating.

Fact Sheet Findings in Support of Provision C.10

C.10-1 Trash and litter are a pervasive problem near and in creeks and in San Francisco Bay. Controlling trash is one of the priorities for this Permit reissuance not only because of the trash discharge prohibition, but also because trash and litter cause particularly major impacts on our enjoyment of creeks and the Bay. There are also significant impacts on aquatic life and habitat in those waters and eventually to the global ocean ecosystem, where plastic often floats, persists in the environment for hundreds of years, if not

forever, concentrates organic toxins, and is ingested by aquatic life. There are also physical impacts, as aquatic species can become entangled and ensnared and can ingest plastic that looks like prey, losing the ability to feed properly.

For the purposes of this provision, trash is defined to consist of litter and particles of litter. Man made litter is defined in California Government Code section 68055.1 (g): *Litter* means all improperly discarded waste material, including, but not limited to, convenience food, beverage, and other product packages or containers constructed of steel, aluminum, glass, paper, plastic, and other natural and synthetic materials, thrown or deposited on the lands and waters of the state, but not including the properly discarded waste of the primary processing of agriculture, mining, logging, sawmilling, or manufacturing.

C.10-2 Data collected by Water Board staff using the SWAMP Rapid Trash Assessment (RTA) Protocol,[114] over the 2003–2005 period,[115] suggest that the current approach to managing trash in waterbodies is not reducing the adverse impact on beneficial uses. The levels of trash in the waters of the San Francisco Bay Region are alarmingly high, considering the Basin Plan prohibits discharge of trash and that littering is illegal with potentially large fines. Even during dry weather conditions, a significant quantity of trash, particularly plastic, is making its way into waters and being transported downstream to San Francisco Bay and the Pacific Ocean. On the basis of 85 surveys conducted at 26 sites throughout the Bay Area, staff have found an average of 2.93 pieces of trash for every foot of stream, and all the trash was removed when it was surveyed, indicating high return rates of trash over the 2003–2005 study period. There did not appear to be one county within the Region with higher trash in waters—the highest wet weather deposition rates were found in western Contra Costa County, and the highest dry weather deposition was found in Sonoma County. Results of the trash in waterbodies assessment work by staff show that rather than adjacent neighborhoods polluting the sites at the bottom of the watershed, these areas, which tend to have lower property values, are subject to trash washing off with urban stormwater runoff cumulatively from the entire watershed.

C.10-3 A number of key conclusions can be made on the basis of the trash measurement in streams:

- Lower watershed sites have higher densities of trash.
- All watersheds studied in the San Francisco Bay Region have high levels of trash.
- There are trash source hotspots, usually associated with parks, schools, or poorly kept commercial facilities, near creek channels, that appear to contribute a significant portion of the trash deposition at lower watershed sites.

[114] SWAMP Rapid Trash Assessment Protocol, Version 8
[115] SWAMP S.F. Bay Region Trash Report, January 23, 2007

- Dry season deposition of trash, associated with wind and dry season runoff, contributes measurable levels of trash to downstream locations.
- The majority of trash is plastic at lower watershed sites where trash accumulates in the wet season. This suggests that urban runoff is a major source of floatable plastic found in the ocean and on beaches as marine debris.
- Parks that have more evident management of trash by city staff and local volunteers, including cleanup within the creek channel, have measurably less trash pieces and higher RTA scores.

C.10-4 The ubiquitous, unacceptable levels of trash in waters of the San Francisco Bay Region warrant a comprehensive and progressive program of education, warning, and enforcement, and certain areas warrant consideration of structural controls and treatment.

C.10-5 Trash in urban waterways of coastal areas can become *marine debris*, known to harm fish and wildlife and cause adverse economic impacts.[116] Trash is a regulated water pollutant that has many characteristics of concern to water quality. It accumulates in streams, rivers, bays, and ocean beaches throughout the San Francisco Bay Region, particularly in urban areas.

C.10-6 Trash adversely affects numerous beneficial uses of waters, particularly recreation and aquatic habitat. Not all litter and debris delivered to streams are of equal concern with regards to water quality. Besides the obvious negative aesthetic effects, most of the harm of trash in surface waters is imparted to wildlife in the form of entanglement or ingestion.[117,118] Some elements of trash exhibit significant threats to human health, such as discarded medical waste, human or pet waste, and broken glass.[119] Also, some household and industrial wastes can contain toxic batteries, pesticide containers, and fluorescent light bulbs that contain mercury. Large trash items such as discarded appliances can present physical barriers to natural stream flow, causing physical impacts such as bank erosion. From a management perspective, the persistent accumulation of trash in a waterbody is of particular concern, and signifies a priority for prevention of trash discharges. Also of concern are trash *hotspots* where illegal dumping, littering, and/or accumulation of trash occur.

C.10-7 The narrative water quality objectives 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

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[116] Moore, S.L., and M.J. Allen. 2000. Distribution of anthropogenic and natural debris on the mainland shelf of the Southern California Bight. *Mar. Poll. Bull.* 40:83-88.

[117] Laist, D. W. and M. Liffmann. 2000. *Impacts of marine debris: research and management needs*. Issue papers of the International Marine Debris Conference, Aug. 6-11, 2000. Honolulu, HI, pp. 16–29.

[118] McCauley, S.J. and K.A. Bjorndahl. 1998. Conservation implications of dietary dilution from debris ingestion: sublethal effects in post-hatchling loggerhead sea turtles. *Conserv. Biol.* 13(4):925-929.

[119] Sheavly, S.B. 2004. *Marine Debris: an Overview of a Critical Issue for our Oceans*. 2004 International Coastal Cleanup Conference, San Juan, Puerto Rico. The Ocean Conservancy.

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).

C.10-8 The Water Board, at its February 11, 2009 hearing, adopted a resolution proposing that 26 waterbodies in the region be added to the 303(d) list for the pollutant trash. The adopted Resolution and supporting documents are contained in Attachment 10.1 – 303(d) Trash Resolution and Staff Report Feb 2009.

Specific Provision C.10 Requirements

Provision C.10. Permittees shall demonstrate compliance with Discharge Prohibition A.2 and trash-related Receiving Water Limitations through the timely implementation of control measures and other actions to reduce trash loads from municipal separate storm sewer systems (MS4s) by 40% by 2014, 70% by 2017, and 100% by 2022 as further specified below.

C.10.a.i. Short-Term Trash Load Reduction Plan
The Short-Term Trash Load Reduction Plan is intended to describe actions to incrementally reduce trash loads toward the 2014 requirement of a 40% reduction and eventual abatement of trash loads to receiving waters.

C.10.a.ii. Baseline Trash Load and **Trash Load Reduction Tracking Method**
In order to achieve the incremental trash load reductions in an accountable manner, the Permittees will propose Baseline Trash Loads and a Trash Load Reduction Tracking Method. The Tracking will account for additional trash load reducing actions and BMPs the Permittees implement. Permittees are also able to propose, with documentation, areas for exclusion from the Tracking Method accounting, by demonstrating that these areas already meet the Discharge Prohibition A.2 and have no trash loads.

C.10.a.iii. Minimum Full Trash Capture
Installation of full trash capture systems to prevent trash loads through the MS4 is MEP as demonstrated by the significant implementation of these systems occurring in the Los Angeles region. The minimum full trash capture installation requirements in this permit represent a moderate initial step toward employing this tool for trash load reduction.

C.10.b.i, ii. Trash Hot Spot Selection and Clean Up
Trash Hot Spots must be cleaned up as an interim measure until complete abatement of trash loads occurs. Eventually, with adequate source controls and trash loading abatement, trash hot spots will not occur in the receiving waters. In addition, Permittees will be credited for trash volume removed from hot spots in the trash load reduction tracking.

C.10.b.iii. Hot Spot Assessments
Trash Hot Spot assessments have been simplified and streamlined. Rather than counting individual trash items, which can vary in size from small plastic of glass particles to shopping carts, volume of material removed is measured, along with dominant types of trash removed. Photographs are recorded both before and after cleanup, to add to the record and verify cleanup.

C.10.c. Long Term Trash Load Reduction
Each Permittee will submit a Plan to achieve the incremental progress of 70% trash load reduction by 2017 during the following permit term, and the 100% reduction of trash loading by 2022.

C.10.d. Reporting
This sub-provision sets forth the reporting required in this provision, including the specific submittals and reports, and the annual reporting requirements.

Costs of Trash Control

Costs for either enhanced trash management measure implementation or installation and maintenance of trash capture devices are significant, but when spread over several years, and when viewed on a per-capita basis, are reasonable. Also, Trash capture devices have been installed by cities in California and in the Bay Region.

Trash and litter are costly to remove from our aquatic resource environments. Staff from the California Coastal Commission report that the Coastal Cleanup Day budget statewide: $200,000-250,000 for staff Coastal Commission staff, and much more from participating local agencies. The main component of this event is the 18,000 volunteer-hours which translates to $3,247,200 in labor, and so is equivalent to $3,250,000-3,500,000 per year to clean up 903,566 pounds of trash and recyclables at $3.60 to $3.90 per pound. This is one of the most cost-effective events because of volunteer labor and donations. The County of Los Angeles spends $20 million per year to sweep beaches for trash, according to Coastal Commission staff.

In Oakland, the Lake Merritt Institute is currently budgeted at $160,000 per year, with trash and litter removal from the Lake as a major task. The budget has increased from about $45,000 in 1996 to current levels. In the period of 1996-2005 the Lake Merritt Institute staff, utilizing significant volunteer resources, and accomplishing other education tasks, removed 410,859 pounds of trash from the Lake at cost of $951,725 at $2.3 per pound.

The City of Oakland reports that installation of two vortex and screen separators, titled by their brand name of CDS units, which cost, according to the table below, $821,000 for installations that treat tributary catchments of 192 acres before discharge to Lake Merritt at $4,276 per acre.

City of Oakland—CDS Unit Overview 9-07

Existing CDS unit location	Outfall number	Treatment area (acres)	Cost of implementation	Sizing	Maintenance requirements	Comments
Intersection of 27th and Valdez Streets	56*	71	$203,000 to contactor; plus ~$100,000 City costs	73 cfs peak flow; 36" stormdrain; Unit sizing: 18'6'6' box with 10'11"diam x 9'6" long cylinder	Visually inspect CDS Unit; remove trash and debris with Hydro Flusher bi-monthly	Installed in 2006. Required relocation of electrical conduit. Water main and gas line were also in the way; the box was adjusted to accommodate these conflicts.
Intersection of 22nd and Valley Streets	56*	121	$368,000 to contactor; plus ~$150,000 City costs	115 cfs peak flow; 54" stormdrain; Unit sizing: 18'8.5'6' box with 12'diam x 9'6" long cylinder	Visually inspect CDS Unit; remove trash and debris with Hydro Flusher bi-monthly	Installed in 2006. Installation costs were higher than anticipated. Sewer lines and PGE facilities were exposed that were not known before. Unit had to be modified and poured-in-place.

* The city is treating 192 acres or 72 percent of the 252 acres draining to outfall 56.

Mr. Morad Sedrak, the TMDL Implementation Program Manager, Bureau of Sanitation, Department of Public Works, City of Los Angeles, reports that the City plans to invest $72 million dollars for storm drain catch basin based capture device installation primarily, for a City of 4 million population, for a per-capita cost of $18 dollars. This effort is occurring over a span of over five years, for an annual per-capita cost of under $4.

Mr. Sedrak reports that O&M costs are not anticipated to increase, as the City of L.A. is already budgeted for 3 catch basin cleanings per year. He also states that catch basin inserts installed inside the catch basin in front of the lateral pipe, which have been certified by the Los Angeles Regional Water Board as total capture trash control devices, cost approximately $800 to $3,000 depending on the depth of the catch basin. The price quoted includes installation and the insert is made of Stainless Steel 316.

Furthermore, the price for catch basin opening screen covers, which are designed to retain trash at the street level for removal by sweepers, and also to open if there is a potential flooding blockage, ranges roughly from $800 to $4,500, depending on the opening size of the catch basin.

The City of Los Angeles has currently spent 27 million dollars on a retrofit program to install catch basin devices in approximately 30% of its area, with either inserts or screens

or both. Mr. Sedrak states that Los Angeles plans to spend $45 million over the next 3 years to retrofit the remaining catch basins within the City. The total number of catch basins within the City is approximately 52,000.

Here are some links to information about the Los Angeles trash control approach:

http://www.lastormwater.org/Siteorg/program/TMDLs/trashtmdl.htm

http://www.lastormwater.org/Siteorg/download/pdfs/general_info/Request-Certification-10-06.pdf)

http://www.lastorhttp://www.lastormwater.org/Siteorg/download/pdfs/general_info/Request-Certification-10-06.pdfmwater.org/Siteorg/program/poll_abate/cbscreens.htm)

http://www.lastormwater.org/Siteorg/program/poll_abate/cbinserts.htm

http://www.lastormwater.org/Siteorg/program/poll_abate/cbscreens.htm

Additional cost information on various trash capture devices are included in the Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP) BMP Trash Toolbox (July 2007). The Toolbox contains cost information for both trash capture devices and enhanced trash management measure implementation, covers a broad range of options and also discusses operation and maintenance costs. Catch basin screens are included with an earlier estimate by the City of Los Angeles of $44 million over 10 years to install devices in 34,000 inlets.

Litter booms are also discussed with an example from the City of Oakland. The Damon Slough litter boom or sea curtain cost $36,000 for purchase and installation, including slough side access improvements for maintenance and trash removal. Annual maintenance costs have been $77,000 for weekly maintenance, which includes use of a crane for floating trash removal.

The costs of the full trash capture device installation required in the Order is significantly less than the previous tentative orders requirements for trash capture, as set forth in the table below.

Trash Capture Cost Estimates – Final TO versus previous TOs

Trash Capture Device Requirement	Acres of Capture	Cost for Trash Capture Installation	Percent of Retail/Wholesale Commercial (ABAG 2005)	Per capita $, Population = 4,533,634
Final TO: Implemented in Year 4 – 30% of Retail/Wholesale Commercial	5527	**$ 27,635,000**	30%	$6.06
Previous TOs: Implement in Year 4, 5% of Urban/suburban land	0.05 X 529,712 = 26,485 (BASMAA) or ABAG 0.05 X 655,015 = 32,750	$132,425,000 or $163,750,000	5% of Urban/suburban land	$29 or $36

30% X 18,426 acres = 5527 acres X $5000/acre = **$27,635,000** for four counties for installation; maintenance will add an additional cost. The Permittees may work cooperatively to achieve this capture installation requirement, and there is the potential for Regional revenue development. The previous requirement was 5% of (.05 X 655,015) (529,712 by BASMAA's count) acres of urban land (from ABAG 2005 table) = 32,750 acres, ((26,486 according to BASMAA) X $5000 = $132,000,000).

C.11. Mercury Controls

Fact Sheet Findings in Support of Provision C.11

C.11-1 On August 9, 2006, the Water Board adopted a Basin Plan amendment including a revised TMDL for mercury in San Francisco Bay, two new water quality objectives, and an implementation plan to achieve the TMDL. The State Water Board has approved this Basin Plan amendment, and USEPA approval is pending. C.11-2 through C.11-6 are components of the Mercury TMDL implementation plan relevant to implementation through the municipal stormwater permit.

C.11-2 The 2003 load of mercury from urban runoff is 160 kg/yr, and the aggregate WLAs for urban runoff is 80 kg/yr and shall be implemented through the NPDES stormwater permits issued to urban runoff management agencies and Caltrans. The urban stormwater runoff allocations implicitly include all current and future permitted discharges, not otherwise addressed by another allocation, and unpermitted discharges within the geographic boundaries of urban runoff management agencies (collectively, *source category*) including, but not limited to, Caltrans roadway and non-roadway facilities and rights-of-way, atmospheric deposition, public facilities, properties proximate to stream banks, industrial facilities, and construction sites.

C.11-3 The allocations for this source category shall be achieved within 20 years, and, as a way to measure progress, an interim loading milestone of 120 kg/yr, halfway between the current load and the allocation, should be achieved within 10 years. If the interim loading milestone is not achieved, NPDES-permitted entities shall demonstrate reasonable and measurable progress toward achieving the 10-year loading milestone.

C.11-4 The NPDES permits for urban runoff management agencies shall require the implementation of BMPs and control measures designed to achieve the allocations or accomplish the load reductions derived from the allocations. In addition to controlling mercury loads, BMPs or control measures shall include actions to reduce mercury-related risks to humans and wildlife. Requirements in the permit issued or reissued and applicable for the term of the permit shall be based on an updated assessment of control measures intended to reduce pollutants in stormwater runoff to the MEP and remain consistent with the section of this chapter titled, *Surface Water Protection and Management—Point Source Control—Stormwater Discharges*.

C.11-5 The following additional requirements are or shall be incorporated into NPDES permits issued or reissued by the Water Board for urban runoff management agencies.

a. Evaluate and report on the spatial extent, magnitude, and cause of contamination for locations where elevated mercury concentrations exist;

b. Develop and implement a mercury source control program;

c. Develop and implement a monitoring system to quantify either mercury loads or loads reduced through treatment, source control, and other management efforts;

d. Monitor levels of methylmercury in discharges;

e. Conduct or cause to be conducted studies aimed at better understanding mercury fate, transport, and biological uptake in San Francisco Bay and tidal areas;

f. Develop an equitable allocation-sharing scheme in consultation with Caltrans (see below) to address Caltrans roadway and non-roadway facilities in the program area, and report the details to the Water Board;

g. Prepare an Annual Report that documents compliance with the above requirements and documents either mercury loads discharged, or loads reduced through ongoing pollution prevention and control activities; and

h. Demonstrate progress toward (a) the interim loading milestone, or (b) attainment of the allocations shown in Individual WLAs (see Table 4-w of the Basin Plan amendment), by using one of the following methods:

(1) Quantify the annual average mercury load reduced by implementing

i. Pollution prevention activities, and
ii. Source and treatment controls. The benefit of efforts to reduce mercury-related risk to wildlife and humans should also be quantified. The Water Board will recognize such efforts as progress toward achieving the interim milestone and the mercury-related water quality standards upon which the allocations and corresponding load reductions are based. Loads reduced as a result of actions implemented after 2001 (or earlier if actions taken are not reflected in the 2001 load estimate) may be used to estimate load reductions.

(2) Quantify the mercury load as a rolling 5-year annual average using data on flow and water column mercury concentrations.

(3) Quantitatively demonstrate that the mercury concentration of suspended sediment that best represents sediment discharged with urban runoff is below the suspended sediment target.

C.11-6 Urban runoff management agencies have a responsibility to oversee various discharges within the agencies' geographic boundaries. However, if it is determined that a source is substantially contributing to mercury loads to the Bay or is outside the jurisdiction or authority of an agency, the Water Board will consider a request from an urban runoff management agency that may include an allocation, load reduction, and/or other regulatory requirements for the source in question.

Specific Provision C.11 Requirements

The C.11 provisions implement the mercury TMDL and follow the general approach for sediment-bound pollutants discussed above where we seek to build our understanding and level of certainty concerning control actions by implementing actions in a phased approach. We then expand implementation of those actions that prove effective, and perhaps scale back or discontinue those that are not effective. Accordingly, there are some provisions that will be implemented throughout the Region, some that will be tested on a limited basis first before making the decision to expand region-wide in the next permit term. Some of the measures are companion measures for efforts targeting PCBs.

Provision C.11.a. Mercury is found in a wide variety of consumer products (e.g., fluorescent bulbs) that are subject to recycling requirements. These recycling efforts are already happening throughout the Region, and Provision C.11.a requires promotion, facilitation and/or participation in these region-wide recycling efforts to increase effectiveness and public participation.

Provision C.11.b. The remand resolution of the SF Bay Mercury TMDL made it clear that methyl mercury monitoring must be required of all NPDES Permittees. Methyl mercury is the most toxic form of mercury, and there is very little information, if any, regarding the concentrations of methyl mercury found in urban runoff. The purpose of the monitoring required through this provision is to obtain seasonal information and to assess the magnitude and spatial/temporal patterns of methylmercury concentrations in urban runoff.

Provisions C.11.c through Provision C.11.f relate to identical C.12 Provisions for PCBs. For each of these, sites for pilot studies will primarily be chosen on the basis of the potential for reducing PCB loads, but consideration will be given to mercury removal in the final design and implementation of the studies. For more information, see the fact sheet discussions for
Provisions C.12.c, d, e, and f and Provision C.2.g.

Provision C.11.g implements the TMDL requirement that Permittees measure mercury loads and loads reduced from program activities. There are three options for accomplishing this requirement: quantifying mercury loads reduced through implemented control measures, quantify mercury loading into the Bay from urban runoff, or demonstrating that the concentration of mercury on suspended sediment particles is below the sediment target of 0.2 ppm. It is likely that the first option will be chosen, and this will require development of an accounting system to establish what load reductions result from program activities. This will not be difficult for those measures that involve capture and measurement of mercury-containing sediment, but it will be more challenging for efforts that do not involve direct measurement.

Provision C.11.h is equivalent to Provision C.12.h for PCBs and is motivated by the same remaining technical uncertainties.

Provision C.11.i requires actions that manage human health risk due to mercury and PCBs. These may include efforts to communicate the health risks of eating Bay fish and other efforts aimed at high risk-communities.

Provision C.11.j requires an allocation sharing scheme to be developed in cooperation with Caltrans. The urban runoff TMDL allocation implicitly includes loads from Caltrans facilities.

C.12. PCBs Controls

The C.12 provisions are consistent with the regulatory approach and implementation plan of the San Francisco Bay PCBs TMDL adopted by the Water Board. They follow the general approach for sediment-bound pollutants discussed above where we seek to build our understanding and level of certainty concerning control actions by implementing actions in a phased approach. We then expand implementation of those actions that prove effective, and perhaps scale back or discontinue those that are not effective. Accordingly, there are some provisions that will be implemented throughout the region, some that will be tested on a limited basis first before making the decision to expand region-wide in the next permit term.

Fact Sheet Findings in Support of Provision C.12

C.12-2 On February 13, 2008, the Water Board adopted a Basin Plan amendment establishing a TMDL for PCBs in San Francisco Bay and an implementation plan to achieve the TMDL. Approval by the State Water Board and USEPA is pending. The following excerpts from the TMDL implementation plan are relevant to implementation of the municipal stormwater permit.

"Stormwater runoff wasteload allocations shall be achieved within 20 years and shall be implemented through the NPDES stormwater permits issued to stormwater runoff management agencies and the California Department of Transportation (Caltrans). The urban stormwater runoff wasteload allocations implicitly include all current and future permitted discharges, not otherwise addressed by another allocation, and unpermitted discharges within the geographic boundaries of stormwater runoff management agencies including, but not limited to, Caltrans roadway and non-roadway facilities and rights-of-way, atmospheric deposition, public facilities, properties proximate to stream banks, industrial facilities, and construction sites.

Requirements in each NPDES permit issued or reissued shall be 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 and other entities (except construction and industrial sites) shall reduce PCBs in stormwater runoff to the maximum extent practicable. Control measures for construction and industrial sites shall reduce discharges based on best available technology economically achievable. All permits shall remain consistent with Section 4.8 - Stormwater Discharges.

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. In the second permit term, stormwater Permittees will be required to implement effective control measures, that will not cause significant adverse environmental impacts, in strategic locations, and to develop a plan to fully implement control measures that will result in

attainment of allocations, including an analysis of costs, efficiency of control measures and an identification of any significant environmental impacts. Subsequent permits will include requirements and a schedule to implement technically feasible, effective and cost efficient control measures to attain allocations. If, as a consequence, allocations cannot be attained, the Water Board will take action to review and revise the allocations and these implementation requirements as part of adaptive implementation.

In addition, stormwater Permittees will be required to 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; support actions to reduce the health risks of people who consume PCBs-contaminated San Francisco Bay fish; and conduct or cause to be conducted monitoring, and studies to fill critical data needs identified in the adaptive implementation section.

Stormwater runoff management agencies have a responsibility to oversee various discharges within the agencies' geographic boundaries. However, if it is determined that a source is substantially contributing to PCBs loads to the Bay or is outside the jurisdiction or authority of an agency the Water Board will consider a request from an stormwater runoff management agency which may include an allocation, load reduction, and/or other regulatory requirements for the source in question."

C.12-3 **Some PCB congeners have dioxin-like properties.** Dioxins are persistent, bioaccumulative, toxic compounds that are produced from the combustion of organic materials in the presence of chlorine. Dioxins enter the air through fuel and waste emissions, including diesel and other motor vehicle exhaust fumes and trash incineration, and are carried in rain and contaminate soil. Dioxins bioaccumulate in fat, and most human exposure occurs through the consumption of animal fats, including those from fish. Therefore, the actions targeting PCBs will likely have the simultaneous benefit of addressing a portion of the dioxin impairment resulting from dioxin-like PCBs.

Specific Provision C.12 Requirements

Provision C.12.a. PCBs were used in a variety of electrical devices and equipment, some of which still can be found during industrial inspections. Provision C.12.a requires the stormwater management agencies to ensure that industrial inspectors can identify PCBs or PCB-containing equipment during their inspections and make sure appropriate agencies are notified if they are found. There is enough experience and/or background knowledge about the presence of such PCB-containing equipment that this measure should be implemented region-wide during this permit term.

Provision C.12.b. PCBs are used in a variety of building materials like caulks and adhesives. PCBs contained in such materials can be liberated and transported in runoff during and after demolition and renovation activities. At this point, it is not known how extensive this type of PCB contamination is in the region. Therefore, the expectation for

this permit term is that Permittees conduct pilot studies (Provision C.12.b) that includes evaluation of the presence of PCBs in such materials, sampling and analysis, and BMP development to prevent PCBs in these materials from being released into the environment during demolition and renovation. Conducting these pilot tests and reporting results will help determine if control measures for PCBs from these sources should be implemented in a more widespread fashion in the next permit term.

Provisions C.12.c and C.12.d form the core of PCB-related efforts for this permit term, and these efforts are crucial for the iterative development of effective control measures for PCBs and other sediment-bound pollutants in future permit terms. The overarching purpose of these two provisions is to conduct five comprehensive pilot studies in locations known to contain high levels of PCBs. The pilot studies will involve a combination of efforts including abatement of the on-land PCB contamination (Provision C.12.c) as well as exploration of sediment management practices (C.12.d) that can be implemented by municipalities to control migration of the PCBs away from the source of contamination. We expect that a suite of control measures will be applied in these five pilot regions to determine the optimum suite of measures for controlling PCB contamination and preventing its transport through the storm drain system. The lessons learned through these pilot efforts will inform the direction of future efforts targeting contaminated zones throughout the Region in subsequent permit terms.

Provision C.12.e. One promising management practice for addressing a wide range of sediment-bound contaminants, including PCBs is on-site treatment. Provision C.12.e requires selection of 10 locations for pilot studies spanning treatment types as described in the Provision. This effort can be conducted in conjunction with Provision C.12.d such that on-site treatment efforts conducted as part of C.12.d can be counted toward accomplishing C.12.e requirements.

Provision C.12.f. Another promising management practice is the diversion of certain flows to the sanitary sewers to be treated by the local POTWs. Provision C.12.f requires an evaluation of locations for diversion pilot studies and implementation of pilot studies at five pump stations. This effort can be conducted in conjunction with Provision C.12.d such that POTW diversion efforts conducted as part of C.12.d can be counted toward accomplishing C.12.f requirements. Also see discussion under Provision C.2.g.

Provision C.12.g requires, consistent with the approach taken in the PCBs TMDL, development of a monitoring system to quantify PCBs loads and loads reduced through source control, treatment and other management measures. This monitoring system will be used to determine progress toward meeting TMDL load allocations. This system should establish the baseline loading or loads reduced against which to compare future loading and load reductions.

Provision C.12.h. There are still uncertainties surrounding the magnitude and nature of PCBs reaching the Bay in urban runoff and the ultimate fate of such PCBs, including biological uptake. Provision C.12.h requires that Permittees ensure that fate and transport studies of PCBs in urban runoff are completed.

Provision C.12.i. requires actions that manage human health risk due to mercury and PCBs. These may include efforts to communicate the health risks of eating Bay fish and other efforts aimed at high risk-communities.

C.13. Copper Controls

Chronic and acute site-specific objectives (SSOs) for dissolved copper have been established in all segments of San Francisco Bay. The plan to implement the SSOs and ensure the achievement and ongoing maintenance of the SSOs in the entire Bay includes two types of actions for urban runoff management agencies. These actions from the SSO implementation are implemented through this permit as provisions to control urban runoff sources of copper as well as measures to resolve remaining technical uncertainties for copper fate and effects in the Bay.

The control measures for urban runoff target significant sources of copper identified in a report produced in 2004 for the Clean Estuary Partnership.[120] This report updated information on sources of copper in urban runoff, loading estimates and associated level of uncertainty, and summarized feasible control measures and priorities for further investigation. Accordingly, the permit provisions target major sources of copper including vehicle brake pads, architectural copper, copper pesticides, and industrial copper use.

Fact Sheet Findings in Support of Provision C.13.

C.13-1 Urban runoff is a conveyance mechanism by which copper reaches San Francisco Bay.

C.13-2 Copper has the reasonable potential to cause or contribute to exceedances of copper water quality standards in San Francisco Bay.

C.13-3 Site specific water quality objectives for dissolved copper have already been adopted for South San Francisco Bay will soon be adopted for the rest of the Bay.

C.13-4 The Permit requirements to control copper to the MEP are necessary to implement and support ongoing achievement of the site-specific water quality objectives.

Specific Provision C.13. Requirements

Provision C.13.a. Copper is used as an architectural feature in roofs, gutters and downspouts. When these roofs are cleaned with aggressive cleaning solutions, substantial amounts of copper can be liberated. The provision C.13.a for architectural copper involves a variety of strategies ranging from BMPs to prohibition against discharge of these cleaning wastes to the storm drain.

[120] TDC (TDC Environmental). 2004. *Copper Sources in Urban Runoff and Shoreline Activities*. Prepared for the Clean Estuary Partnership.

Provision C.13.b. Copper is commonly used as an algaecide in pools, spas, and fountains. The provision C.13.b prohibits discharge to the storm drain of copper-containing wastewater from such amenities.

Provision C.13.c. Vehicle brake pads are a large source of copper to the urban environment. There are cooperative efforts (e.g., the Brake Pad Partnership) evaluating the potential effects of brake wear debris on water quality. This cooperative effort could result in voluntary actions to reduce the amount of copper in automobile brake pads. However, this voluntary reduction is uncertain, and some aftermarket brake pads are possibly unaffected by the voluntary action. Moreover, the benefits of copper content reduction might be slowly realized because there is a great deal of wear debris already deposited on watersheds, and this wear debris will continue to be deposited as long as copper-containing brake pads are in use. Therefore, there might need to be additional measures addressing copper-containing wear debris on the part of urban stormwater management agencies. Provision C.13.c requires ongoing participation in the cooperative efforts of the Partnership.

Provision C.13.d Some industrial facilities likely use copper or have sources of copper (e.g., plating facilities, metal finishers, auto dismantlers). This control measure requires municipalities to include these facilities in their inspection program plans.

The most recent Staff Report[121] for the SSOs north of the Dumbarton Bridge also describes several areas of remaining technical uncertainty, and **Provision C.13.e** requires studies to address these uncertainties. Two of these areas are of particular concern, and urban runoff management agencies are required to conduct or cause to be conducted studies to help resolve these two uncertainties.

The first uncertainty concerns copper's tendency, even at low concentrations, to cause a variety of sublethal (not resulting in death, but in impaired function) effects. The studies documenting such effects have, so far, been conducted in the laboratory in experiments modeling freshwater systems, and many of them have not yet been published. A number of uncertainties need to be resolved before interpretation and extension to marine or estuarine systems can be attempted.[122]

The second uncertainty is that surface sediment samples have exhibited toxicity to test organisms at a number of sites throughout the Bay. Research has shown that sediment toxicity to bivalve embryos is caused by "elevated concentrations of divalent cations....with copper as the most probable cause of toxicity." Additional studies are needed to further examine whether water and sediment toxicity tests used in the RMP are accurate predictors of impacts on the Bay's aquatic and benthic communities.

[121] SFBRWQCB (San Francisco Bay Regional Water Quality Control Board). 2007. *Copper Site-Specific Objectives in San Francisco Bay: Proposed Basin Plan Amendment and Draft Staff Report.* June.
[122] Ibid.

C.14. Polybrominated Diphenyl Ethers (PBDE), Legacy Pesticides and Selenium

This section is predicated on the fact that legacy pesticides, PBDEs, and selenium are either known to impair or potentially impair Bay and tributary beneficial uses. Further, urban stormwater is a likely or potential cause or contributor to such impairment. The requirements for this permit term are primarily information gathering consistent with Provision C.1. Namely, this provision requires that Permittees gather information on a number of pollutants of concern (e.g., PBDEs, DDT, dieldrin, chlordane, selenium) for which TMDLs are planned or are in the early stages of development.

The goals of the provisions in this section are the following: One goal is to determine the concentrations and distribution of these pollutants and if urban runoff is a conveyance mechanism associated with their possible impairment of San Francisco Bay.

A second goal is to gather and provide information to allow calculation of PBDEs, legacy pesticides, and selenium loads to San Francisco Bay from urban runoff conveyance systems. A third goal is to identify control measures and/or management practices to eliminate or reduce discharges of PBDEs, legacy pesticides, or selenium conveyed by urban runoff conveyance systems. The Permittees are encouraged to work with the other municipal stormwater management agencies in the Bay Region to implement a plan to identify, assess, and manage controllable sources of these pollutants in urban runoff. The control actions initiated for PCBs will form the core of initial actions targeting sediment bound pollutants like these. It is very likely that some of these PCB control measures (see Provision C.12) warrant consideration for the control of sediment bound pollutants like PBDEs, legacy pesticides, and possibly others as well.

C.15. Exempted and Conditionally Exempted Discharges

Legal Authority

Broad Legal Authority: CWA section 402(p)(3)(B)(ii-iii), CWC section 1337, and Federal NPDES regulation 40 CFR 122.26(d)(2)(i)(B, C, D, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(B) requires MS4 operators, "to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(1) provides that the Permittees shall prevent all types of illicit discharges into the MS4 except for certain non-stormwater discharges.

Fact Sheet Findings in Support of Provision C.15.

Prohibition A.1. effectively prohibits the discharge of non-stormwater discharges into the storm sewer system. However, we recognize that certain types of non-stormwater discharges may be exempted from this prohibition if they are unpolluted and do not violate water quality standards. Other types of non-stormwater discharges may be conditionally exempted from Prohibition A.1. if the discharger employs appropriate control measures and BMPs prior to discharge, and monitors and reports on the discharge.

Specific Provision C.15. Requirements

Provision C.15.a. Exempted Non-Stormwater Discharges. This section of the Permit identifies the types of non-stormwater discharges that are exempted from Discharge Prohibition A.1. if such discharges are unpolluted and do not violate water quality standards. If any exempted non-stormwater discharge is identified as a source of pollutants to receiving waters, the discharge shall be addressed as a conditionally exempted discharge and must meet the requirements of Provision C.15.b.

Provision C.15.b. Conditionally Exempted Non-Stormwater Discharges. This section of the Permit identifies the types of non-stormwater discharges that are conditionally exempted from Discharge Prohibition A.1. if they are identified by Permittees or the Executive Officer as not being sources of pollutants to receiving waters. To eliminate adverse impacts from such discharges, project proponents shall develop and implement appropriate pollutant control measures and BMPs, and where applicable, shall monitor and report on the discharges in accordance with the requirements specified in Provision C.15.b. The intent of Provision C.15.b.'s requirements is to facilitate Permittees in regulating these non-stormwater discharges to the storm drains since the Permittees have ultimate responsibility for what flows in those storm drains to receiving waters. For all planned discharges, the nature and characteristic of the discharge must be verified prior to the discharge so that effective

pollution control measures are implemented, if deemed necessary. Such preventative measures are cheaper by far than post-discharge cleanup efforts.

Provision C.15.b.i.(1). Pumped Groundwater from Non Drinking Water Aquifers. These aquifers tend to be shallower than drinking water aquifers and more subject to contamination. The wells must be purged prior to sample collection. Since wells are purged regularly, this section of the Permit requires twice a year monitoring of these aquifers. Pumped groundwater from non drinking water aquifers, which are owned and/or operated by Permittees who pump groundwater as drinking water, are conditionally exempted as long as the discharges meet the requirements in this section of the Permit.

Provision C.15.b.i.(2). Pumped Groundwater, Foundation Drains, and Water from Crawl Space Pumps and Footing Drains. This section of the Permit encourages these types of discharges to be directed to landscaped areas or bioretention units, when feasible. If the discharges cannot be directed to vegetated areas, it requires testing to determine if the discharge is uncontaminated. Uncontaminated discharges shall be treated, if necessary, to meet specified discharge limits for turbidity and pH.

Provision C.15.b.ii. Air Conditioning Condensate. Small air conditioning units are usually operated during the warm weather months. The condensate from these units are uncontaminated and unlikely to reach a storm drain or waters of the State because they tend to be low in volume and tend to evaporate or percolate readily. Therefore, condensate from small air conditioning units should be discharged to landscaped areas or the ground. Commercial and industrial air conditioning units tend to produce year-round continuous flows of condensate. It may be difficult to direct a continuous flow to a landscaped area large enough to accommodate the volume. While the condensate tends to be uncontaminated, it picks up contaminates on its way to the storm drain and/or waters of the State and can contribute to unnecessary dry weather flows. Therefore, discharges from new commercial and industrial air conditioning units should be discharged to landscaped areas, if they can accommodate the continuous volume, or to the sanitary sewer, with the local sanitary sewer agency's approval. If none of these options are feasible, air conditioning condensate can be directly discharged into the storm drain. If descaling or anti-algal agents are used to treat the air conditioning units, residues from these agents must be properly disposed of.

Provision C.15.b.iii. Planned, Unplanned, and Emergency Discharges of the Potable Water System.. Potable water discharges contribute pollution to water quality in receiving waters because they contain chlorine or chloramines, two very toxic chemicals to aquatic life. Potable water discharges can cause erosion and scouring of stream and creek banks, and sedimentation can result if effective BMPs are not implemented. Therefore, appropriate dechlorination and monitoring of chlorine residual, pH and turbidity, particularly for planned discharges of potable water, are crucial to prevent adverse impacts in the receiving waters.

This section of the Permit requires Permittees to notify Water Board staff at least one week in advance for planned discharges of potable water with a flowrate of 250,000 gpd or more or a total 500,000 gallons or more. These planned discharges must meet specified discharge benchmarks for chlorine residual, pH, and turbidity.

To address unplanned discharges of potable water such as non-routine water line breaks, leaks, overflows, fire hydrant shearing, and emergency flushing, this section of the Permit requires Permittees to implement administrative BMPs such as source control measures, managerial practices, operations and maintenance procedures or other measures to reduce or prevent potential pollutants from being discharged during these events. This Provision also contains specific notification and monitoring requirements to assess immediate and continued impacts to water quality when these events happen.

This section of the Permit acknowledges that in cases of emergency discharge, such as from firefighting and disasters, priority of efforts shall be directed toward life, property, and the environment, in that order. Therefore, Permittees are required to implement BMPs that do not interfere with immediate emergency response operations or impact public health and safety. Reporting requirements for such events shall be determined by Water Board staff on a case-by-case basis.

Provision C.15.b.iv. Individual Residential Car Washing. Soaps and automotive pollutants such as oil and metals can be discharged into storm drains and waterbodies from individual residential car washing activities. However, it is not feasible to prohibit individual residential car washing because it would require too much resources for the Permittees to regulate the prohibition. This section of the Permit requires Permittees to encourage residents to implement BMPs such as directing car washwaters to landscaped areas, using as little detergent as possible, and washing cars at commercial car washing facilities.

Provision C.15.b.v. Swimming Pool, Hot tub, Spa, and Fountain Water Discharges. These types of discharges can potentially contain high levels of chlorine and copper. Permittees shall prohibit the discharge of such waters that contain chlorine residual, copper algaecide, filter backwash, or other pollutants to the storm drains or to waterbodies. High flow rates into the storm drain or waterbody could cause erosion and scouring of the stream or creek banks. These types of discharges should be directed to landscaped areas large enough to accommodate the volume or to the sanitary sewer, with the local sanitary sewer's approval. If these discharge options are not feasible and the swimming pool, hot tub, spa, or fountain water discharges must enter the storm drain, they must be dechlorinated to non-detectable levels of chlorine and they must not contain copper algaecide. Flow rate should be regulated to minimize downstream erosion and scouring. We strongly encourage local sanitary sewer agencies to accept these types of non-stormwater discharges, especially for new and rebuilt ones where a connection could be achieved with marginal effort. This Provision also requires Permittees to coordinate with local sanitary agencies in these efforts.

Provision C.15.b.v.i. Irrigation Water, Landscape Irrigation, and Lawn or Garden Watering. Fertilizers and pesticides can be washed off of landscaping and discharged into storm drains and waterbodies. However, it is not feasible to prohibit excessive irrigation because it would require too much resource for the Permittees to regulate such a prohibition. It is also not feasible for individual Permittees to ban the use fertilizers and pesticides. This section of the Permit requires Permittees to promote and/or work with potable water purveyors to promote measures that minimize runoff and pollutant loading from excess irrigation, such as conservation programs, outreach regarding overwatering and less toxic options for pest control and landscape management, the use of drought tolerant and native vegetation, and to implement appropriate illicit discharge response and enforcement for ongoing, large-volume landscape irrigation runoff to the storm drains.

Provision C.15.b.vii. requires Permittees to identify and describe additional types and categories of discharges not listed in Provision C.15.b., that they propose to conditionally exempt from Prohibition A.1., in periodic submittals to the Executive Officer.

Provision C.15.b.viii. establishes a mechanism to authorize under the Permit non-stormwater discharges owned or operated by the Permittees.

Attachment J: Standard NPDES Stormwater Permit Provisions

The following legal authority applies to Attachment J:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, D, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Standard provisions, reporting requirements, and notifications are consistent to all NPDES permits and are generally found in federal NPDES regulation 40 CFR 122.41.

Attachment J includes Standard Provisions. These Standard Provisions ensure that NPDES stormwater permits are consistent and compatible with USEPA's federal regulations. Some Standard Provision sections specific to publicly owned sewage treatment works are not included in Attachment J.

Fact Sheet Attachment 6.1

Construction Inspection Data

Construction Inspection Data

Facility/Site Inspected	Inspection Date	Weather During Inspection	Inches of Rain Since Last Inspection	Enforcement Response Level	Problem(s) Observed							Specific Problem(s)	Resolution			Comments/ Rationale for Longer Compliance Time
					Erosion Control	Runon and Runoff Control	Sediment Control	Active Treatment System	Good Site Management	Non Stormwater Management	Illicit Discharge		Problems Fixed	Need More Time	Escalate Enforcement	
Panoramic Views	9/30/08	Dry	0	Written Notice			x					Driveway not stabilized				
Panoramic Views	10/15/08	Dry	0.5										x			50' of driveway rocked.
Panoramic Views	11/15/08	Rain	3	Stop Work	x		x				x	Uncovered graded lots eroding; Sediment entering a stormdrain that didn't have adequate protection.				
Panoramic Views	11/15/08	Drizzling	0.25										x			Lots blanketed. Storm drains pumped. Street cleaned.
Panoramic Views	12/1/08	Dry	4	Verbal Warning					x			Porta potty next to stormdrain.	x			Porta potty moved away from stormdrain.
Panoramic Views	1/15/08	Rain	3.25	Written Warning	x					x		Fiber rolls need maintenance; Tire wash water flowing into street				
Panoramic Views	1/25/09	Dry	0										x			Fiber rolls replaced.

Facility/Site Inspected	Inspection Date	Weather During Inspection	Inches of Rain Since Last Inspection	Enforcement Response Level	Problem(s) Observed							Specific Problem(s)	Resolution			Comments/ Rationale for Longer Compliance Time
					Erosion Control	Runon and Runoff Control	Sediment Control	Active Treatment System	Good Site Management	Non Stormwater Management	Illicit Discharge		Problems Fixed	Need More Time	Escalate Enforcement	
Panoramic Views	2/28/09	Rain	2.4	Stop Work	x		x				x	Slope erosion control failed. Fiber rolls at the bottom of the hill flattened. Sediment laden discharge skipping protected stormdrains and entering unprotected stormdrains.				
Panoramic Views	2/28/09	Rain	0.1											x		Fiber rolls replaced. Silt fences added. More stormdrains protected. Streets cleaned. Slope too soggy to access.
Panoramic Views	3/15/09	Dry	1	Citation with Fine					x		x	Paint brush washing not designated	x			Street and storm drains cleaned. Slopes blanketed.
Panoramic Views	4/1/09	Dry	0.5	Citation with Fine							x	Concrete washout overflowed; Evidence of illicit discharge				
Panoramic Views	4/15/09	Dry	0										x			Concrete washout replaced; Storm drain and line cleaned.

Fact Sheet Attachment 10.1

303(d) Trash Resolution and Staff Report February 2009

Available at
http://www.waterboards.ca.gov/sanfranciscobay/board_decisions/adopted_orders/2009/R2-2009-0008.pdf

ATTACHMENT A

Provision C.3.b.
Sample Reporting Table

Provision C.3.b. Sample Reporting Table
Regulated Projects Approved During the Reporting Period 07/08 to 06/09
City of Eden Annual Report FY 2008-09

Project Name, Project Number, Location, Street Address,	Name of Developer, Project Phase No.,[1] Project Type & Description	Project Watershed[2]	Total Site Area, Total Area of Land Disturbed	Total New and/or Replaced Impervious Surface Area[3]	Total Pre- and Post-Project Impervious Surface Area[4]	Status of Project[5]	Source Control Measures	Site Design Measures	Treatment Systems Installed[6]	Operation & Maintenance Responsibility Mechanism	Hydraulic Sizing Criteria	Alternative Compliance Measures[7,8]	HM Controls[9,10]
Private Projects													
Nirvana Estates; Project #05-122; Property bounded by Paradise Lane, Serenity Drive, and Eternity Circle; Eden, CA	Heavenly Homes; Phase 1; Construction of 156 single-family homes and 45 townhomes with commercial shops and underground parking.	Runoff from site drains to Babbling Brook	25 acres site area, 21 acres disturbed	20 acres new	20 acres post-project	Application submitted 12/29/07, Application deemed complete 1/30/08, Project approved 7/16/08	Stenciled inlets, street sweeping, covered parking, car wash pad drains to sanitary sewer	Pervious pavement for all driveways, sidewalks, and commercial plaza	vegetated swales, detention basins,	Conditions of Approval require Homeowners Association to perform regular maintenance. Written record will be made available to City inspectors.	WEF Method	n/a	Contra Costa sizing charts used to design detention basin at Peace Park. Also contributed to in-stream projects in Babbling Brook
Barter Heaven; Project #05-345; Shoppers Lane & Bargain Avenue; 14578 Shoppers Lane, Eden, CA	Deals Galore Development Co.; Demolition of strip mall and parking lot and construction of 500-unit 5-story shopping mall with underground parking and limited outdoor parking.	Runoff from site drains to Bargain River	5 acres site area, 3 acres disturbed	1 acre new, 2 acres replaced	3.5 acres pre-project, 4.5 acres post-project	Application submitted 7/9/08, Application deemed complete 8/2/08, Project approved 12/12/08	Stenciled inlets, trash enclosures, underground parking, street sweeping	One-way aisles to minimize outdoor parking footprint; roof drains to planter boxes	tree wells with bioretention; planter boxes with bioretention	Conditions of Approval require property owner (landlord) to perform regular maintenance. Written record will be made available to City inspectors.	BMP Handbook Method	$ 250,000 paid to Renew Regional Project sponsored by Riverworks Foundation, 243 Water Way, Eden, CA 408-345-6789	Renew Project includes treatment and HM Controls

Provision C.3.b. Sample Reporting Table
Regulated Projects Approved During the Reporting Period 07/08 to 06/09
City of Eden Annual Report FY 2008-09

Project Name, Project Number, Location, Street Address,	Name of Developer, Project Phase No.,[1] Project Type & Description	Project Watershed[2]	Total Site Area, Total Area of Land Disturbed	Total New and/or Replaced Impervious Surface Area[3]	Total Pre- and Post-Project Impervious Surface Area[4]	Status of Project[5]	Source Control Measures	Site Design Measures	Treatment Systems Installed[6]	Operation & Maintenance Responsibility Mechanism	Hydraulic Sizing Criteria	Alternative Compliance Measures[7,8]	HM Controls[9,10]
New Beginnings; Project No. #05-456; Hope Street & Chance Road; 567 Hope Boulevard, Eden, CA	Fresh Start Corporation; Demolition of abandoned warehouse and construction of a 5-story building with 250 low-income rental housing units.	Runoff from site drains to Poor Man Creek	5 acres site area, 100,000 ft^2 disturbed	1 acre replaced	2 acres pre-project, 1 acre post-project	Application submitted 2/9/09, Application deemed complete 4/10/09; Project approved 6/30/09	Trash enclosures, underground parking, street sweeping, car wash pad drains to sanitary sewer	roof drains to landscaping	parking runoff flows to six bioretention units/gardens	Conditions of Approval require property owner (landlord) to perform regular maintenance. Written record will be made available to City inspectors.	BMP Handbook Method	n/a	n/a
Public Projects													
Gridlock Relief, Project No. #05-99, ABC Blvd between Main and Huett Streets, Eden, CA	City of Eden. Widening of ABC Blvd from 4 to 6 lanes	Runoff from site drains to Congestion River	6 acres site area, 3 acres disturbed	2 acres new, 1 acre replaced	4 acres pre-project, 6 acres post-project	Application submitted 7/9/06, Application deemed complete 10/6/08, Project approved 12/9/08, Construction scheduled to begin 7/10/09	none	ABC Blvd sloped to drain runoff into landscaped areas in median	Runoff leaving underdrain system of landscaped median is pumped to bioretention gardens along either side of ABC Blvd	Signed statement from City of Eden assuming post-construction responsibility for treatment BMP maintenance.	WEF Method	n/a	BAHM used to design and size stormwater treatment units so that increased runoff is detained.

Instructions for Provision C.3.b. Sample Reporting Table

1. **Project Name, Number, Location, and Street Address** – Include the following information:
   - Name of the project
   - Number of the project (if applicable)
   - Location of the project with cross streets
   - Street address of the project (if available)

2. **Name of Developer, Project Phase Number, Project Type, and Project Description** – Include the following information:
   - Name of the developer
   - Project phase name and/or number (only if the project is being developed in phases) – each phase should have a separate row entry
   - Type of development (i.e., new and/or redevelopment)
   - Description of development (e.g., 5-story office building, residential with 160 single-family homes with five 4-story buildings to contain 200 condominiums, 100 unit 2-story shopping mall, mixed use retail and residential development (apartments), industrial warehouse)

3. **Project Watershed**
   - State the watershed(s) that the Project drains into
   - Optional but recommended: Also state the downstream watershed(s)

4. **Total Site Area and Total Area of Land Disturbed** – State the total site area and the total area of land disturbed.

5. **Total New and/or Replaced Impervious Surface Area**
   - State the total new impervious surface area
   - State the total replaced impervious surface area, as applicable

6. **Total Pre- and Post-Project Impervious Surface Area** – For redevelopment projects, state both the pre-project impervious surface area and the post-project impervious surface area.

7. **Status of Project** – Include the following information:
   - Project application submittal date
   - Project application deemed complete date
   - Final, major, staff-level discretionary review and approval date

8. **Source Control Measures** – List all source control measures that have been or will be included in the project.

9. **Site Design Measures** – List all site design measures that have been or will be included in the project.

10. **Treatment Systems Installed** – List all post-construction stormwater treatment system(s) installed onsite and/or at a joint stormwater treatment system facility.

11. **Operation and Maintenance Responsibility Mechanism** – List the legal mechanism(s) that have been or will be used to assign responsibility for the maintenance of the post-construction stormwater treatment systems.

12. **Hydraulic Sizing Criteria Used** – List the hydraulic sizing criteria used for the Project.

13. **Alternative Compliance Measures**

    - **Option 1: LID Treatment at an Offsite Location (Provision C.3.e.i.(1))** – On a separate page, give a discussion of the alternative compliance project including the information specified in Provision C.3.b.v.(1)(m)(i) for the offsite project.
    - **Option 2: Payment of In-Lieu Fees (Provision C.3.e.i.(2))** – On a separate page, provide the information specified in Provision C.3.b.v.(1)(m)(ii).

14. **HM Controls**

    - If HM control is not required, state why not
    - If HM control is required, state control method used (e.g., method to design and size device(s), method(s) used to meet the HM Standard, and description of device(s) or method(s) used, such as detention basin(s), biodetention unit(s), regional detention basins, or in-stream control)

ATTACHMENT B

Provision C.3.g.
Alameda Permittees
Hydromodification Management Requirements

Alameda Permittees Hydromodification Management Requirements

1. On-site and Regional Hydromodification Management (HM) Control Design Criteria

a. *Range of flows to control*: Flow duration controls shall be designed such that post-project stormwater discharge rates and durations match pre-project discharge rates and durations from 10 percent of the pre-project 2-year peak flow[123] up to the pre-project 10-year peak flow, except where the lower endpoint of this range is modified as described in Section 6 of this Attachment.

b. *Goodness of fit criteria*: The post-project flow duration curve shall not deviate above the pre-project flow duration curve by more than 10 percent over more than 10 percent of the length of the curve corresponding to the range of flows to control.

c. *Allowable low flow rate*: Flow control structures may be designed to discharge stormwater at a very low rate that does not threaten to erode the receiving waterbody. This flow rate (also called *Qcp*[124]) shall be no greater than 10 percent of the pre-project 2-year peak flow unless a modified value is substantiated by analysis of actual channel resistance in accordance with an approved User Guide as described in Section 6 of this Attachment.

d. *Standard HM modeling*: On-site and regional HM controls designed using the Bay Area Hydrology Model (BAHM[125]) and site-specific input data shall be considered to meet the HM Standard. Such use must be consistent with directions and options set forth in the most current BAHM User's Manual.[126] Permittees shall demonstrate to the satisfaction of the Executive Officer that any modifications of the BAHM made are consistent with the requirements of this Attachment and Provision C.3.f.

e. *Alternate HM modeling and design*: The project proponent may use a continuous simulation hydrologic computer model[127] to simulate pre-project and post-project runoff and to design HM controls. To use this method, the project proponent shall compare the

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[123] Where referred to in this Order, the 2-year peak flow is determined using a flood frequency analysis procedure based on USGS Bulletin 17 B to obtain the peak flow statistically expected to occur at a 2-year recurrence interval. In this analysis, the appropriate record of hourly rainfall data (e.g., 35–50 years of data) is run through a continuous simulation hydrologic model, the annual peak flows are identified, rank ordered, and the 2-year peak flow is estimated. Such models include USEPA's Hydrologic Simulation Program—Fortran (HSPF), U.S. Army Corps of Engineers' Hydrologic Engineering Center-Hydrologic Modeling System (HEC-HMS), and USEPA's Storm Water Management Model (SWMM).

[124] Qcp is the allowable low flow discharge from a flow control structure on a project site. It is a means of apportioning the critical flow in a stream to individual projects that discharge to that stream, such that cumulative discharges do not exceed the critical flow in the stream.

[125] *The Bay Area Hydrology Model – A Tool for Analyzing Hydromodification Effects of Development Projects and Sizing Solutions,* Bicknell, J., D. Beyerlein, and A. Feng, September 26, 2006. Available at http://www.scvurppp-w2k.com/permit_c3_docs/Bicknell-Beyerlein-Feng_CASQA_Paper_9-26-06.pdf

[126] *The Bay Area Hydrology Model – A Tool for Analyzing Hydromodification Effects of Development Projects and Sizing Solutions,* Bicknell, J., D. Beyerlein, and A. Feng, September 26, 2006. Available at http://www.scvurppp-w2k.com/permit_c3_docs/Bicknell-Beyerlein-Feng_CASQA_Paper_9-26-06.pdf

[127] Such models include US EPA's Hydrologic Simulation Program—Fortran (HSPF), U.S. Army Corps of Engineers Hydrologic Engineering Center-Hydrologic Modeling System (HEC-HMS), and USEPA's Surface Water Management Model (SWMM).

pre-project and post-project model output for a rainfall record of at least 30 years, and shall show that all applicable performance criteria in 1.a-e above are met.

2. Impracticability Provision

Where conditions (e.g., extreme space limitations) prevent a project from meeting the HM Standard for a reasonable cost, *and* where the project's runoff cannot be directed to a regional HM control within a reasonable time frame, *and* where an in-stream measure is not practicable, the project shall use (1) site design for hydrologic source control, *and* (2) stormwater treatment measures that collectively minimize, slow, and detain[128] runoff to the maximum extent practicable. In addition, the project proponent shall provide for or contribute financially to an alternative HM project as set forth below:

a. *Reasonable cost*: To show that the HM Standard cannot be met at a reasonable cost, the project proponent must demonstrate that the total cost to comply with both the HM Standard and the Provision C.3.d treatment requirement exceeds 2 percent of the project construction cost, excluding land costs. Costs of HM and treatment control measures shall not include land costs, soil disposal fees, hauling, contaminated soil testing, mitigation, disposal, or other normal site enhancement costs such as landscaping or grading that are required for other development purposes.

b. *Regional HM controls:* A regional HM control shall be considered available if there is a planned location for the regional HM control and if an appropriate funding mechanism for a regional HM control is in place by the time of project construction.

c. *In-stream measures practicability:* In-stream measures shall be considered practicable when an in-stream measure for the project's watershed is planned and an appropriate funding mechanism for an in-stream measure is in place by the time of project construction.

d. *Financial contribution to an alternative HM project:* The difference between 2 percent of the project construction costs and the cost of the treatment measures at the site (both costs as described in Section 2.a of this Attachment) shall be contributed to an alternative HM project, such as a stormwater treatment retrofit, HM retrofit, regional HM control, or in-stream measure that is not otherwise required by the Water Board or other regulatory agency. Preference shall be given to projects discharging, in this order, to the same tributary, mainstem, watershed, then in the same municipality or county.

3. Record Keeping

Permittees shall collect and retain the following information for all projects subject to HM requirements:

a. Site plans identifying impervious areas, surface flow directions for the entire site, and location(s) of HM measures;

b. For projects using standard sizing charts, a summary of sizing calculations used;

c. For projects using the BAHM, a listing of model inputs;

[128] Stormwater treatment measures that detain runoff are generally those that filter runoff through soil or other media and include bioretention units, bioswales, basins, planter boxes, tree wells, media filters, and green roofs.

d. For projects using custom modeling, a summary of the modeling calculations with corresponding graph showing curve matching (existing, post-project, and post-project with HM controls curves);

e. For projects using the Impracticability Provision, a listing of all applicable costs and a brief description of the alternative HM Project (name, location, date of start up, entity responsible for maintenance); and

f. A listing, summary, and date of modifications made to the BAHM, including technical rationale. Permittees shall submit this list and explanation annually with the Annual Report. This may be prepared at the Countywide Program level and submitted on behalf of participating Permittees.

4. HM Control Areas

Applicable projects shall be required to meet the HM Standard when such projects are in areas of HM applicability shown in the Alameda Permittees' HM Map.[129] (available at http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/muni/mrp/Final%20TO%20HM%20Maps.pdf). Plans to restore a creek reach may reintroduce the applicability of HM requirements; in these instances, Permittees may add, but shall not delete, areas of applicability accordingly.

To assist in location and evaluation of project applicability, the Alameda Permittees' HM Map depicts a number of features including the following:

- Hardened channels and culverts at least 24 inches in diameter (green solid or dashed lines);
- Natural channels (red lines);
- Boundaries of major watersheds (light blue lines); and
- Surface streets and highways (gray or black lines).

These data are of varying age, precision and accuracy and are not intended for legal description or engineering design. Watersheds extending beyond the County boundaries are shown for illustration purposes only. Project proponents are responsible for verifying and describing actual conditions of site location and drainage.

5. Alameda Permittees' HM Map is color-coded as follows:

a. **Solid pink areas** – Solid pink designates hilly areas, where high slopes (greater than 25 percent) occur. The HM Standard and all associated requirements apply in areas shown in solid pink on the map. In this area, the HM Standard does *not* apply if a project proponent demonstrates that all project runoff will flow through enclosed storm drains, existing concrete culverts, or fully hardened (with bed and banks continuously concrete-lined) channels to the tidal area shown in light gray.

b. **Purple/red hatched areas** – These are upstream of areas where hydromodification impacts are of concern because of factors such as bank instability, sensitive habitat, or restoration projects. The HM Standard and all associated requirements apply in areas

[129] The watercourses potentially susceptible to hydromodification impacts are identified based on an assessment approach developed by Balance Hydrologics (2003).

shown in purple/red (printer-dependant) hatch marking on the map. Projects in these areas may be subject to additional agency reviews related to hydrologic, habitat or other watershed-specific concerns.

c. **Solid white areas** – Solid white designates the land area between the hills and the tidal zone. This area may be susceptible to hydromodification unless the site is connected to storm drains that discharge to the tidal area. The HM Standard and all associated requirements apply to projects in solid white areas *unless* a project proponent demonstrates that all project runoff will flow through fully hardened channels.[130] Short segments of engineered earthen channels (length less than 10 times the maximum width of trapezoidal cross-section) can be considered resistant to erosion if located downstream of a concrete channel of similar or greater length and comparable cross-sectional dimensions. Plans to restore a hardened channel may affect the HM Standard applicability in this area.

d. **Solid gray areas** – Solid gray designates areas where streams or channels are tidally influenced or primarily depositional near their outfall in San Francisco Bay. The HM Standard does not apply to projects in this area. Plans to restore a hardened channel may affect the HM Standard applicability in this area.

e. **Dark gray, *Eastern County* area** – Dark gray designates the portion of eastern Alameda County that lies outside the discharge area of this NPDES permit. This area is in the Central Valley Regional Water Quality Control Board's jurisdiction.

6. Potential Exceptions to Alameda Permittees' HM Map Designations

The Program may choose to prepare a User Guide[131] to be used for evaluating individual receiving waterbodies using detailed methods to assess channel stability and watercourse critical flow. This User Guide would reiterate and collate established stream stability assessment methods that have been presented in the Program's HMP.[132] After the Program has collated its methods into a User Guide format, received approval of the User Guide from the Executive Officer,[133] and informed the public through such process as an electronic mailing list, the Permittees may use the User Guide to guide preparation of technical reports for the following: implementing the HM Standard using in-stream or regional HM controls; determining whether certain projects are discharging to a watercourse that is less susceptible (from point of discharge to the Bay) to hydromodification (e.g., would have a lower potential for erosion than set forth in these requirements); and/or determining if a watercourse has a higher critical flow and project(s) discharging to it are eligible for an alternative Qcp for the purpose of designing on-site or regional measures to control flows draining to these channels (i.e., the actual threshold of erosion-causing critical flow is higher than 10 percent of the 2-year pre-project flow). In no case shall the design value of Qcp exceed 50 percent of the 2-year pre-project flow.

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[130] In this paragraph, *fully hardened channels* include enclosed storm drains, existing concrete culverts, or channels whose bed and banks are continuously concrete-lined to the tidal area shown in light gray on the map.

[131] The User Guide may be offered under a different title.

[132] The Program's HMP has undergone Water Board staff review and been subject to public notice and comment.

[133] The User Guide shall not introduce a new concept, but rather reformat existing methods; therefore, Executive Officer approval is appropriate.

ATTACHMENT C

Provision C.3.g.
Contra Costa Permittees
Hydromodification Management Requirements

Contra Costa Permittees Hydromodification Management Requirements

1. Demonstrating Compliance with the Hydromodification Management (HM) Standard

Contra Costa Permittees shall ensure that project proponents shall demonstrate compliance with the HM Standard by demonstrating that any one of the following four options is met:

a. *No increase in impervious area.* The project proponent may compare the project design to the pre-project condition and show that the project will not increase impervious area and also will not facilitate the efficiency of drainage collection and conveyance.

b. *Implementation of hydrograph modification IMPs.* The project proponent may select and size IMPs to manage hydrograph modification impacts, using the design procedure, criteria, and sizing factors specified in the Contra Costa Clean Water Program's *Stormwater C.3 Guidebook.* The use of flow-through planters shall be limited to upper-story plazas, adjacent to building foundations, on slopes where infiltration could impair geotechnical stability, or in similar situations where geotechnical issues prevent use of IMPs that allow infiltration to native soils. Limited soil infiltration capacity in itself does not make use of other IMPs infeasible.

c. *Estimated post-project runoff durations and peak flows do not exceed pre-project durations and peak flows.* The project proponent may use a continuous simulation hydrologic computer model such as USEPA's Hydrograph Simulation Program—Fortran (HSPF) to simulate pre-project and post-project runoff, including the effect of proposed IMPs, detention basins, or other stormwater management facilities. To use this method, the project proponent shall compare the pre-project and post-project model output for a rainfall record of at least 30 years, using limitations and instructions provided in the Program's *Stormwater C.3 Guidebook*, and shall show that the following criteria are met:

i. For flow rates from 10 percent of the pre-project 2-year runoff event (0.1Q2) to the pre-project 10-year runoff event (Q10), the post-project discharge rates and durations shall not deviate above the pre-project rates and durations by more than 10 percent over more than 10 percent of the length of the flow duration curve.

ii. For flow rates from 0.5Q2 to Q2, the post-project *peak flows* shall not exceed pre-project peak flows. For flow rates from Q2 to Q10, post-project peak flows may exceed pre-project flows by up to 10 percent for a 1-year frequency interval. For example, post-project flows could exceed pre-project flows by up to 10 percent for the interval from Q9 to Q10 or from Q5.5 to Q6.5, but not from Q8 to Q10.

d. *Projected increases in runoff peaks and durations will not accelerate erosion of receiving stream reaches.* The project proponent may show that, because of the specific characteristics of the stream receiving runoff from the project site, or because of proposed stream restoration projects, or both, there is little likelihood that the cumulative impacts from new development could increase the net rate of stream erosion to the extent that beneficial uses would be significantly impacted. To use this option, the project proponent shall evaluate the receiving stream to determine the relative risk of erosion impacts and take the appropriate actions as described below and in Table A-1. Projects 20 acres or larger in total area shall not use the medium risk methodology in *(d)ii* below.

i. ***Low Risk.*** In a report or letter report, signed by an engineer or qualified environmental professional, the project proponent shall show that all downstream channels between the project site and the Bay/Delta fall into one of the following *low-risk* categories.

(1) Enclosed pipes.

(2) Channels with continuous hardened beds and banks engineered to withstand erosive forces and composed of concrete, engineered riprap, sackcrete, gabions, mats, and such. This category excludes channels where hardened beds and banks are not engineered continuous installations (i.e., have been installed in response to localized bank failure or erosion).

(3) Channels subject to tidal action.

(4) Channels shown to be aggrading (i.e., consistently subject to accumulation of sediments over decades) and to have no indications of erosion on the channel banks.

ii. ***Medium Risk.*** Medium risk channels are those where the boundary shear stress could exceed critical shear stress as a result of hydrograph modification but where either the sensitivity of the boundary shear stress to flow is low (e.g., an oversized channel with high width to depth ratios) or where the resistance of the channel materials is relatively high (e.g., cobble or boulder beds and vegetated banks). In *medium-risk* channels, accelerated erosion due to increased watershed imperviousness is not likely but is possible, and the uncertainties can be more easily and effectively addressed by mitigation than by additional study.

In a preliminary report, the project proponent's engineer or qualified environmental professional shall apply the Program's *Basic Geomorphic Assessment*[134] methods and criteria to show each downstream reach between the project site and the Bay/Delta is either at *low-risk* or *medium-risk* of accelerated erosion due to watershed development. In a following, detailed report, a qualified stream geomorphologist[135] shall use the Program's Basic Geomorphic Assessment methods and criteria, available information, and current field data to evaluate each *medium-risk* reach. For *each medium-risk* reach, the detailed report shall show one of the following:

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[134] Contra Costa Clean Water Program *Hydrograph Modification Management Plan*, May 15, 2005, Attachment 4, pp. 6-13. This method must be made available in the Program's *Stormwater C.3 Guidebook.*

[135] Typically, detailed studies will be conducted by a stream geomorphologist retained by the lead agency (or, on the lead agency's request, another public agency such as the Contra Costa County Flood Control and Water Conservation District) and paid for by the project proponent.

(1) A detailed analysis, using the Program's criteria, showing the particular reach may be reclassified as *low-risk.*

(2) A detailed analysis, using the Program's criteria, confirming the *medium-risk* classification, and:

(a) A preliminary plan for a mitigation project for that reach to stabilize stream beds or banks, improve natural stream functions, and/or improve habitat values, and

(b) A commitment to implement the mitigation project timely in connection with the proposed development project (including milestones, schedule, cost estimates, and funding), and

(c) An opinion and supporting analysis by one or more qualified environmental professionals that the expected environmental benefits of the mitigation project substantially outweigh the potential impacts of an increase in runoff from the development project, and

(d) Communication, in the form of letters or meeting notes, indicating consensus among staff representatives of regulatory agencies having jurisdiction that the mitigation project is feasible and desirable. In the case of the Regional Water Board, this must be a letter, signed by the Executive Officer or designee, specifically referencing this requirement. (This is a preliminary indication of feasibility required as part of the development project's Stormwater Control Plan. All applicable permits must be obtained before the mitigation project can be implemented.)

iii. ***High Risk.*** High-risk channels are those where the sensitivity of boundary shear stress to flow is high (e.g., incised or entrenched channels, channels with low width-to-depth ratios, and narrow channels with levees) or where channel resistance is low (e.g., channels with fine-grained, erodible beds and banks, or with little bed or bank vegetation). In a *high-risk* channel, it is presumed that increases in runoff flows will accelerate bed and bank erosion.

To implement this option (i.e., to allow increased runoff peaks and durations to a high-risk channel), the project proponent must perform a comprehensive analysis to determine the design objectives for channel restoration and must propose a comprehensive program of in-stream measures to improve channel functions while accommodating increased flows. Specific requirements are developed case-by-case in consultation with regulatory agencies having jurisdiction. The analysis will typically involve watershed-scale continuous hydrologic modeling (including calibration with stream gauge data where possible) of pre-project and post-project runoff flows, sediment transport modeling, collection and/or analysis of field data to characterize channel morphology including analysis of bed and bank materials and bank vegetation, selection and design of in-stream structures, and project environmental permitting.

2. IMP Model Calibration and Validation

The Program shall monitor flow from Hydrograph Modification Integrated Management Practices (IMPs) to determine the accuracy of its model inputs and assumptions. Monitoring

shall be conducted with the aim of evaluating flow control effectiveness of the IMPs. The Program shall implement monitoring where feasible at future new development projects to gain insight into actual versus predicted rates and durations of flow from IMP overflows and underdrains.

At a minimum, Permittees shall monitor five locations for a minimum of two rainy seasons. If two rainy seasons are not sufficient to collect enough data to determine the accuracy of model inputs and assumptions, monitoring shall continue until such time as adequate data are collected.

Permittees shall conduct the IMP monitoring as described in the IMP Model Calibration and Validation Plan in Section 5 of this Attachment. Monitoring results shall be submitted to the Executive Officer by June 15 of each year following collection of monitoring data. If the first year's data indicate IMPs are not effectively controlling flows as modeled in the HMP, the Executive Officer may require the Program to make adjustments to the IMP sizing factors or design, or otherwise take appropriate corrective action. The Permittees shall submit an IMP Monitoring Report by August 30 of the second year[136] of monitoring. The IMP Monitoring Report shall contain, at a minimum, all the data, graphic output from model runs, and a listing of all model outputs to be adjusted, with full explanation for each. Board staff will review the IMP Monitoring Report and require the Program to make any appropriate changes to the model within a 3-month time frame.

3. Stormwater C.3 Guidebook and IMP Design Criteria

The Current Contra Costa Clean Water Program C.3 Guidebook, 4th Edition (September 2008) shall be implemented until the expiration of this permit (November 2014). Any significant changes in the designs of the IMPs, their sizing factors or manner of implementation shall be approved by the Water Board.

4. IMP Model Calibration and Validation Plan Objective

Monitoring shall be conducted with the aim of evaluating flow control effectiveness of the IMPs. The IMPs were redesigned in 2008 to meet a low flow criterion of 0.2Q2, not 0.1Q2, which is current HMP standard for Contra Costa County. The Program shall implement monitoring at future new development projects at a minimum of five locations and for a minimum of two rainy seasons to gain insight into actual versus predicted rates and durations of flow from IMP overflows and underdrains. If two rainy seasons are not sufficient to collect enough data to determine the accuracy of model inputs and assumptions, monitoring shall continue until such time as adequate data are collected.

a. **The Dischargers Shall Identify and Establish Monitoring Sites – Program staff** shall work with municipal Co-Permittees to identify potential monitoring sites on development projects that implement IMPs. Proposed sites shall be identified during review of planning and zoning applications so that monitoring stations can be designed and constructed as part of the development project. Monitoring shall begin after the development project is complete and the site is in use.

   Criteria for appropriate sites include, but are not limited to, the following:

[136] If the monitoring extends beyond 2 years, an IMP Monitoring Report shall be submitted by August 30 annually until model calibration and validation is complete.

- To ensure applicability of results, the development project and IMPs should be typical of development sites and types of IMPs foreseen throughout the County. In particular, at least one each of the infiltration planter, flow-through planter, and *dry* swale shall be selected for monitoring.
- The area tributary to the IMP should be clearly defined, should contain and direct runoff at all rainfall intensities to the IMP. Two monitoring locations shall contain tributary areas that are a mix of pervious and impervious areas to test the pervious area simplifying assumptions used in the HMP, Table 14, Attachment 2, page 49. If no such locations are constructed by the monitoring period, modeling of mixed (pervious and impervious) tributary areas can substitute for direct monitoring of this type of location.
- The site shall be easily accessible at all times of day and night to allow inspection and maintenance of measurement equipment.
- Hourly rain gauge data representative of the site's location shall be available.

b. **Documentation of Monitoring Sites** – The Dischargers shall record and report (i.e., document) pertinent information for each monitoring site. Documentation of each monitoring site shall include the following:
   - Amount of tributary area;
   - Condition of roof or paving;
   - Grading and drainage to the IMP, including calculated time of concentration.
   - Locations and elevations of inlets and outlets;
   - As-built measurements of the IMP including depth of soil and gravel layers, height of underdrain pipe above the IMP floor or native soil;
   - Detailed specifications of soil and gravel layers and of filter fabric and other appurtenances; and
   - Condition of IMP surface soils and vegetation.

c. **Design, Construction, and Operation of Monitoring Sites** – The Dischargers shall ensure that IMPs selected for monitoring are equipped with a manhole, vault, or other means to install and access equipment for monitoring flows from IMP overflows and underdrains.

   Development of suitable methods for monitoring the entire range of flows may require experiment. The Program and Water Board are interested in the timing and duration of very low flows from underdrains, as well as higher flows from IMP overflows. The Dischargers shall ensure that equipment is configured to measure the entire range of flows and to avoid potential clogging of orifices used to measure low flows.

   The Dischargers shall ensure that construction of IMPs is inspected carefully to ensure that IMPs are installed as designed and to avoid potential operational problems. For example, gravel used for underdrain layers should be washed free of fines, and filter fabric should be installed without breaks.

The Dischargers shall ensure that, following construction, artificial flows are applied to the IMP to verify the IMP and monitoring equipment are operating correctly and to resolve any operational problems prior to measuring flows from actual rain storms.

The Dischargers shall ensure that monitoring equipment is properly maintained. Maintenance of monitoring equipment will require, initially, inspections during and after storms that produce runoff. The inspection and maintenance schedule may be adjusted as additional experience is gained.

d. Data to be Obtained – The Dischargers shall collect the following data for each IMP, during the monitoring period:

- Hourly rainfall and more frequent rainfall data where available;
- Hourly IMP outflow and 15-minute outflow for all time periods in which sub-hourly rainfall data are available;
- Hourly IMP inflow (if possible) and more frequent inflow (if possible) when sub-hourly rainfall data are available; and
- Notes and observations.

e. Evaluation of Data – The principal use of the monitoring data shall be a comparison of predicted to actual flows. The Dischargers shall ensure that the HSPF model is set up as it was to prepare the curves in Attachment 2 of the HMP, with appropriate adjustments for the drainage area of the IMP to be monitored and for the actual sizing and configuration of the IMP. Hourly rainfall data from observed storms shall be input to the model, and the resulting hourly predicted output recorded. Where sub-hourly rainfall data are available, the model shall be run with, and output recorded for, 15-minute time steps.

The Dischargers shall compare predicted hourly outflows to the actual hourly outflows. As more data are gathered, the Dischargers may examine aggregated data to characterize deviations from predicted performance at various storm intensities and durations.

Because high-intensity storms are rare, it will take many years to obtain a suitable number of events to evaluate IMP performance under overflow conditions. Underdrain flows will occur more frequently, but possibly only a few times a year, depending on rainfall and IMP characteristics (e.g., extent to which the IMP is oversized, and actual, rather than predicted, permeability of native soils). However, evaluating a range of rainfall events that do *not* produce underflow will help demonstrate the effectiveness of the IMP.

5. Record Keeping and Reporting

Permittees shall collect and retain the following information for all projects subject to HM requirements:

a. Site plans identifying impervious areas, surface flow directions for the entire site, and location(s) of HM measures;

b. For projects using standard sizing charts, a summary of sizing calculations used;

c. For projects using the BAHM, a listing of model inputs;

d. For projects using custom modeling, a summary of the modeling calculations with corresponding graph showing curve matching (existing, post-project, and post-project with HM controls curves);

e. For projects using the Impracticability Provision, a listing of all applicable costs and a brief description of the alternative HM project (name, location, date of start up, entity responsible for maintenance); and

f. A list and thorough technical explanation of any changes in design criteria for HM Controls, including IMPs. Permittees shall submit this list and explanation annually with the Annual Report.

6. The current Contra Costa Clean Water Program C.3 Guidebook, 4th Edition (C.3 Guidebook) (September 2008) design approach and IMPs shall be used to comply with Provision C.3.g flow requirements until this permit expires and is reissued, pending model verification studies as described below. The IMPs shall be an implementation option as the flow control implementation for development projects up to a footprint of 30 acres

By April 1, 2014, the Contra Costa Clean Water Program shall submit a proposal containing one or a combination of the following three options (a.-c.) for implementation after the expiration and reissuance of this permit:

a. Present model verification monitoring results demonstrating that the IMPs are sufficiently overdesigned and perform to meet the 0.1Q2 low flow design criteria; or

b. Present study results of Contra Costa County streams geology and other factors that support the low flow design criteria of 0.2Q2 as the limiting HMP design low flow; or

c. Propose redesigns of the IMPs to meet the low flow design criteria of 0.1Q2 to be implemented during the next permit term.

ATTACHMENT D

Provision C.3.g.
Fairfield-Suisun Permittees
Hydromodification Management Requirements

Fairfield-Suisun Permittees Hydromodification Management Requirements

1. On-site and Regional Hydromodification Management (HM) Control Design Criteria

a. *Range of flows to control*: Flow duration controls shall be designed such that post-project stormwater discharge rates and durations match pre-project discharge rates and durations from 20 percent of the pre-project 2-year peak flow[137] up to the pre-project 10-year peak flow.

b. *Goodness of fit criteria*: The post-project flow duration curve shall not deviate above the pre-project flow duration curve by more than 10 percent over more than 10 percent of the length of the curve corresponding to the range of flows to control.

c. *Allowable low flow rate:* Flow control structures may be designed to discharge stormwater at a very low rate that does not threaten to erode the receiving waterbody. This flow rate (also called Qcp[138]) shall be no greater than 20 percent of the pre-project 2-year peak flow.

d. *Standard HM modeling:* On-site and regional HM controls designed using the Bay Area Hydrology Model (BAHM[139]) and site-specific input data shall be considered to meet the HM Standard. Such use must be consistent with directions and options set forth in the most current BAHM User Manual.[140] Permittees shall demonstrate to the satisfaction of the Executive Officer that any modifications of the BAHM made are consistent with this Attachment and Provision C.3.g.

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[137] Where referred to in this Order, the 2-year peak flow is determined using a flood flow frequency analysis procedure based on USGS Bulletin 17 B to obtain the peak flow statistically expected to occur at a 2-year recurrence interval. In this analysis, the appropriate record of hourly rainfall data (e.g., 35–50 years of data) is run through a continuous simulation hydrologic model, the annual peak flows are identified, rank ordered, and the 2-year peak flow is estimated. Such models include USEPA's Hydrologic Simulation Program—Fortran (HSPF), U.S. Army Corps of Engineers' Hydrologic Engineering Center-Hydrologic Modeling System (HEC-HMS), and USEPA's Storm Water Management Model (SWMM).

[138] Qcp is the allowable low flow discharge from a flow control structure on a project site. It is a means of apportioning the critical flow in a stream to individual projects that discharge to that stream, such that cumulative discharges do not exceed the critical flow in the stream.

[139] See www.bayareahydrologymodel.org , Resources

[140] *The Bay Area Hydrology Model User Manual*is available at http://www.bayareahydrologymodel.org/downloads.html.

e. *Alternate HM modeling and design:* The project proponent may use a continuous simulation hydrologic computer model[141] to simulate pre-project and post-project runoff and to design HM controls. To use this method, the project proponent shall compare the pre-project and post-project model output for a rainfall record of at least 30 years, and shall show that all applicable performance criteria in 1.a–c above are met.

f. *Sizing Charts:* The Program developed design procedures, criteria, and sizing factors for infiltration basins and bioretention units, based on a low flow rate that exceeds the allowable low flow rate. After the Program has modified its sizing factors[142] to the allowable criteria, received approval of the modified sizing factors from the Executive Officer,[143] and informed the public through such mechanism as an electronic mailing list, project proponents may meet the HM Standard by using the Program's design procedures, criteria, and sizing factors for infiltration basins and/or bioretention units.

2. Impracticability Provision

Where conditions (e.g., extreme space limitations) prevent a project from meeting the HM Standard for a reasonable cost, *and* where the project's runoff cannot be directed to a regional HM control within a reasonable time frame, *and* where an in-stream measure is not practicable, the project shall use (1) site design for hydrologic source control, *and* (2) stormwater treatment measures that collectively minimize, slow, and detain[144] runoff to the maximum extent practicable. In addition, if the cost of providing site design for hydrologic source control and treatment measures to the maximum extent practicable does not exceed 2% of the project cost (as defined in "2.a." below), the project proponent shall provide for or contribute financially to an alternative HM project as set forth below:

a. *Reasonable cost*: To show that the HM Standard cannot be met at a reasonable cost, the project proponent must demonstrate that the total cost to comply with both the HM Standard and the Provision C.3.d. treatment requirement exceeds 2 percent of the project construction cost, excluding land costs. Costs of HM and treatment control measures shall not include land costs, soil disposal fees, hauling, contaminated soil testing, mitigation, disposal, or other normal site enhancement costs such as landscaping or grading that are required for other development purposes.

b. *Regional HM controls*: A regional HM control shall be considered available if there is a planned location for the regional HM control and if an appropriate funding mechanism for a regional HM control is in place by the time of project construction.

c. *In-stream measures practicability*: In-stream measures shall be considered practicable when an in-stream measure for the project's watershed is planned and an appropriate funding mechanism for an in-stream measure is in place by the time of project construction.

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[141] Such models include USEPA's Hydrologic Simulation Program—Fortran (HSPF), U.S. Army Corps of Engineers Hydrologic Engineering Center-Hydrologic Modeling System (HEC-HMS), and USEPA's Storm Water Management Model (SWMM).

[142] Current sizing factors and design criteria are shown in Appendix D of the FSURMP HMP.

[143] The modified sizing factors will not introduce a new concept but rather make an existing compliance mechanism more stringent; therefore, Executive Officer approval is appropriate.

[144] Stormwater treatment measures that detain runoff are generally those that filter runoff through soil or other media, and include bioretention units, bioswales, basins, planter boxes, tree wells, media, filters, and green roofs.

d. *Financial contribution to an alternative HM project*: The difference between 2 percent of the project construction costs and the cost of the treatment measures at the site (both costs as described in Section 2.a of this Attachment) shall be contributed to an alternative HM project, such as a stormwater treatment retrofit, HM retrofit, regional HM control, or in-stream measure. Preference shall be given to projects discharging, in this order, to the same tributary, mainstem, watershed, then in the same municipality or county.

3. Record Keeping

Permittees shall collect and retain the following information for all projects subject to HM requirements:

a. Site plans identifying impervious areas, surface flow directions for the entire site, and location(s) of HM measures;

b. For projects using standard sizing charts, a summary of sizing calculations used;

c. For projects using the BAHM, a listing of model inputs;

d. For projects using custom modeling, a summary of the modeling calculations with corresponding graph showing curve matching (existing, post-project, and post-project with HM controls curves);

e. For projects using the Impracticability Provision, a listing of all applicable costs and a brief description of the alternative HM project (name, location, date of start up, entity responsible for maintenance); and

f. A listing, summary, and date of modifications made to the BAHM, including technical rationale. Permittees shall submit this list and explanation annually with the Annual Report.

4. HM Control Areas

Applicable projects shall be required to meet the HM Standard when such projects discharge into the upstream reaches of Laurel or Ledgewood Creeks, as delineated in the Fairfield-Suisun Permittees' HM Maps (available at http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/muni/mrp/Final%20TO%20HM%20Maps.pdf.). Plans to restore a creek reach may reintroduce the applicability of HM requirements; in these instances, Permittees may add, but shall not delete, areas of applicability accordingly.

ATTACHMENT E

Provision C.3.g.
San Mateo Permittees
Hydromodification Management Requirements

San Mateo Permittees Hydromodification Management Requirements

1. On-site and Regional Hydromodification Management (HM) Control Design Criteria

a. *Range of flows to control:* Flow duration controls shall be designed such that post-project stormwater discharge rates and durations match pre-project discharge rates and durations from 10 percent of the pre-project 2-year peak flow[145] up to the pre-project 10-year peak flow.

b. *Goodness of fit criteria*: The post-project flow duration curve shall not deviate above the pre-project flow duration curve by more than 10 percent over more than 10 percent of the length of the curve corresponding to the range of flows to control.

c. *Allowable low flow rate:* Flow control structures may be designed to discharge stormwater at a very low rate that does not threaten to erode the receiving waterbody. This flow rate (also called Qcp[146]) shall be no greater than 10 percent of the pre-project 2-year peak flow.

d. *Standard HM modeling*: On-site and regional HM controls designed using the Bay Area Hydrology Model (BAHM[147]) and site-specific input data shall be considered to meet the HM Standard. Such use must be consistent with directions and options set forth in the

[145] Where referred to in this Order, the 2-year peak flow is determined using a flood flow frequency analysis procedure based on USGS Bulletin 17 B to obtain the peak flow statistically expected to occur at a 2-year recurrence interval. In this analysis, the appropriate record of hourly rainfall data (e.g., 35–50 years of data) is run through a continuous simulation hydrologic model, the annual peak flows are identified, rank ordered, and the 2-year peak flow is estimated. Such models include USEPA's Hydrologic Simulation Program—Fortran (HSPF), U.S. Army Corps of Engineers' Hydrologic Engineering Center-Hydrologic Modeling System (HEC-HMS), and USEPA's Storm Water Management Model (SWMM).

[146] Qcp is the allowable low flow discharge from a flow control structure on a project site. It is a means of apportioning the critical flow in a stream to individual projects that discharge to that stream, such that cumulative discharges do not exceed the critical flow in the stream.

[147] See www.bayareahydrologymodel.org , Resources

most current BAHM User Manual.[148] Permittees shall demonstrate to the satisfaction of the Executive Officer that any modifications of the BAHM made are consistent with the requirements of Provision C.3.g.

e. *Alternate HM modeling and design*: The project proponent may use a continuous simulation hydrologic computer model[149] to simulate pre-project and post-project runoff and to design HM controls. To use this method, the project proponent shall compare the pre-project and post-project model output for a rainfall record of at least 30 years, and shall show that all applicable performance criteria in 1.a.–c. above are met.

2. Impracticability Provision

Where conditions (e.g., extreme space limitations) prevent a project from meeting the HM Standard for a reasonable cost, *and* where the project's runoff cannot be directed to a regional HM control within a reasonable time frame, *and* where an in-stream measure is not practicable, the project shall use (1) site design for hydrologic source control, *and* (2) stormwater treatment measures that collectively minimize, slow, and detain[150] runoff to the maximum extent practicable. In addition, , if the cost of providing site design for hydrologic source control and treatment measures to the maximum extent practicable does not exceed 2% of the project cost (as defined in "2.a." below), the project proponent shall provide for or contribute financially to an alternative HM project as set forth below:

a. *Reasonable cost*: To show that the HM Standard cannot be met at a reasonable cost, the project proponent must demonstrate that the total cost to comply with both the HM Standard and the Provision C.3.d treatment requirement exceeds 2 percent of the project construction cost, excluding land costs. Costs of HM and treatment control measures shall not include land costs, soil disposal fees, hauling, contaminated soil testing, mitigation, disposal, or other normal site enhancement costs such as landscaping or grading that are required for other development purposes.

b. *Regional HM controls:* A regional HM control shall be considered available if there is a planned location for the regional HM control and if an appropriate funding mechanism for a regional HM control is in place by the time of project construction.

c. *In-stream measures practicability:* In-stream measures shall be considered practicable when an in-stream measure for the project's watershed is planned and an appropriate funding mechanism for an in-stream measure is in place by the time of project construction.

d. *Financial contribution to an alternative HM project*: The difference between 2 percent of the project construction costs and the cost of the treatment measures at the site (both costs as described in Section 2.a of this Attachment shall be contributed to an alternative HM project, such as a stormwater treatment retrofit, HM retrofit, regional HM control, or

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[148] The Bay Area Hydrology Model User Manualis available at http://www.bayareahydrologymodel.org/downloads.html

[149] Such models include USEPA's Hydrologic Simulation Program—Fortran (HSPF), U.S. Army Corps of Engineers Hydrologic Engineering Center-Hydrologic Modeling System (HEC-HMS), and USEPA's Storm Water Management Model (SWMM).

[150] Stormwater treatment measures that detain runoff are generally those that filter runoff through soil or other media, and include bioretention units, bioswales, basins, planter boxes, tree wells, media filters, and green roofs.

in-stream measure. Preference shall be given to projects discharging, in this order, to the same tributary, mainstem, watershed, then in the same municipality, or county.

3. Record Keeping

Permittees shall collect and retain the following information for all projects subject to HM requirements:

a. Site plans identifying impervious areas, surface flow directions for the entire site, and location(s) of HM measures;

b. For projects using standard sizing charts, a summary of sizing calculations used;

c. For projects using the BAHM, a listing of model inputs;

d. For projects using custom modeling, a summary of the modeling calculations with corresponding graph showing curve matching (existing, post-project, and post-project with HM controls curves);

e. For projects using the Impracticability Provision, a listing of all applicable costs and a brief description of the alternative HM project (name, location, date of startup, entity responsible for maintenance); and

f. A listing, summary, and date of modifications made to the BAHM, including technical rationale. Permittees shall submit this list and explanation annually with the Annual Report. This may be prepared at the Countywide Program level and submitted on behalf of participating Permittees.

4. HM Control Areas

Applicable projects shall be required to meet the HM Standard when such projects are in the HM control areas shown in the San Mateo Permittees' HM Map (available at http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/muni/mrp/Final%20TO%20HM%20Maps.pdf). Plans to restore a creek reach may reintroduce the applicability of HM requirements; in these instances, Permittees may add, but shall not delete, areas of applicability accordingly.

The HM Standard and all associated requirements apply in areas that are shown in green on the map and noted in the map's key as *areas subject to HMP*. The other areas are exempt from the HM Standard because they drain to hardened channels or low gradient channels (a characteristic applicable to San Mateo County's particular shoreline properties), or are in highly developed areas. Plans to restore a hardened channel may affect areas of applicability.

Areas shown in the San Mateo Permittees' HM Map may be modified as follows:

b. Street Boundary Interpretation – Streets are used to mark the boundary between areas where the HM Standard must be met and exempt areas. Parcels on the boundary street are considered within the area exempted from the hydromodification requirements. Nonetheless, there might be cases where the drainage from a particular parcel(s) on the boundary street drains westward into the hydromodification required area and, as such, any applicable project on such a parcel(s) would be subject to the hydromodification requirements.

c. **Hardened Channel/Drainage to Exempt Area** – If drainage leaving a proposed project subject to the HM Standard is determined to flow only through a hardened channel and/or enclosed pipe along its entire length before directly discharging into a waterway in the exempt area or into tidal waters, the project would be exempted from the HM Standard and its associated requirements. The project proponent must demonstrate, in a statement signed by an engineer or qualified environmental professional, that this condition is met.

d. **Boundary Re-Opener** – If the municipal regional permit or future permit reissuances or amendments modify the types of projects subject to the hydromodification requirements, the appropriate location for an HMP boundary or boundaries will be reevaluated at the same time.

ATTACHMENT F

Provision C.3.g.
Santa Clara Permittees
Hydromodification Management Requirements

Santa Clara Permittees Hydromodification Management Requirements

1. On-site and Regional Hydromodification Management (HM) Control Design Criteria

a. *Range of flows to control:* Flow duration controls shall be designed such that post-project stormwater discharge rates and durations match pre-project discharge rates and durations from 10 percent of the pre-project 2-year peak flow[151] up to the pre-project 10-year peak flow, except where the lower endpoint of this range is modified as described in Section 5 of this Attachment.

b. *Goodness of fit criteria*: The post-project flow duration curve shall not deviate above the pre-project flow duration curve by more than 10 percent over more than 10 percent of the length of the curve corresponding to the range of flows to control.

c. *Allowable low flow rate*: Flow control structures may be designed to discharge stormwater at a very low rate that does not threaten to erode the receiving waterbody. This flow rate (also called *Qcp*[152]) shall be no greater than 10 percent of the pre-project 2-year peak flow unless a modified value is substantiated by analysis of actual channel resistance in accordance with an approved User Guide as described in Section 5 of this Attachment.

d. *Standard HM modeling*: On-site and regional HM controls designed using the Bay Area Hydrology Model (BAHM[153]) and site-specific input data shall be considered to meet the HM Standard. Such use must be consistent with directions and options set forth in the

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[151] Where referred to in this Order, the 2-year peak flow is determined using a flood flow frequency analysis procedure based on USGS Bulletin 17B to obtain the peak flow statistically expected to occur at a 2-year recurrence interval. In this analysis, the appropriate record of hourly rainfall data (e.g., 35–50 years of data) is run through a continuous simulation hydrologic model, the annual peak flows are identified, rank ordered, and the 2-year peak flow is estimated. Such models include USEPA's Hydrologic Simulation Program—Fortran (HSPF), U.S. Army Corps of Engineers' Hydrologic Engineering Center-Hydrologic Modeling System (HEC-HMS), and USEPA's Storm Water Management Model (SWMM).

[152] Qcp is the allowable low flow discharge from a flow control structure on a project site. It is a means of apportioning the critical flow in a stream to individual projects that discharge to that stream, such that cumulative discharges do not exceed the critical flow in the stream.

[153] See www.bayareahydrologymodel.org , Resources.

most current BAHM User Manual.[154] Permittees shall demonstrate to the satisfaction of the Executive Officer that any modifications of the BAHM made are consistent with this attachment and Provision C.3.g.

e. *Alternate HM modeling and design*: The project proponent may use a continuous simulation hydrologic computer model[155] to simulate pre-project and post-project runoff and to design HM controls. To use this method, the project proponent shall compare the pre-project and post-project model output for a rainfall record of at least 30 years, and shall show that all applicable performance criteria in 1.a. – c. above are met.

2. Impracticability Provision

Where conditions (e.g., extreme space limitations) prevent a project from meeting the HM Standard for a reasonable cost, *and* where the project's runoff cannot be directed to a Regional HM control[156] within a reasonable time frame, *and* where an in-stream measure is not practicable, the project shall use (1) site design for hydrologic source control, *and* (2) stormwater treatment measures that collectively minimize, slow, and detain[157] runoff to the maximum extent practicable. In addition, if the cost of providing site design for hydrologic source control and treatment measures to the maximum extent practicable does not exceed 2% of the project cost (as-defined in "2.a." below), the project shall contribute financially to an alternative HM project as set forth below:

a. *Reasonable cost*: To show that the HM Standard cannot be met at a reasonable cost, the project proponent must demonstrate that the total cost to comply with both the HM Standard and the Provision C.3.d treatment requirement exceeds 2 percent of the project construction cost, excluding land costs. Costs of HM and treatment control measures shall not include land costs, soil disposal fees, hauling, contaminated soil testing, mitigation, disposal, or other normal site enhancement costs such as landscaping or grading that are required for other development purposes.

b. *Regional HM control:* A regional HM control shall be considered available if there is a planned location for the regional HM control and if an appropriate funding mechanism for a regional control is in place by the time of project construction.

c. *In-stream measures practicability:* In-stream measures shall be considered practicable when an in-stream measure for the project's watershed is planned and an appropriate funding mechanism for an in-stream measure is in place by the time of project construction.

d. *Financial contribution to an alternative HM project:* The difference between 2 percent of the project construction costs and the cost of the treatment measures at the site (both costs as described in Section 2.a of this Attachment) shall be contributed to an alternative

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[154] *The Bay Area Hydrology Model User Manual* is available at http://www.bayareahydrologymodel.org/downloads.html.

[155] Such models include USEPA's Hydrologic Simulation Program—Fortran (HSPF), U.S. Army Corps of Engineers Hydrologic Engineering Center-Hydrologic Modeling System (HEC-HMS), and USEPA's Storm Water Management Model (SWMM).

[156] *Regional HM controls* are flow duration control structures that collect stormwater runoff discharge from multiple projects (each of which should incorporate hydrologic source control measures as well) and are designed such that the HM Standard is met for all the projects at the point where the regional control measure discharges.

[157] Stormwater treatment measures that detain runoff are generally those that filter runoff through soil or other media, and include bioretention units, bioswales, basins, planter boxes, sand filters, and green roofs.

HM project, such as a stormwater treatment retrofit, HM retrofit, regional HM control, or in-stream measure. Preference shall be given to projects discharging, in this order, to the same tributary, mainstem, watershed, then in the same municipality or county.

3. Record Keeping

Permittees shall collect and retain the following information for all projects subject to HM requirements:

a. Site plans identifying impervious areas, surface flow directions for the entire site, and location(s) of HM measures;

b. For projects using standard sizing charts, a summary of sizing calculations used;

c. For projects using the BAHM, a listing of model inputs;

d. For projects using custom modeling, a summary of the modeling calculations with corresponding graph showing curve matching (existing, post-project, and post-project with HM controls curves);

e. For projects using the Impracticability Provision, a listing of all applicable costs and a brief description of the alternative HM project (name, location, date of start up, entity responsible for maintenance); and

f. A listing, summary, and date of modifications made to the BAHM, including technical rationale. Permittees shall submit this list and explanation annually with the Annual Report. This may be prepared at the Countywide Program level and submitted on behalf of participating Permittees.

4. HM Control Areas

Applicable projects shall be required to meet the HM Standard when such projects are located in areas of HM applicability as described below and shown in the Santa Clara Permittees' HM Map (available at http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/muni/mrp/Final%20TO%20HM%20Maps.pdf).

a. Purple areas: These areas represent catchments that drain to hardened channels that extend continuously to the Bay or to tidally influenced sections of creeks. The HM Standard and associated requirements do not apply to projects in the areas designated in purple on the map.

Plans to restore a creek reach may reintroduce the applicability of HM requirements, unless the creek restoration project is designed to accommodate the potential hydromodification impacts of future development; if this is not the case, in these instances, Permittees may add, but shall not delete, areas of applicability accordingly.

b. Red areas: These areas represent catchments and subwatersheds that are greater than or equal to 65% impervious, based on existing imperviousness data sources. The HM Standard and associated requirements do not apply to projects in the areas designated in red on the map.

c. Pink areas: These are areas that are under review by the Permittees for accuracy of the imperviousness data. The HM Standard and associated requirements apply to projects in areas designated as pink on the map until such time as a Permittee presents new data that indicate that the actual level of imperviousness of a particular area is greater than or equal

to 65% impervious. Any new data will be submitted to the Water Board in one coordinated submittal within one year of permit adoption.

d. **Green area**: These areas represent catchments and subwatersheds that are less than 65% impervious and are not under review by the Permittees. The HM Standard and associated requirements apply to projects in areas designated as green on the map.

5. Potential Exceptions to Map Designations

The Program may choose to prepare a User Guide[158] to be used for evaluating individual receiving waterbodies using detailed methods to assess channel stability and watercourse critical flow. This User Guide would reiterate and collate established stream stability assessment methods that have been presented in the Program's HMP.[159] After the Program has collated its methods into User Guide format, received approval of the User Guide from the Executive Officer,[160] and informed the public through such process as an electronic mailing list, the Permittees may use the User Guide to guide preparation of technical reports for the following: implementing the HM Standard using in-stream or regional controls; determining whether certain projects are discharging to a watercourse that is less susceptible (from point of discharge to the Bay) to hydromodification (e.g., would have a lower potential for erosion than set forth in these requirements); and/or determining if a watercourse has a higher critical flow and project(s) discharging to it are eligible for an alternative Qcp for the purpose of designing on-site or regional measures to control flows draining to these channels (i.e., the actual threshold of erosion-causing critical flow is higher than 10 percent of the 2-year pre-project flow). In no case shall the design value of Qcp exceed 50 percent of the 2-year pre-project flow.

[158] The User Guide may be offered under a different title.
[159] The Program's HMP has undergone Water Board staff review and been subject to public notice and comment.
[160] The User Guide will not introduce a new concept, but rather reformat existing methods; therefore, Executive Officer approval is appropriate.

ATTACHMENT G

Provision C.3.h.
Sample Reporting Table

Table C.3.h. – Operation and Maintenance of Stormwater Treatment Systems
City of Eden Annual Report FY 2008-09

Facility/Site Inspected and Responsible Party for Maintenance	Date of Inspection	Type of Inspection (annual, follow-up, etc.)	Type of Treatment System or HM Control Inspected	Inspection Findings or Results	Enforcement Action Taken (Warning, NOV, administrative citation, etc.)	Comments
ABC Company 123 Alphabet Road San Jose	12/06/08	annual	offsite bioretention unit	proper operation	none	Unit is operating properly and is well maintained.
DEF site 234 Blossom Drive Santa Clara	12/17/08	annual	onsite media filter	ineffective filter media	verbal warning	Media filter is clogged and needs to be replaced.
	12/19/08	follow-up	onsite media filter	proper operation	none	New media filter in place and unit is operating properly.
	1/19/09	follow-up	onsite media filter	proper operation	none	Unit is operating properly.
GHI Hotel 1001 Grand Blvd 227 Touring Parkway	12/21/08	annual	onsite swales	proper operation	notice of violation	Bioretention unit #2 is badly eroded because of flow channelization. Stormwater is flowing over the eroded areas, bypassing treatment and running off into parking area.
			onsite bioretention unit #1	proper operation		
			onsite bioretention unit #2	eroded areas due to flow channelization		
	12/27/08	follow-up	onsite bioretention unit #2	proper operation	none	Entire bioretention unit #2 has been replanted and re-graded. Raining heavily but no overflow observed.
Rolling Hills Estates Homeowners' Association 543 Rolling Hill Drive Pleasanton	01/17/09	annual	onsite pond	sediment and debris accumulation	notice of violation	Pond needs sediment removal and check dam needs debris removal.
	01/24/09	follow-up	onsite pond	sediment and debris accumulation	administrative citation $1000	Pond still a mess. Administrative citation requires maintenance within a week.
	01/31/09	follow-up	onsite pond	proper maintenance	none	Pond maintenance completed.
	02/18/09	spot inspection	onsite pond	proper operation and maintenance	none	Proper operation and maintenance.

ATTACHMENT H

Provision C.8.
Status and Long-Term Monitoring
Follow-up Analysis and Actions

Status and Long-Term Monitoring Follow-up Analysis and Actions for Biological Assessment, Bedded Sediment Toxicity, and Bedded Sediment Pollutants

When results from Biological Assessment, Bedded Sediment Toxicity, and/or Bedded Sediment Pollutants monitoring indicate impacts at a monitoring location, Permittees shall evaluate the extent and cause(s) of impacts to determine the potential role of urban runoff as indicated in Table H-1.

Table H-1. Sediment Triad Approach to Determining Follow-Up Actions

Chemistry Results[161]	Toxicity Results[162]	Bioassessment Results[163]	Action
No chemicals exceed Threshold Effect Concentrations (TEC), mean Probable Effects Concentrations (PEC) quotient < 0.5 and pyrethroids < 1.0 Toxicity Unit (TU)[164]	No Toxicity	No indications of alterations	No action necessary
No chemicals exceed TECs, mean PEC quotient < 0.5 and pyrethroids< 1.0 TU	Toxicity	No indications of alterations	(1) Take confirmatory sample for toxicity. (2) If toxicity repeated, attempt to identify cause and spatial extent. (3) Where impacts are under Permittee's control, take management actions to minimize upstream sources causing toxicity; initiate no later than the second fiscal year following the sampling event.

[161] TEC and PEC are found in MacDonald, D.D., G.G. Ingersoll, and T.A. Berger. 2000. Development and Evaluation of Consensus-based Sediment Quality Guidelines for Freshwater Ecosystems. *Archives of Environ. Contamination and Toxicology* 39(1):20–31.

[162] Toxicity is exhibited when *Hyallela* survival statistically different than and < 20 percent of control.

[163] Alterations are exhibited if metrics indicate substantially degraded community.

[164] Toxicity Units (TU) are calculated as follows: TU = Actual concentration (organic carbon normalized) ÷ Reported *H. azteca* LC_{50} concentration (organic concentration normalized). Weston, D.P., R.W. Holmes, J. You, and M.J. Lydy, 2005. Aquatic Toxicity Due to Residential Use of Pyrethroid Insecticides. *Environ. Science and Technology* 39(24):9778–9784.

Chemistry Results[161]	**Toxicity Results**[162]	**Bioassessment Results**[163]	**Action**
No chemicals exceed TECs, mean PEC quotient < 0.5 and pyrethroids< 1.0 TU	No Toxicity	Indications of alterations	Identify the most probable cause(s) of the alterations in biological community. Where impacts are under Permittee's control, take management actions to minimize the impacts causing physical habitat disturbance; initiate no later than the second fiscal year following the sampling event.
No chemicals exceed TECs, mean PEC quotient < 0.5 and pyrethroids< 1.0 TU	Toxicity	Indications of alterations	(1) Identify cause(s) of impacts and spatial extent. (2) Where impacts are under Permittee's control, take management actions to minimize impacts; initiate no later than the second fiscal year following the sampling event.
3 or more chemicals exceed PECs, the mean PEC quotient is > 0.5, or pyrethroids > 1.0 TU	No Toxicity	Indications of alterations	(1) Identify cause of impacts. (2) Where impacts are under Permittee's control, take management actions to minimize the impacts caused by urban runoff; initiate no later than the second fiscal year following the sampling event.
3 or more chemicals exceed PECs, the mean PEC quotient is > 0.5, or pyrethroids > 1.0 TU	Toxicity	No indications of alterations	(1) Take confirmatory sample for toxicity. (2) If toxicity repeated, attempt to identify cause and spatial extent. (3) Where impacts are under Permittee's control, take management actions to minimize upstream sources; initiate no later than the second fiscal year following the sampling event.
3 or more chemicals exceed PECs, the mean PEC quotient is > 0.5, or pyrethroids > 1.0 TU	No Toxicity	No Indications of alterations	If PEC exceedance is Hg or PCBs, address under TMDLs
3 or more chemicals exceed PECs, the mean PEC quotient is > 0.5, or pyrethroids > 1.0 TU	Toxicity	Indications of alterations	(1) Identify cause(s) of impacts and spatial extent. (2) Where impacts are under Permittee's control, take management actions to address impacts.

ATTACHMENT I

Provision C.8.
Standard Monitoring Provisions

All monitoring activities shall meet the following requirements:

1. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity. [40 CFR 122.41(j)(1)]
2. Permittees shall retain records of all monitoring information, including all calibration and maintenance of monitoring instrumentation, and copies of all reports required by this Order for a period of at least five (5) years from the date of the sample, measurement, report, or application. This period may be extended by request of the Water Board or USEPA at any time and shall be extended during the course of any unresolved litigation regarding this discharge. [40 CFR 122.41(j)(2), CWC section 13383(a)]
3. Records of monitoring information shall include [40 CFR 122.41(j)(3)]:
   a. The date, exact place, and time of sampling or measurements;
   b. The individual(s) who performed the sampling or measurements;
   c. The date(s) analyses were performed;
   d. The individual(s) who performed the analyses;
   e. The analytical techniques or methods used; and,
   f. The results of such analyses.
4. The CWA provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Order shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than $20,000 per day of violation, or by imprisonment of not more than four years, or both. [40 CFR 122.41(j)(5)]
5. Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified in the monitoring Provisions. [40 CFR 122.41(l)(4)(iii)]
6. All chemical, bacteriological, and toxicity analyses shall be conducted at a laboratory certified for such analyses by the California Department of Health Services or a laboratory approved by the Executive Officer.
7. For priority toxic pollutants that are identified in the California Toxics Rule (CTR) (65 Fed. Reg. 31682), the Permittees shall instruct its laboratories to establish calibration standards that are equivalent to or lower than the Minimum Levels (MLs) published in Appendix 4 of the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP). If a Permittee can demonstrate that a particular ML is not attainable, in accordance with procedures set forth in 40 CFR 136, the lowest quantifiable concentration of the lowest calibration standard analyzed by a specific analytical procedure (assuming that all the method specified sample weights, volumes, and processing steps have been followed) may be used instead of the ML listed in Appendix 4 of the SIP. The Permittee must submit documentation from the laboratory to the Water Board for approval prior to raising the ML for any priority toxic pollutant.
8. The Clean Water Act provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or non-

compliance shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than six months per violation, or by both. [40 CFR 122.41(k)(2)]

9. If the discharger monitors any pollutant more frequently than required by the Permit, unless otherwise specified in the Order, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the reports requested by the Water Board. [40 CFR 122.41(l)(4)(ii)]

ATTACHMENT J

Minimum Trash Capture Area
and
Minimum Number of Trash Hot Spots

Table 10.1 Minimum Trash Capture Area and Trash Hot Spots for Population Based Permittees

Data Source: http://quake.abag.ca.gov/mitigation/pickdbh2.html and Association of Bay Area Governments, 2005 ABAG Land Use Existing Land Use in 2005: Report and Data for Bay Area Counties

	Population	Retail / Wholesale Commercial Acres	**Minimum Trash Capture Catchment Area (Acres)**[165]	# of Trash Hot Spots per 30K Population	# of Trash Hot Spots per 100 Retail / Wholesale Commercial Acres	**Minimum # of Trash Hot Spots**[166]
Alameda County						
San Leandro	73,402	721	**216**	2	7	4
Oakland	420,183	759	**228**	14	8	8
Dublin	46,934	377	**113**	1	3	**3**
Emeryville	9,727	69	**21**	1	1	1
Albany	16,877	95	**28**	1	1	1
Berkeley	106,697	183	**55**	3	1	3
Alameda County Unincorporated.	140,825	375	**112**	4	3	4
Alameda	75,823	402	**121**	2	4	**4**
Fremont	213,512	698	**209**	7	6	7
Hayward	149,205	726	**218**	4	7	**7**
Livermore	83,604	423	**127**	2	4	**4**
Newark	43,872	314	**94**	1	3	**3**
Piedmont	11,100	1	**0.3**	1	1	1
Pleasanton	69,388	366	**110**	2	3	**3**
Union City	73,402	183	**55**	2	1	2

[165] 30% of Retail / Wholesale Commercial Acres

[166] If the hot spot # based on % commercial area is more than twice that based on population, the minimum hot spot # is double the population based #.

	Population	Retail / Wholesale Commercial Acres	**Minimum Trash Capture Catchment Area (Acres)**[165]	# of Trash Hot Spots per 30K Population	# of Trash Hot Spots per 100 Retail / Wholesale Commercial Acres	**Minimum # of Trash Hot Spots**[166]
San Mateo County						
San Mateo County Unincorporated.	65,844	71	**21**	2	1	2
Atherton	7,475	0	**0**	1	1	1
Belmont	26,078	58	**17**	1	1	1
Brisbane	3,861	16	**5**	1	1	1
Burlingame	28,867	123	**37**	1	1	1
Colma	1,613	106	**32**	1	1	1
Portola Valley	4,639	9	**3**	1	1	1
Daly City	106,361	242	**73**	3	2	3
East Palo Alto	32,897	59	**18**	1	1	1
Foster City	30,308	67	**20**	1	1	1
Half Moon Bay	13,046	49	**15**	1	1	1
Hillsborough	11,272	0	**0**	1	1	1
Menlo Park	31,490	83	**25**	1	1	1
Millbrae	21,387	68	**20**	1	1	1
Pacifica	39,616	100	**30**	1	1	1
Redwood City	77,269	309	**93**	2	3	**3**
San Bruno	43,444	137	**41**	1	1	1
San Carlos	28,857	129	**39**	1	1	1
San Mateo	95,776	275	**82**	3	2	3
South San Francisco	63,744	195	**58**	2	1	2
Woodside	5,625	9	**3**	1	1	1

	Population	Retail / Wholesale Commercial Acres	**Minimum Trash Capture Catchment Area (Acres)**[165]	# of Trash Hot Spots per 30K Population	# of Trash Hot Spots per 100 Retail / Wholesale Commercial Acres	**Minimum # of Trash Hot Spots**[166]
Contra Costa County						
Contra Costa County Unincorporated.	173,573	524	**157**	5	5	5
Concord	123,776	1016	**305**	4	10	8
Walnut Creek	65,306	329	**99**	2	3	**3**
Clayton	10,784	21	**6**	1	1	1
Danville	42,629	134	**40**	1	1	1
El Cerrito	23,320	105	**32**	1	1	1
Hercules	24,324	37	**11**	1	1	1
Lafayette	23,962	68	**20**	1	1	1
Martinez	36,144	142	**43**	1	1	1
Moraga	16,138	108	**32**	1	1	1
Orinda	17,542	24	**7**	1	1	1
Pinole	19,193	140	**42**	1	1	1
Pittsburg	63,652	520	**156**	2	5	4
Pleasant Hill	33,377	219	**66**	1	2	**2**
Richmond	103,577	391	**117**	3	3	3
San Pablo	31,190	131	**39**	1	1	1
San Ramon	59,002	274	**82**	1	2	**2**

	Population	Retail / Wholesale Commercial Acres	**Minimum Trash Capture Catchment Area (Acres)**[165]	# of Trash Hot Spots per 30K Population	# of Trash Hot Spots per 100 Retail / Wholesale Commercial Acres	**Minimum # of Trash Hot Spots**[166]
Santa Clara County						
Santa Clara County Unincorporated	99,122	270	**81**	3	3	3
Cupertino	55,551	213	**64**	2	2	2
Los Altos	28,291	65	**20**	1	1	1
Los Altos Hills	8,837	0	**0**	1	1	1
Los Gatos	30,296	163	**49**	1	1	1
Milpitas	69,419	457	**137**	2	4	**4**
Monte Sereno	3,579	0	**0**	1	1	1
Mountain View	73,932	375	**112**	2	3	**3**
Santa Clara	115,503	560	**168**	3	5	**5**
Saratoga	31,592	41	**12**	1	1	1
San Jose	989,496	2983	**895**	32	29	32
Sunnyvale	137,538	548	**164**	3	5	**5**
Palo Alto	63,367	282	**84**	2	2	2
Solano County						
Vallejo	120,416	559	**168**	4	5	**5**
Fairfield	106,142	486	**146**	3	4	**4**
Suisun	28,031	75	**22**	1	1	1
Totals	4,930,339	19057	**5718**	165	184	349

Table 10-2. Non-Population Based Permittee Trash Hot Spot and Trash Capture Assignments

Non population based Permittee	Number of Trash Hot Spots	Trash Capture Requirement
Santa Clara Valley Water District	12	4 trash booms or 8 outfall capture devices (minimum 2 ft. diameter outfall) or equivalent measures
Alameda County Flood Control Agency	9	3 trash booms or 6 outfall capture devices (minimum 2 ft. diameter outfall) or equivalent measures
Alameda Co. Zone 7 Flood Control Agency	3	1 trash boom or 2 outfall capture devices (minimum 2 ft. diameter outfall) or equivalent measures
Contra Costa County Flood Control Agency	6	2 trash booms or 4 outfall capture devices (minimum 2 ft. diameter outfall) or equivalent measures
San Mateo County Flood Control District	2	1 trash booms or 2 outfall capture devices (minimum 2 ft. diameter outfall) or equivalent measures
Vallejo Sanitation and Flood District	1	1 trash boom or 2 outfall capture devices or equivalent measures (minimum 2 ft. diameter outfall)

ATTACHMENT K

Standard NPDES Stormwater Permit Provisions

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD SAN FRANCISCO BAY REGION

Standard Provisions and Reporting Requirements for NPDES Stormwater Discharge Permits

February 2009

A. GENERAL PROVISIONS

1. Neither the treatment nor the discharge of pollutants shall create a pollution, contamination, or nuisance as defined by Section 13050 of the California Water Code.
2. All discharges authorized by this Order shall be consistent with the terms and conditions of this Order.
3. **Duty to Comply**
   a. If a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under Section 307(a) of the Clean Water Act, or amendments thereto, for a toxic pollutant which is present in the discharge authorized herein and such standard or prohibition is more stringent than any limitation upon such pollutant in a Board adopted Order, discharger must comply with the new standard or prohibition. The Board will revise or modify the Order in accordance with such toxic effluent standard or prohibition and so notify the discharger.
   b. If more stringent applicable water quality standards are approved pursuant to Section 303 of the Clean Water Act, or amendments thereto, the discharger must comply with the new standard. The Board will revise and modify this Order in accordance with such more stringent standards.
   c. The filing of a request by the discharger for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition. [40 CFR 122.41(f)]
4. **Duty to Mitigate**

   The discharger shall take all reasonable steps to minimize or prevent any discharge in violation of this order and permit which has a reasonable likelihood of adversely affecting public health or the environment, including such accelerated or additional monitoring as requested by the Board or Executive Officer to determine the nature and impact of the violation. [40 CFR 122.41(d)]
5. Pursuant to U.S. Environmental Protection Agency regulations the discharger must notify the Water Board as soon as it knows or has reason to believe (1) that they have begun or expect to begin, use or manufacture of a pollutant not reported in the permit application,

or (2) a discharge of toxic pollutants not limited by this permit has occurred, or will occur, in concentrations that exceed the limits specified in 40 CFR 122.42(a).

6. The discharge of any radiological, chemical, or biological warfare agent waste is prohibited.
7. All facilities used for transport, treatment, or disposal of wastes shall be adequately protected against overflow or washout as the result of a 100-year frequency flood.
8. Collection, treatment, storage and disposal systems shall be operated in a manner that precludes public contact with wastewater, except where excluding the public is inappropriate, warning signs shall be posted.
9. **Property Rights**

   This Order and Permit does not convey any property rights of any sort or any exclusive privileges. The requirements prescribed herein do not authorize the commission of any act causing injury to the property of another, nor protect the discharger from liabilities under federal, state or local laws, nor create a vested right for the discharge to continue the waste discharge or guarantee the discharger a capacity right in the receiving water. [40 CFR 122.41(g)]

10. **Inspection and Entry**

    The Board or its authorized representatives shall be allowed:

    a. Entry upon premises where a regulated facility or activity is located or conducted, or where records are kept under the conditions of the order and permit;

    b. Access to and copy at, reasonable times, any records that must be kept under the conditions of the order and permit;

    c. To inspect at reasonable times any facility, equipment (including monitoring and control equipment), practices, or operations regulated or required under the order and permit; and

    d. To photograph, sample, and monitor, at reasonable times for the purpose of assuring compliance with the order and permit or as otherwise authorized by the Clean Water Act, any substances or parameters at any locations. [40 CFR 122.41(i)]

11. **Permit Actions**

    This Order and Permit may be modified, revoked and reissued, or terminated in accordance with applicable State and/or Federal regulations. Cause for taking such action includes, but is not limited to any of the following:

    a. Violation of any term or condition contained in the Order and Permit;

    b. Obtaining the Order and Permit by misrepresentation, or by failure to disclose fully all relevant facts;

    c. Endangerment to public health or environment that can only be regulated to acceptable levels by order and permit modification or termination; and

    d. Any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge.

12. Duty to Provide Information

The discharger shall furnish, within a reasonable time, any information the Board may request to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit. The discharger shall also furnish to the Board, upon request, copies of records required to be kept by its permit. [40 CFR 122.41(h)]

13. Availability

A copy of this permit shall be maintained at the discharge facility and be available at all times to operating personnel.

14. Continuation of Expired Permit

This permit continues in force and effect until a new permit is issued or the Board rescinds the permit. Only those dischargers authorized to discharge under the expiring permit are covered by the continued permit.

B. GENERAL REPORTING REQUIREMENTS

1. Signatory Requirements

a. All reports required by the order and permit and other information requested by the Board or USEPA Region 9 shall be signed by a principal executive officer or ranking elected official of the discharger, or by a duly authorized representative of that person. [40 CFR 122.22(b)]

b. Certification

All reports signed by a duly authorized representative under Provision E.1.a. shall contain the following certification:
"I certify under penalty of law that this document and all attachments are prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who managed the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations. [40 CFR 122.22(d)]

2. Should the discharger discover that it failed to submit any relevant facts or that it submitted incorrect information in any report, it shall promptly submit the missing or correct information. [40 CFR 122.41(l)(8)]

3. False Reporting

Any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance shall be subject to enforcement procedures as identified in Section F of these Provisions.

4. Transfers

a. This permit is not transferable to any person except after notice to the Board. The Board may require modification or revocation and reissuance of the permit to change the name of the Permittee and incorporate such other requirements as may be necessary under the Clean Water Act.

b. Transfer of control or ownership of a waste discharge facility under an National Pollutant Discharge Elimination System permit must be preceded by a notice to the Board at least 30 days in advance of the proposed transfer date. The notice must include a written agreement between the existing discharger and proposed discharger containing specific dates for transfer of responsibility, coverage, and liability between them. Whether an order and permit may be transferred without modification or revocation and reissuance is at the discretion of the Board. If order and permit modification or revocation and reissuance is necessary, transfer may be delayed 180 days after the Board's receipt of a complete application for waste discharge requirements and an NPDES permit.

5. Compliance Reporting

a. Planned Changes

The discharger shall file with the Board a report of waste discharge at least 120 days before making any material change or proposed change in the character, location or volume of the discharge.

b. Compliance Schedules

Reports of compliance or noncompliance with, or any progress reports on, interim and final compliance dates contained in any compliance schedule shall be submitted within 10 working days following each scheduled date unless otherwise specified within this order and permit. If reporting noncompliance, the report shall include a description of the reason for failure to comply, a description and schedule of tasks necessary to achieve compliance and an estimated date for achieving full compliance. A final report shall be submitted within 10 working days of achieving full compliance, documenting full compliance

c. Non-compliance Reporting (Twenty-four hour reporting:)

i. The discharger shall report any noncompliance that may endanger health or the environment. All pertinent information shall be provided orally within 24 hours from the time the discharger becomes aware of the circumstances. A written submission shall also be provided within five working days of the time the discharger becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times and, if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

C. ENFORCEMENT

1. The provision contained in this enforcement section shall not act as a limitation on the statutory or regulatory authority of the Board.

2. Any violation of the permit constitutes violation of the California Water Code and regulations adopted hereunder and the provisions of the Clean Water Act, and is the basis for enforcement action, permit termination, permit revocation and reissuance, denial of an application for permit reissuance; or a combination thereof.
3. The Board may impose administrative civil liability, may refer a discharger to the State Attorney General to seek civil monetary penalties, may seek injunctive relief or take other appropriate enforcement action as provided in the California Water Code or federal law for violation of Board orders.
4. It shall not be a defense for a discharger in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this order and permit.
5. A discharger seeking to establish the occurrence of any upset (See Definitions, G. 24) has the burden of proof. A discharger who wishes to establish the affirmative defense of any upset in an action brought for noncompliance shall demonstrate, through properly signed contemporaneous operating logs, or other relevant evidence that:
   a. an upset occurred and that the Permittee can identify the cause(s) or the upset;
   b. the permitted facility was being properly operated at the time of the upset;
   c. the discharger submitted notice of the upset as required in paragraph E.6.d.; and
   d. the discharger complied with any remedial measures required under A.4.

   No determination made before an action for noncompliance, such as during administrative review of claims that noncompliance was caused by an upset, is final administrative action subject to judicial review.
   In any enforcement proceeding, the discharger seeking to establish the occurrence of any upset has the burden of proof. [40 CFR 122.41(n)]

D. DEFINITIONS

1. DDT and Derivatives shall mean the sum of the p,p' and o,p' isomers of DDT, DDD (TDE), and DDE.
2. Duly authorized representative is one whose:
   a. Authorization is made in writing by a principal executive officer or ranking elected official;
   b. Authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as general manager in a partnership, manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. (A duly authorized representative may thus be either a named individual or any individual occupying a named position.); and
   c. Written authorization is submitted to the USEPA Region 9. If an authorization becomes no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements above must be submitted to the Board and USEPA Region 9 prior to

or together with any reports, information, or applications to be signed by an authorized representative.

3. Hazardous substance means any substance designated under 40 CFR 116 pursuant to Section 311 of the Clean Water Act.
4. HCH shall mean the sum of the alpha, beta, gama (Lindane), and delta isomers of hexachlorocyclohexane.
5. Overflow is defined as the intentional or unintentional spilling or forcing out of untreated or partially treated wastes from a transport system (e.g. through manholes, at pump stations, and at collection points) upstream from the plant headworks or from any treatment plant facilities.
6. Priority pollutants are those constituents referred to in 40 CFR S122, Appendix D and listed in the USEPA NPDES Application Form 2C, (dated 6/80) Items V-3 through V-9.
7. Storm Water means storm water runoff, snow melt runoff, and surface runoff and drainage. It excludes infiltration and runoff from agricultural land.
8. Toxic pollutant means any pollutant listed as toxic under Section 307(a)(1) of the Clean Water Act or under 40 CFR S401.15.
9. Total Identifiable Chlorinated hydrocarbons (TICH) shall be measured by summing the individual concentrations of DDT, DDD, DDE, aldrin, BHC, chlordane, endrin, heptachlor, lindane, dieldrin, PCBs and other identifiable chlorinated hydrocarbons.
10. Waste, waste discharge, discharge of waste, and discharge are used interchangeably in this order and permit. The requirements of this order and permit are applicable to the entire volume of water, and the material therein, which is disposed of to surface and ground waters of the State of California.

TAB NO. 2

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

REVISED ORDER 01-024
NPDES PERMIT NO. CAS029718

REISSUING WASTE DISCHARGE REQUIREMENTS FOR:

SANTA CLARA VALLEY WATER DISTRICT, COUNTY OF SANTA CLARA, CITY OF CAMPBELL, CITY OF CUPERTINO, CITY OF LOS ALTOS, TOWN OF LOS ALTOS HILLS, TOWN OF LOS GATOS, CITY OF MILPITAS, CITY OF MONTE SERENO, CITY OF MOUNTAIN VIEW, CITY OF PALO ALTO, CITY OF SAN JOSE, CITY OF SANTA CLARA, CITY OF SARATOGA, AND CITY OF SUNNYVALE, which have joined together to form the SANTA CLARA VALLEY URBAN RUNOFF POLLUTION PREVENTION PROGRAM

The California Regional Water Quality Control Board, San Francisco Bay Region, (hereinafter referred to as the Regional Board) finds that:

1. The Santa Clara Valley Water District (hereinafter District), County of Santa Clara, City of Campbell, City of Cupertino, City of Los Altos, Town of Los Altos Hills, Town of Los Gatos, City of Milpitas, City of Monte Sereno, City of Mountain View, City of Palo Alto, City of San Jose, City of Santa Clara, City of Saratoga, and City of Sunnyvale (hereinafter referred to as the Dischargers) have joined together to form the Santa Clara Valley Urban Runoff Pollution Prevention Program (hereinafter referred to as the Program) and have submitted a permit application (Report of Waste Discharge), dated December 21, 1999, for re-issuance of waste discharge requirements under the National Pollutant Discharge Elimination System (NPDES) to discharge stormwater run off from storm drains and watercourses within the Dischargers' jurisdictions.

2. The Dischargers are currently subject to NPDES Permit No.CAS029718 issued by Order No. 95-180 on August 23, 1995, and modified by Order No. 99-050 on July 21, 1999.

3. The Dischargers each have jurisdiction over and/or maintenance responsibility for their respective municipal separate storm drain systems and/or watercourses in the Santa Clara basin. (See attached location and political jurisdiction map.) The basin can be divided into eleven sub basins or watersheds including the Coyote Creek watershed on the east side of the valley, the Guadalupe River watershed which drains the south-central portion of the valley, the San Francisquito Creek watershed which drains the northwest portion of the valley (and part of San Mateo County), and a series of small, relatively urbanized watersheds that drain the west side of the valley. (See attached basin watersheds map.) Discharge consists of the surface runoff generated from various land uses in all the hydrologic sub basins in the basin which discharge into watercourses, which in turn flow into South San Francisco Bay.

   The quality and quantity of these discharges varies considerably and is affected by hydrology, geology, land use, season, and sequence and duration of hydrologic event. Pollutants of concern in these discharges are certain heavy metals, excessive sediment production from erosion due to anthropogenic activities, petroleum hydrocarbons from sources such as used motor oil, microbial pathogens of domestic sewage origin from illicit discharges, certain pesticides associated with

the risk of acute aquatic toxicity, excessive nutrient loads which may cause or contribute to the depletion of dissolved oxygen and/or toxic concentrations and dissolved ammonia, and other pollutants which may cause aquatic toxicity in the receiving waters.

4. Section 402(p) of the federal Clean Water Act (CWA), as amended by the Water Quality Act of 1987, requires NPDES permits for stormwater discharges from separate municipal storm drain systems, stormwater discharges associated with industrial activity (including construction activities), and designated stormwater discharges which are considered significant contributors of pollutants to waters of the United States. On November 16, 1990, the United States Environmental Protection Agency (hereinafter US EPA) published regulations (40 CFR Part 122) which prescribe permit application requirements for municipal separate storm drain systems pursuant to Section 402(p) of the CWA. On May 17, 1996, USEPA published an Interpretive Policy Memorandum on Reapplication Requirements for Municipal Separate Storm Sewer Systems (MS4s), which provided guidance on permit application requirements for regulated MS4s.

5. This Order was developed in cooperation with the Santa Clara Basin Watershed Management Initiative (SCBWMI). The SCBWMI, in which the Program and several of the Dischargers are active participants, is a stakeholder driven process that commenced in June 1996 as a pilot effort by the Regional Board. The SCBWMI seeks to integrate regulatory and watershed programs in the South San Francisco Bay Region. As part of this process, Regional Board staff conducted a series of 10 meetings with the Regulatory Subgroup of the SCBWMI (which included RWQCB staff, representatives of the Dischargers, and representatives of local environmental groups and other interested parties), and solicited the Regulatory Subgroup's input and comments concerning the Dischargers' permit and permit application. Through this process, the Regulatory Subgroup attempted to identify, prioritize, and resolve issues related to the Dischargers' and Program's performance, the Management Plan, and this permit, and attempted to develop a consensus concerning the requirements reflected herein. This Permit also reflects the SCBWMI's recommendations concerning the role of the Program and Dischargers in watershed management activities in the Santa Clara Valley Basin and lower South San Francisco Bay.

6. On December 21, 1999, the Dischargers and the Program submitted a Permit Re-Application Package that included the Program's 1997 Urban Runoff Management Plan, the Dischargers' updated Urban Runoff Management Plans, the Program's Watershed 2000 Vision statement,[1] the Dischargers' updated Memorandum of Agreement and Bylaws for Program Funding and Management, and the Program's and Dischargers' Annual Reports for FY 1999/00 and Workplans for FY 2000/01, which will hereinafter collectively be known as the Management Plan. The intent of the Management Plan is to reduce the discharge of pollutants in stormwater to the maximum extent practicable, and in a manner designed to achieve compliance with water quality standards and objectives, and effectively prohibit non-stormwater discharges into municipal storm drain systems and watercourses within the Dischargers' jurisdictions. The

[1] The Program's Watershed 2000 Vision, submitted as part of its December 21, 1999 Permit Re-Application Package, contains a five-year watershed education and outreach strategy that outlines the outreach efforts of the Santa Clara Basin Watershed Management Initiative. The strategy includes development, implementation, and evaluation of a county-wide Watershed Education and Outreach Campaign, beginning in FY 00-01. The goals of the Campaign are to 1) educate residents on the Santa Clara Basin watershed and how to protect it; 2) promote public involvement in watershed stewardship; and 3) change behaviors that negatively impact the watershed.

Management Plan fulfills the Regional Board's permit application requirements subject to the condition that it will be improved and revised in accordance with the provisions of this Order.

7. The Management Plan describes a framework for management of stormwater discharges during the term of this permit. The title page and table of contents of the Program's 1997 Urban Runoff Management Plan (Management Plan) are attached to this Order. The 1997 Management Plan describes the Program's goals and objectives, and the annual reporting and program evaluation process. Performance Standards, which represent the baseline level of effort required of each of the Dischargers, are contained in Appendix A of the 1997 Management Plan. The baseline performance standards serve as a reference point upon which to base effectiveness evaluations and consideration of opportunities for improving them.

   Program activities are focused on the following elements:
   - Program Management
   - Annual Reporting and Evaluation
   - Monitoring
   - Public Agency Activities
   - Public Information and Participation
   - Metals Control Measures
   - Watershed Management Measures
   - Illicit Connection / Illegal Dumping Elimination
   - Industrial and Commercial Discharges
   - New Development and Construction
   - Continuous Improvement

   Each Discharger has developed an Urban Runoff Management Plan to reduce, control and/or otherwise address sources of discharge. The Dischargers' Management Plans incorporate Performance Standards that, where necessary, refine the model Performance Standards to suit local conditions. The Dischargers' Management Plans contain local strategies for urban runoff control, including tailored Performance Standards, workplans to implement Performance Standards, and Best Management Practices and Standard Operating Procedures that detail how control measures will be carried out day-to-day.

   The Program participates, in and contributes to, joint efforts with other entities, including regulatory agencies, public benefit corporations, universities, and citizens' groups. These entities take the lead on addressing particular sources because they are regional, statewide or national in scope, because they have different skills or expertise, or because they have appropriate regulatory authority.

   The Program will continue to build and actively participate in the SCBWMI. The Program and several of the Dischargers are stakeholders (signatories) in the SCBWMI and provide staff support and funding to the SCBWMI. The SCBWMI, as a stakeholder process, provides the tools to identify community goals and issues, and facilitates the development of common ground between stakeholders to recommend to policy-makers the actions needed to better manage watershed resources.

8. The Program and the Dischargers are dedicated to a process of continuous review and improvement, which includes seeking new opportunities to control stormwater pollution and to protect beneficial uses. Accordingly, the Program and the Dischargers will on a continuous basis conduct and document peer review and evaluation of each relevant element of each Dischargers program and revise activities, control measures, Best Management Practices (BMPs) and Performance Standards. These changes will be documented in the Annual Report and will be considered an enforceable component of this Order. These reviews provide an opportunity for local staff to experience peer review, and to explore Bay Area, statewide and national stormwater program models and to identify additional ways that the Program could assist local pollution-prevention efforts.

9. It is the intent of Regional Board staff to perform, in coordination with the Dischargers and interested persons, an annual performance review and evaluation of the Program and its activities. The reviews are a useful means of evaluating overall Program effectiveness, implementation of Performance Standards, and continuous improvement opportunities. The following areas will be evaluated:

   a. Overall Program effectiveness;

   b. Performance Standard improvements;

   c. Dischargers' coordination and implementation of watershed based management actions (e.g., flood management, new development and construction, industrial source controls, public information/participation, monitoring);

   d. Partnership opportunities with other Bay Area stormwater programs; and

   e. Consistency in meeting maximum extent practicable measures within the Program and with other Regional, Statewide, and National municipal stormwater management programs.

10. The Program is organized, coordinated, and implemented based upon a Memorandum of Agreement (MOA) and set of Bylaws signed by the Dischargers, which define roles and responsibilities of the Dischargers. The roles and responsibilities of the Dischargers are, in part, as follows:

    a. The Management Committee, which includes representatives from all of the Dischargers, is the decision making body of the Program. It operates within the budget and policies established by the Dischargers' governing boards and councils to decide matters of budget and policy necessary to implement the Management Plan, and provides direction to the Program Manager and staff. The Management Committee has established ad hoc task groups to assist in planning and implementation of the Management Plan, and may add, modify, or delete such groups as deemed necessary.

    b. Any party as defined within the Program MOA may act as the contracting/fiscal agent for the Program. A contracted Program Manager is responsible for implementation of the Program's self-monitoring activities and preparation and submittal of Program components of the Annual Report and Workplans. In acting as the Program's contracting/fiscal agent, the Discharger does not assume responsibility for the obligations assigned to other Dischargers by this Order. In acting as the contracted Program manager, the Program manager does not assume responsibility for the obligations assigned to the Dischargers by this Order.

c. Each of the Dischargers is individually responsible for adoption and enforcement of ordinances and policies, implementation of assigned control measures/best management practices (BMPs) needed to prevent or reduce pollutants in stormwater, and for providing funds for the capital, operation, and maintenance expenditures necessary to implement such control measures/BMPs within their jurisdiction. Each Discharger is also responsible for its share of the costs of the area-wide component of the Program as specified in the MOA and Bylaws. Except for the area-wide component of the Program, enforcement actions concerning this Order will be pursued only against the individual Discharger(s) responsible for specific violations of this Order.

11. The Regional Board adopted a revised Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) on June 21, 1995, which was approved by the State Water Resources Control Board and the Office of Administrative Law on July 21 and November 13 of 1995, respectively. This updated and consolidated plan represents the Regional Board's master water quality control planning document. A summary of the regulatory provisions is contained in Title 23 of the California Code of Regulations at Section 3912. The Basin Plan identifies beneficial uses and water quality objectives for surface waters in the Region, as well as effluent limitations and discharge prohibitions intended to protect those uses. This Order implements the plans, policies, and provisions of the Board's Basin Plan.

12. The beneficial uses of South San Francisco Bay, its tributary streams and contiguous water bodies, and other water bodies within the drainage basin are listed in the Basin Plan.

13. The Regional Board considers stormwater discharges from the urban and developing areas in the San Francisco Bay Region, such as the Santa Clara Valley basin, to be significant sources of certain pollutants in waters of the Region that may be causing or threatening to cause or contribute to water quality impairment. Furthermore, as delineated on the CWA Section 303(d) list, the Regional Board finds that there is a reasonable potential that municipal stormwater discharges may cause or contribute to an excursion above water quality standards for: mercury, PCBs, dioxins, furans, diazinon, dieldrin, chlordane, and DDT in South San Francisco Bay; diazinon in Calabazas Creek, Coyote Creek, Guadalupe Creek, the Guadalupe River, Los Gatos Creek, Matadero Creek, San Francisquito Creek, Saratoga Creek, and Stevens Creek, mercury in the Guadalupe River, Alamitos Creek, Guadalupe Creek, Calero Reservoir, and Guadalupe Reservoir;[2] and sediment in San Francisquito Creek and possibly other creeks in the Santa Clara Basin. In accordance with CWA Section 303(d), the Regional Board is required to establish the Total Maximum Daily Loads (TMDLs) of these pollutants to these waters sufficient to eliminate impairment and attain water quality standards. Therefore, certain early actions and/or further assessments by the Dischargers are warranted and required pursuant to this Order.

In addition, pursuant to Provision C.1 of Order No. 95-180 as modified by Order No. 99-050, the Program's and Dischargers' Annual Reports dated September 1, 1999 and September 1, 2000 included delineations of control measures designed to address specific pollutants of concern in

[2] In addition, in May 2000, the Regional Board transmitted a Report to US EPA entitled, "Watershed Management of Mercury in the San Francisco Bay Estuary: Draft Total Maximum Daily Load." The Regional Board has listed all segments of San Francisco Bay as impaired due to mercury pollution. The Report indicates that urban runoff serves as a conveyance for mercury, and recommends certain actions by urban runoff programs when a mercury TMDL has been adopted.

the near term and a program of continuous improvement to further address these pollutants and their adverse water quality impacts over time. The Regional Board has reviewed these prior Provision C.1 submissions and, in response, is including additional requirements in Provision C.9 of this Order to continue implementation of previously delineated pollutant specific control measures and identification and implementation of additional control measures necessary to prevent or reduce discharges of pollutants that are causing or contributing to the exceedance of water quality standards.

14. The Regional Board had made previous findings that municipal stormwater discharges from the urban and developing areas in the San Francisco Bay Region, such as the Santa Clara Basin, cause or contribute to excursions above water quality standards for copper and nickel in South San Francisco Bay, south of the Dumbarton Bridge (Lower South San Francisco Bay). However, recent studies and related actions as described below provide cause for the Regional Board to revise the finding.

    a. A cooperative effort was initiated in 1998 to establish TMDLs for copper and nickel in Lower South San Francisco Bay. The SCBWMI established the TMDL Workgroup (TWG) as a stakeholder group to oversee and provide input and advice on development of the TMDLs. The TWG included representatives from the Dischargers, Regional and State Board staff, US EPA, San Francisco Estuary Institute, California Department of Fish and Game, environmental groups (CLEAN South Bay and Silicon Valley Toxics Coalition), business groups (Chamber of Commerce, Silicon Valley Manufacturing Group, and the Copper Development Association), Silicon Valley Pollution Prevention Center, and others.

    b. At its April 14, 2000 meeting the TWG approved the following reports and forwarded them to the SCBWMI: Impairment Assessment Report and Copper Action Plan. The TWG also approved an outline of a Nickel Action Plan.

    c. The Impairment Assessment Report (dated June 2000) recommends the establishment of site-specific objectives for Lower South San Francisco Bay in the range of 5.5 to 11.6 µg/l for dissolved copper and in the range of 11.9 to 24.4 µg/l for dissolved nickel and concludes that impairment of Lower South San Francisco Bay due to copper or nickel is unlikely. Accordingly, the report recommends that copper and nickel be removed from the CWA Section 303(d) list. The report also identifies specific areas of uncertainty associated with the finding that impairment is unlikely. Action Plan implementation items should address these uncertainties.

    d. The Copper Action Plan (dated June 2000) contains specific actions to be implemented by various entities. Actions applicable to the Dischargers are described in Appendix B of this Order. These include immediate pollution prevention Baseline actions and additional actions that would be triggered by specific increases in ambient concentrations. The plan calls for monitoring of municipal wastewater and urban runoff copper loading and dissolved copper in Lower South San Francisco Bay during the dry season. If the mean dissolved copper concentrations measured at certain specified stations[3] increases from its current level of 3.2

[3] Ten stations described in the Copper Action Plan are being monitored monthly during the dry season (May through October) for dissolved copper and nickel by the Publicly Owned Treatment Works (POTWs) that discharge to Lower

µg/l to 4.0 µg/l or higher, Phase 1 actions would be triggered to further control copper discharges. If the mean dissolved copper concentration increases to 4.4 µg/l, Phase 2 actions would be triggered. Such incremental increases in mean dissolved copper concentrations shall be used solely for triggering the aforementioned actions. If dischargers into the Lower South San Francisco Bay demonstrate that the increases in copper concentrations are due to factors beyond their control, the Regional Board will consider eliminating or postponing actions required under Phase 1 or Phase 2 of the Copper Action Plan.

e. The Nickel Action Plan (dated August 23, 2000) contains specific actions to be implemented by various entities. Actions applicable to the Dischargers are described in Appendix C of this Order. These include immediate pollution prevention Baseline actions and additional actions that would be triggered by specific increases in ambient concentrations. The plan calls for monitoring of municipal wastewater and urban runoff copper loading and dissolved copper in Lower South San Francisco Bay during the dry season. If the mean dissolved nickel concentrations measured at certain specified stations[4] increases from its current level of 3.8 µg/l to 6.0 µg/l or higher, Phase 1 actions would be triggered to further control nickel discharges. If the mean dissolved nickel concentration increases to 8.0 µg/l, Phase 2 actions would be triggered. Such incremental increases in mean dissolved nickel concentrations shall be used solely for triggering the aforementioned actions. If dischargers into the Lower South San Francisco Bay demonstrate that the increases in nickel concentrations are due to factors beyond their control, the Board will consider eliminating or postponing actions required under Phase 1 or Phase 2 of the Nickel Action Plan.

f. Some Baseline, Phase 1, and Phase 2 actions in the Copper Action Plan and Nickel Action Plan may require the assistance of the Regional Board to co-ordinate and assist in the efforts of dischargers into the Lower South San Francisco Bay and other entities to limit or reduce copper and nickel levels in the Lower South San Francisco Bay. It is the intent of the Regional Board that its staff will to the extent practicable coordinate and assist Baseline, Phase 1, and Phase 2 actions as identified in the Copper Action Plan and Nickel Action Plan.

g. Based upon the information contained in the Impairment Assessment Report, the Regional Board hereby concludes that Lower South San Francisco Bay is not impaired by copper or nickel. Therefore, it is the intent of the Regional Board to remove Lower South San Francisco Bay from the CWA Section 303(d) list of impaired water bodies for copper and nickel the next time the list is updated. This conclusion is based on data collected in Lower South San Francisco Bay from 1997 to 1999 which show that the mean dissolved copper concentration was 2.7 µg/l (range 0.8 to 4.9 µg/l) and that the mean dissolved nickel concentration was 3.8 µg/l (range 1.5 to 10.1 µg/l) and these data are below the lowest end of the suggested ranges for site specific objectives in the Impairment Assessment Report of 5.5 to 11.6 µg/l for dissolved copper and 11.9 to 24.4 µg/l for dissolved nickel.

h. It is the intent of the Regional Board to amend the Basin Plan to establish site-specific objectives for copper and nickel for Lower South San Francisco Bay. Information contained in the Impairment Assessment Report, along with other information, including information to be developed by the Dischargers for review and consideration by the Regional Board, will

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South San Francisco Bay. The results of this monitoring will be reported by the POTWs in their monthly and annual Self Monitoring Reports submitted to the Regional Board and to the SCBWMI Regulatory Subgroup.

be used to establish the objectives. It is the intent of the Regional Board to establish appropriate site-specific objectives using available state and/or federal water quality guidance and procedures.

i. The Regional Board has adopted similar findings as those noted above in the October 2000 amendments to the NPDES permits for the POTWs that discharge to Lower South San Francisco Bay, relative to the results and conclusion of the copper and nickel TMDL studies.

15. In Order No. 99-059 regarding the NPDES stormwater permit for the San Mateo Countywide Stormwater Pollution Prevention Program (STOPPP), the Regional Board required STOPPP to develop and implement an erosion control and prevention plan for the San Francisquito Creek watershed that drains approximately 45 square miles – 80% of which lies within the boundaries of San Mateo County. The Santa Clara Valley Water District, in partnership with the United States Geological Survey, adjacent municipal governments, and regional and state regulatory boards, has assumed a proactive role toward development of a sediment analysis within the San Francisquito Creek watershed. This ongoing effort included the development of a decision support system with community stakeholders, assisting continued development of STOPPP's erosion control plan, and characterization of management practices. It is the Regional Board's intent to continue to direct STOPPP to make progress on this issue, and to have the Dischargers work cooperatively with STOPPP to build upon the efforts already initiated without assuming a disproportionate share of the burden to resolve sediment issues is this watershed.

16. This Order contains in Provision C.5 the requirement to create an effective BMP approach for the following rural public works maintenance and support activities: a) management and/or removal of large woody debris and live vegetation from stream channels; b) streambank stabilization projects; c) road construction, maintenance, and repairs in rural areas to prevent and control road-related erosion; and d) environmental permitting for rural public works activities.

17. The Management Plan contains performance standards and supporting documents to address the post-construction and construction phase impacts of new and redevelopment projects on stormwater quality (Planning Procedures and Construction Inspection Performance Standards). The Dischargers will continue to implement these performance standards and continuously improve them to the maximum extent practicable for new development as described in Provision C.3.a. Provision C.3.b. which was in the October, 2000 Tentative Order has been removed in this draft, and only the current performance standard for New Development Planning Procedures from the existing permit, included in Provision C.3.a, has been retained. Provision C.3.b. will be extensively revised and the Order will be amended to address significant changes to Provision C.3 in the near future. The Dischargers consent to reopening the permit to address revisions to Provision C.3. The Order will be proposed for amendment in response to comments received and the need to address the "Cities of Bellflower, et. al." decision by the State Board (State Board Order No. 2000-11). When the Order is re-noticed for amendment of Provision C.3, supplemental comments will be taken, and all comments relating to Provision C.3 will receive appropriate response at that time.

18. On April 15, 1992, the Board adopted Resolution No. 92-043 directing the Executive Officer to implement the Regional Monitoring Program for San Francisco Bay. Subsequent to a public hearing and various meetings, Board staff requested major permit holders in this region, under authority of Section 13267 of California Water Code, to report on the water quality of the

estuary. These permit holders, including the Dischargers, responded to this request by participating in a collaborative effort, through the San Francisco Estuary Institute. This effort has come to be known as the San Francisco Estuary Regional Monitoring Program for Trace Substances (RMP). The RMP involves collection and analysis of data on pollutants and toxicity in water, sediment and biota of the estuary. This Order specifies that the Dischargers shall continue to participate in the RMP or shall submit and implement an acceptable alternative monitoring plan. Annual reports from the RMP are referenced elsewhere in this Order.

19. The San Francisco Estuary Project, established pursuant to CWA Section 320, culminated in June of 1993 with completion of its Comprehensive Conservation and Management Plan (CCMP) for the preservation, restoration, and enhancement of the San Francisco Bay-Delta Estuary. The CCMP includes recommended actions in the areas of aquatic resources, wildlife, wetlands, water use, pollution prevention and reduction, dredging and waterway modification, land use, public involvement and education, and research and monitoring. Recommended actions which may, in part, be addressed through implementation of the Dischargers' Management Plan include, but are not limited to, the following:

    a. Action PO-2.1: Pursue a mass emissions strategy to reduce pollutant discharges into the Estuary from point and nonpoint sources and to address the accumulation of pollutants in estuarine organisms and sediments.

    b. Action PO-2.4: Improve the management and control of urban runoff from public and private sources.

    c. Action PO-2.5: Develop control measures to reduce pollutant loadings from energy and transportation systems.

    d. Action LU-1.1: Local General Plans should incorporate watershed protection plans to protect wetlands and stream environments and reduce pollutants in runoff.

    e. Action LU-3.1: Prepare and implement Watershed Management Plans that include the following complementary elements: 1) wetlands protection; 2) stream environment protection; and, 3) reduction of pollutants in runoff.

    f. Action LU-3.2: Develop and implement guidelines for site planning and Best Management Practices.

    g. Action PI-2.3: Work with educational groups, interpretive centers, decision-makers, and the general public to build awareness, appreciation, knowledge, and understanding of the Estuary's natural resources and the need to protect them. This would include how these natural resources contribute to and interact with social and economic values.

20. On February 1, 1989, pursuant to Section 304(l) of the Clean Water Act, as amended by the Water Quality Act of 1987, the State Water Resources Control Board included South San Francisco Bay, below the Dumbarton Bridge (South Bay), on the 304(l)(1)(B) list of impaired waters for the pollutants cadmium, chromium, copper, lead, mercury, nickel, silver, selenium, and zinc (304(l) metals) and included the Dischargers on the 304(l)(1)(C) list of point sources discharging the listed pollutants. Order No. 90-094 served as an Individual Control Strategy required by Section 304(l) for point sources on the 304(l)(1)(C) list. The Individual Control Strategy was designed to produce a reduction in the discharge of toxic pollutants from stormwater discharges sufficient, in combination with controls on point and nonpoint sources of

pollutants, to achieve applicable water quality standards no later than three years after the date of the establishment of the Individual Control Strategy.

The Regional Board reviewed reports submitted by the Dischargers between June of 1990 and September of 1993 and San Francisco Regional Monitoring Program for Trace Substances data and found that the Dischargers made considerable progress in reducing the discharge of pollutants, including 304(l) metals, but that the South Bay remained impaired and applicable water quality objectives had not been achieved. Consequently, on December 15, 1993, the Regional Board adopted Cease and Desist Order No. 93-164 which required the Dischargers to submit a plan identifying measures for further control of the 304(l) metals and assigning responsibilities and time schedules for implementation of such control measures. The Dischargers' Management Plan includes an implementation plan for Metals Control Measures. This Order requires implementation of the Management Plan and the Metals Control Measures and their annual evaluation and update and serves as a continuation of the Individual Control Strategy.

21. It is the Regional Board's intent that this Order shall ensure attainment of applicable water quality objectives and protection of the beneficial uses of receiving waters and associated habitat. This Order therefore includes standard requirements to the effect that discharges shall not cause violations of water quality objectives nor shall they cause certain conditions to occur which create a condition of nuisance or water quality impairment in receiving waters. Accordingly, the Regional Board is requiring that these standard requirements be addressed through the implementation of technically and economically feasible control measures to reduce pollutants in stormwater discharges to the maximum extent practicable as provided in Provisions C.1 through C.10 of this Order. Compliance with Provisions C.1 through C.10 is deemed compliance with the requirements of this Order. If these measures, in combination with controls on other point and nonpoint sources of pollutants, do not result in attainment of applicable water quality objectives, the Regional Board will reopen this permit pursuant to Provisions C.1 and C.12 of this Order to impose additional conditions which require implementation of additional control measures.

22. It is generally not considered feasible at this time to establish numeric effluent limitations for pollutants in municipal stormwater discharges. Instead, the provisions of this permit require implementation of Best Management Practices to control and abate the discharge of pollutants in stormwater discharges.

23. The Regional Board considers the Management Plan an essential component of an urban watershed management plan for the Santa Clara Basin and its eleven sub basins or watersheds. The Management Plan is intended to provide a framework for protection and restoration of the Santa Clara Basin watersheds and the Lower South San Francisco Bay in part through effective and efficient implementation of appropriate control measures for the most important sources of pollutants within the watersheds.

24. The State Board has issued NPDES general permits for the regulation of stormwater discharges associated with industrial activities and construction activities. To effectively implement the Industrial and Commercial Dischargers and New Development and Construction elements of the Management Plan, the Dischargers will conduct investigations and local regulatory activities at

industries and construction sites covered by these general permits. However, under the Clean Water Act, the Regional Board cannot delegate to the Dischargers its own authority to enforce these general permits. Therefore, Regional Board staff intend to work cooperatively with the Dischargers to ensure that industries and construction sites within the Dischargers' jurisdictions are in compliance with applicable general permit requirements and are not subject to uncoordinated stormwater regulatory activities.

25. Federal, state, or regional entities within the Dischargers' boundaries, not currently named in this Order, operate storm drain facilities and/or discharge stormwater to the storm drains and watercourses covered by this Order. The Dischargers may lack legal jurisdiction over these entities under the state and federal constitutions. Consequently, the Regional Board recognizes that the Dischargers should not be held responsible for such facilities and/or discharges. The definition of discharges of stormwater in the federal NPDES regulations may result in federal, state, or regional entities within the Santa Clara Basin, not currently named in this Order, being subject to NPDES permitting regulations. The Regional Board will consider issuing separate NPDES permits for such stormwater discharges to other federal, state, or regional entities within the Dischargers' boundaries or amending this permit to include such dischargers.

26. The action to adopt a NPDES permit is exempt from the provisions of the California Environmental Quality Act (Division 13 of the Public Resources Code, Chapter 3, Section 21100, et. seq.) in accordance with Section 13389 of the California Water Code.

27. The Regional Board will notify interested agencies and interested persons of the availability of reports, plans, and schedules, including Annual Reports, Work Plans, Performance Standards, and the Management Plan, and will provide interested persons with an opportunity for a public hearing and/or an opportunity to submit their written views and recommendations. The Regional Board will consider all comments and may modify the reports, plans, or schedules or may modify this Order in accordance with the NPDES permit regulations. All submittals required by this Order conditioned with acceptance by the Executive Officer will be subject to these notification, comment, and public hearing procedures.

28. The Regional Board has notified the Dischargers and interested agencies and interested persons of its intent to prescribe reissued waste discharge requirements and a reissued NPDES permit for this discharge and has provided them with an opportunity for a public hearing and an opportunity to submit their written views and recommendations.

29. The Regional Board, at a properly noticed public meeting, heard and considered all comments pertaining to the discharge.

30. It is the intention of the Regional Board that this Order supersedes Order Nos. 90-094, 92-021, 93-164, 95-180, and 99-050.

31. This Order serves as a NPDES permit, pursuant to CWA Section 402, or amendments thereto, and shall become effective ten days after the date of its adoption provided the Regional Administrator, US EPA, Region IX, has no objections.

IT IS HEREBY ORDERED that the Dischargers, in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted hereunder and the provisions of the Clean Water Act as amended and regulations and guidelines adopted hereunder, shall comply with the following:

A. DISCHARGE PROHIBITION

The Dischargers shall, within their respective jurisdictions, effectively prohibit the discharge of non-stormwater (materials other than stormwater) into the storm drain systems and watercourses. NPDES permitted discharges are exempt from this prohibition. Compliance with this prohibition shall be demonstrated in accordance with Provision C.1 and C.8 of this Order. Provision C.8 describes a tiered categorization of non-stormwater discharges based on potential for pollutant content.

B. RECEIVING WATER LIMITATIONS

1. The discharge shall not cause the following conditions to create a condition of nuisance or to adversely affect beneficial uses of waters of the State:

   a. Floating, suspended, or deposited macroscopic particulate matter, or foam;

   b. Bottom deposits or aquatic growths;

   c. Alteration of temperature, turbidity, or apparent color beyond present natural background levels;

   d. Visible, floating, suspended, or deposited oil or other products of petroleum origin; and/or

   e. Substances present in concentrations or quantities which will cause deleterious effects on aquatic biota, wildlife, or waterfowl, or which render any of these unfit for human consumption.

2. The discharge shall not cause or contribute to a violation of any applicable water quality standard for receiving waters contained in the Regional Board Basin Plan. If applicable water quality objectives are adopted and approved by the State Board after the date of the adoption of this Order, the Regional Board may revise and modify this Order as appropriate.

C. PROVISIONS

1. The Dischargers shall comply with Discharge Prohibition 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. If exceedance(s) of water quality standards or water quality objectives (collectively WQSs) persist notwithstanding implementation of the Management Plan, a Discharger shall assure compliance with Discharge Prohibition A.1 and Receiving Water Limitations B.1 and B.2 by complying with the following procedure:

a. Upon a determination by either the Discharger(s) or the Regional Board that discharges are causing or contributing to an exceedance of an applicable WQS, the Discharger(s) shall promptly notify and thereafter submit 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 may be incorporated in the annual update to the Management Plan unless the Regional Board directs an earlier submittal. The report shall include an implementation schedule. The Regional Board may require modifications to the report;

b. Submit any modifications to the report required by the Regional Board within 30 days of notification;

c. Within 30 days following approval of the report described above by the Regional Board, the Dischargers shall revise the Management Plan and monitoring program to incorporate the approved modified control measures that have been and will be implemented, the implementation schedule, and any additional monitoring required;

d. Implement the revised Management Plan and monitoring program in accordance with the approved schedule.

As long as Dischargers have complied with the procedures set forth above and are implementing the revised Management Plan, they do not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional control measures and BMPs.

2. Urban Runoff Management Plan and Performance Standards

a. The Dischargers shall implement control measures and best management practices to reduce pollutants in stormwater discharges to the maximum extent practicable. The Management Plan shall serve as the framework for identification, assignment, and implementation of such control measures/BMPs. The Management Plan contains Performance Standards that address the following Program elements: Illicit Connection/Illegal Discharge Control; Industrial/Commercial Discharger Control; Public Streets, Roads, and Highways Operation and Maintenance; Storm Drain Operation and Maintenance; Water Utility Operation and Maintenance; and New Development Planning Procedures and Construction Inspection. Performance Standards are defined as the level of implementation necessary to demonstrate the control of pollutants in stormwater to the maximum extent practicable. The Dischargers shall implement the Management Plan, and shall, through its continuous improvement process[4], 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 and as required by Provisions C.1 through C.10 of this Order.

b. The Management Plan shall be revised to adopt and incorporate any new Performance Standards developed by the Dischargers or any revised Performance Standard identified by

[4] Continuous Improvement shall be defined as seeking new opportunities for improving Program effectiveness, controlling stormwater pollution, and, protecting beneficial uses. The Program's approach to implementing Performance Standards explicitly acknowledges that "Maximum Extent Practicable" (MEP) is an ever evolving, flexible and advancing concept. As knowledge about controlling urban runoff continues to evolve so does the definition of MEP.

the Dischargers through the Program's continuous improvement process. Performance Standards shall be developed or revised through a process which includes 1) opportunities for public participation, 2) appropriate external technical input and criteria for the applicability, economic feasibility, cost effectiveness, design, operation, and maintenance, and 3) measures for evaluation of effectiveness so as to achieve pollutant reduction or pollution prevention benefits to the maximum extent practicable. New or revised Performance Standards may be based upon special studies or other activities conducted by the Dischargers, literature review, or special studies conducted by other programs or dischargers. New or revised Performance Standards shall include the baseline components to be accomplished and the method to be used to verify that the Performance Standard has been achieved. The Dischargers shall incorporate newly developed or updated Performance Standards, acceptable to the Executive Officer, into applicable annual revisions to the Management Plan and adhere to implementation of the new/revised Performance Standard(s). In addition to the annual Management Plan revisions, the Dischargers shall submit a compilation of all annual Management Plan revisions by September 1, 2004, which shall serve in part as the re-application for the next permit. The draft Annual Workplan required in Provision C.6 shall identify any Performance Standards that will be developed or revised for the upcoming fiscal year. Following the addition/revision of a Performance Standard, acceptable to the Executive Officer, the Dischargers for which the Performance Standard is applicable shall adhere to its implementation.

3. **New and Redevelopment Performance Standards**

The Management Plan contains performance standards and supporting documents to address the post-construction and construction phase impacts of new and redevelopment projects on stormwater quality (Planning Procedures and Construction Inspection Performance Standards). The Dischargers will continue to implement these performance standards and continuously improve them to the maximum extent practicable in accordance with the following sections.

a) Planning Procedures

i) The Dischargers will continue to implement and continually improve the following performance standards for planning procedures:

1) Each Discharger shall have adequate legal authority to implement new development control measures as part of its development plan review and approval procedures.

2) Each Discharger shall provide developers with information and guidance materials on site design guidelines, building permit requirements, and BMPs for stormwater pollution prevention early in the application process, as appropriate for the type of project.

3) Environmental documents required for those projects that fall under CEQA or NEPA review, such as EIRs, negative declarations, and initial study checklists, shall address stormwater quality impacts during the life of the project (both significant and cumulative), required permits, and specific mitigation measures related to stormwater quality.

4) Each Discharger, to the maximum extent practicable, shall require developers of projects with significant stormwater pollution potential[5] to mitigate stormwater quality impacts, through proper site planning and design techniques and/or/or addition of permanent post-construction stormwater treatment control measures ("treatment controls").

5) Each Discharger shall require developers of projects that disturb a land area of five acres or more to demonstrate coverage under the State General Construction Activity StormWater Permit.

6) Each Discharger shall require developers of projects with potential for significant erosion and planned construction activity during the wet season (as defined by local ordinance) to prepare and implement an effective erosion and/or sediment control plan or similar document prior to the start of the wet season.

7) Each Discharger shall require developers of projects that include installation of permanent structural stormwater controls to establish and provide a method for operation and maintenance of such structural controls.

8) Each Discharger shall ensure that municipal capital improvement projects include stormwater quality control measures during and after construction, as appropriate for each project, and that contractors comply with stormwater quality control requirements during construction and maintenance activities.

9) Each Discharger shall provide training at least annually to its planning, building, and public works staffs on planning procedures, policies, design guidelines, and BMPs for stormwater pollution prevention.

4. Public Information/ Public Participation Basic Performance Standards

The goals of public information and participation (PI/P) are to identify and change behaviors that adversely affect water quality and to increase the understanding and appreciation of streams and the San Francisco Bay. To meet these goals the Dischargers shall implement the January 3, 2001 Watershed Education & Outreach Campaign Conceptual Plan. PI/P activities shall be conducted locally, county-wide and in collaboration with other regional agencies. At a minimum, annual PI/P efforts must include general outreach, targeted outreach (including outreach to municipal staff within each Dischargers' jurisdictions), educational programs, and citizen participation activities designed to further the objectives and meet the requirements of this permit. Annual Draft Workplans shall state the PI/P activities each Discharger will conduct or participate in to meet the requirements of this provision. Both the level of implementation and the effectiveness of PI/P activities shall be reported annually. Effectiveness may be measured through direct or indirect means, such as observation of business/citizen behavior; surveys; and/or analysis of available data on public involvement in or response to PI/P activities. The implementation and effectiveness of each PI/P activity shall be reported in the Annual Report.

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[5] A project with significant stormwater pollution potential is defined as one that causes substantial or potentially substantial adverse change in the quantity and/or quality of stormwater runoff generated from the site. (This is consistent with the CEQA definition of significance and currently requires professional judgment.)

5. **Performance Standard for Rural Public Works Maintenance and Support**

The Program shall develop by June 30, 2002, Performance Standards, annual training and technical assistance needs, and annual reporting requirements for the following rural public works maintenance and support activities: a) management and/or removal of large woody debris and live vegetation from stream channels; b) streambank stabilization projects; c) road construction, maintenance, and repairs in rural areas to prevent and control road-related erosion; and d) environmental permitting for rural public works activities.

6. **Annual Reports and Workplans**

a. The Dischargers shall submit an Annual Report by September 15 of each year, documenting the status of the Program's and the Dischargers' activities during the previous fiscal year, including the results of a qualitative field level assessment of activities implemented by the Dischargers, and the performance of tasks contained in the Management Plan.

The Annual Report shall include a compilation of deliverables and milestones completed during the previous 12-month period, as described in the Management Plan and Annual Workplan. In each Annual Report, the Dischargers may propose pertinent updates, improvements, or revisions to the Management Plan, which shall be complied with under this Order unless disapproved by the Executive Officer or acted upon in accordance with Provision C.12. As part of the Annual Report process, each Discharger shall evaluate the effectiveness of the activities completed during the reporting period. Direct and indirect measures of effectiveness may include, but are not limited to, conformance with established Performance Standards, quantitative monitoring to assess the effectiveness of control measures, measurements or estimates of pollutant load reductions, detailed accounting of Program accomplishments, funds expended, or staff hours utilized. Methods to improve effectiveness in the implementation of tasks and activities including development of new, or modification of existing, Performance Standards, shall be identified through the Program's continuous improvement process, where appropriate.

In each Annual Report, the Dischargers shall propose pertinent updates, improvements, or revisions to the Management Plan, which shall be deemed to be incorporated into this Order unless disapproved of by the Executive Officer or acted on in accordance with Provision C.11.

i. Enhanced Annual Reporting Requirements for Industrial/Commercial Discharger Control Program

The goal of industrial and commercial discharger control measures is to reduce or eliminate adverse water quality impacts from activities conducted at any industrial and commercial site within the Dischargers' jurisdictions which has a potential for significant urban runoff pollution. Performance measures for this program area are in the various program management plans, which are included in this permit by reference. Enhanced annual reporting shall, at a minimum, include the number of inspections conducted grouped into reasonably descriptive industry and commercial business categories. If any actual non-compliance or threatened non-compliance is noted during the inspection, the nature of follow-up will be reported, through resolution of the noted issue, up to and including enforcement action. Dischargers shall describe the procedures for this program component in the September 2001 Annual Report and begin implementing these procedures immediately thereafter.

The range of industrial and commercial businesses that will require regular inspection is not limited to those industrial sites that are required to obtain coverage under the State's Industrial Stormwater NPDES General Permit. The Program shall propose the categories of industrial and commercial businesses that the Dischargers shall commit to inspecting, along with proposed inspection frequencies, in the September 2001 Annual Report. The Dischargers shall begin implementing these procedures immediately thereafter.

Frequency of inspection of a given site or category of industry or commercial business may vary depending upon known or anticipated threat to water quality, but should not be less frequent than once in five years. Inspection frequency can be reduced for sites that demonstrate a history of compliance or exhibit little threat to water quality, and inspection frequency should be increased for sites that demonstrate non-compliance, or exhibit significant threat to water quality.

ii. Enhanced Annual Reporting Requirements for Illicit Connection and Illegal Dumping Elimination Activities

The goal of illicit connection and illegal dumping control measures is to identify and eliminate non-permissible non-stormwater discharges associated with illegal dumping or illicit connections to the storm drain system. Performance measures for this program area are in the various program management plans, which are included in this permit by reference. Enhanced annual reporting for this program area shall, at a minimum, include number of responses to reports of potential impacts to water quality, complaints, spills, and other similar reports. These should be, at a minimum, characterized as to report source, nature of the report, location of the event, reported source of pollutants, and follow-up and investigation, if any. In addition, for any actual non-compliance or threatened non-compliance noted during the investigation of the report, the nature of follow-up will be reported, through resolution of the noted issue, up to and including enforcement action. Dischargers shall describe the procedures for this program

component in the September 2001 Annual Report and begin implementing these procedures immediately thereafter.

b. By March 1 of the year following the submission of each Annual Report, the Dischargers shall submit draft Workplans that describe the proposed implementation of the Management Plan and the Watersheds 2000 Vision Statement (from the NPDES Permit Re-application, 12/21/99) for the next fiscal year.

The Workplans shall consider the status of implementation of current year activities and actions of the Dischargers, problems encountered, and proposed solutions, and shall address any comments received from the Executive Officer on the previous year Annual Report. The Workplans shall include clearly defined tasks, responsibilities, and schedules for implementation of Program and Discharger actions for the next fiscal year. The Workplans shall also include a proposal for development of new, or modification of existing, Performance Standards in accordance with Provision C.2.b and alternative monitoring activities as required in Provision C.7.

The Workplans shall be deemed to be final and incorporated into the Management Plan and this Order as of July 1 unless previously determined to be unacceptable by the Executive Officer. The Dischargers shall address any comments or conditions of acceptability received from the Executive Officer on their draft Workplans prior to the submission of their Annual Report on September 15, at which time the modified Workplans shall be deemed to be incorporated into the Management Plan and this Order unless disapproved of by the Executive Officer.

7. Monitoring Program

a. The Dischargers shall implement a Monitoring Program that supports the development and implementation and demonstrates the effectiveness of the Management Plan and related work conducted through the Santa Clara Basin Watershed Management Initiative. The Monitoring Program shall be designed to achieve the following objectives:

- Characterization of representative drainage areas and stormwater discharges, including land-use characteristics, pollutant concentrations, and mass loading;
- Assessment of existing or potential adverse impacts on beneficial uses caused by pollutants of concern in stormwater discharges, including an evaluation of representative receiving waters;
- Identification of potential sources of pollutants of concern found in stormwater discharges; and
- Evaluation of effectiveness of representative stormwater pollution prevention or control measures.

The Monitoring Program shall include the following:

i. Provision for conducting and reporting the results of special studies conducted by the Dischargers which are designed to determine effectiveness of BMPs or control measures,

define a Performance Standard or assess the adverse impacts of a pollutant or pollutants on beneficial uses.

ii. 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.

iii. 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. Alternative monitoring methods may include participation in the Bay Area Stormwater Management Agencies Association's Regional Monitoring Strategy and related projects.

b. Multi-Year Receiving Waters Monitoring Plan In conjunction with the submissions required by Provision C.9, the Dischargers shall submit by July 1, 2001, an interim draft of a Five-Year Receiving Waters Monitoring Plan, and, by March 1, 2002, a final Five-Year Receiving Waters Monitoring Plan acceptable to the Executive Officer, designed to comply with these Monitoring Program requirements. The Receiving Waters Monitoring Plan shall include provisions for monitoring South San Francisco Bay by participating in the San Francisco Estuary Regional Monitoring Program for Trace Substances or an acceptable alternative monitoring program. The Receiving Waters Monitoring Plan activities shall also be coordinated with SCBWMI assessment activities.

c. Annual Monitoring Program Plan The Dischargers shall submit by March 1 of each year an Annual Monitoring Program Plan, acceptable to the Executive Officer, that includes clearly defined tasks, responsibilities, and schedules for implementation of monitoring activities for the next fiscal year designed to comply with these Monitoring Program requirements.

8. Non-Stormwater Discharges

a. **Exempted Discharges** In carrying out Discharge Prohibition A of this Order, the following non-stormwater discharges are not prohibited unless they are identified by the Dischargers or the Executive Officer as sources of pollutants to receiving waters:

i. Flows from riparian habitats or wetlands;
ii. Diverted stream flows;
iii. Springs;
iv. Rising ground waters; and
v. Uncontaminated groundwater infiltration.

If the any of the above categories of discharges, or sources of such discharges, are identified as sources of pollutants to receiving waters, then such categories or sources shall be addressed as conditionally exempted discharges in accordance with Provision C.8.b.

b. **Conditionally Exempted Discharges** The following non-stormwater discharges are not prohibited if they are identified by either the Dischargers (and incorporated into the Management Plan as an Appendix) or the Executive Officer as not being sources of pollutants to receiving waters or if appropriate control measures to prevent or eliminate adverse impacts of such sources are developed and implemented under the Management Plan in accordance with Provision C.8.c.:

i. Uncontaminated pumped groundwater;
ii. Foundation drains;
iii. Water from crawl space pumps;
iv. Footing drains;
v. Air conditioning condensate;
vi. Irrigation water;
vii. Landscape irrigation;
viii. Lawn or garden watering;
ix. Planned and unplanned discharges from potable water sources;
x. Water line and hydrant flushing;
xi. Individual residential car washing; and
xii. Discharges or flows from emergency fire fighting activities.

c. The Dischargers shall identify and describe the categories of discharges listed in C.8.b that they wish to exempt from Prohibition A in periodic submissions to the Executive Officer. For each such category, the Dischargers shall identify and describe as necessary and appropriate to the category either documentation that the discharges are not sources of pollutants to receiving waters or circumstances in which they are not found to be sources of pollutants to receiving waters. Otherwise, the Dischargers shall describe control measures to eliminate adverse impacts of such sources, procedures and Performance Standards for their implementation, procedures for notifying the Regional Board of these discharges, and procedures for monitoring and record management. Such submissions shall be deemed to be incorporated into the Management Plan unless disapproved by the Executive Officer or acted on in accordance with Provision C.11 and the NPDES permit regulations.

d. Permit Authorization for Exempted Discharges

i. Discharges of non-stormwater from sources owned or operated by the Dischargers are authorized and permitted by this Order, if they are in accordance with the conditions of this provision and the Dischargers' Management Plan.

ii. The Regional Board may require dischargers of non-stormwater other than the Dischargers to apply for and obtain coverage under a NPDES permit and comply with the control measures developed by the Dischargers pursuant to this Provision. Non-stormwater discharges that are in compliance with such control measures may be accepted by the Dischargers and are not subject to Prohibition A.

iii. The Dischargers may propose, as part of their annual updates to the Management Plan under Provision C.6 of this Order, additional categories of non-stormwater discharges to be included in the exemption to Discharge Prohibition A. Such proposals are subject to approval by the Regional Board in accordance with the NPDES permit regulations.

9. Water Quality-Based Requirements for Specific Pollutants of Concern

In accordance with Provision C.1 and Findings 12 and 13 of this Order, the Dischargers shall implement control programs for pollutants that have the reasonable potential to cause or contribute to exceedances of water quality standards. These control programs shall include the following.

a. **Control Program for Copper**. The Dischargers shall implement all applicable elements of the Copper Action Plan, as presented in Appendix B, including immediate implementation of the baseline actions of the Copper Action Plan. Detailed descriptions of activities in each fiscal year shall be included in Annual Workplans and associated evaluations and results shall be reported in the Annual Reports. If the results of the monitoring referenced in Finding 14 show that mean dissolved copper concentrations have risen to 4.0 µg/l, the Dischargers shall implement Phase 1 actions described in Appendix B and report on the Phase I actions in the Annual Report required by Provision C.6. If the results of the monitoring referenced in Finding 14 show that mean dissolved copper concentrations have risen to 4.4 µg/l, the Dischargers shall implement Phase 2 actions described in Appendix B and report on the Phase 2 actions in the Annual Report required by Provision C.6.

b. **Control Program for Nickel**. The Dischargers shall implement all applicable elements of the Nickel Action Plan, as presented in Appendix C, including immediate implementation of the baseline actions. Detailed descriptions of activities in each fiscal year shall be included in Annual Workplans and associated evaluations and results shall be reported in Annual Reports. If the results of the monitoring referenced in Finding 14 show that mean dissolved nickel concentrations have risen to 6.0 µg/l, the Dischargers shall implement Phase 1 actions described in Appendix C and report on the Phase I actions in the Annual Report required by Provision C.6. If the results of the monitoring referenced in Finding 14 show that mean dissolved nickel concentrations have risen to 8.0 µg/l, the Dischargers shall implement Phase 2 actions described in Appendix C and report on the Phase 2 actions in the Annual Report required by Provision C.6.

c. **Control Program for Mercury**. To address the impairment of the Guadalupe River Watershed and San Francisco Bay for mercury, the Dischargers shall implement a mercury pollution prevention plan (Mercury Plan) which includes:

i. Development and adoption of policies, procedures, and/or ordinances calling for:

- The virtual elimination of mercury from controllable sources in urban runoff, including the identification of mercury-containing products used by the Dischargers and a schedule for their timely phase out; and
- Coordination with solid waste management agencies to ensure maximum recycling of fluorescent lights and/or establishment of "take back" programs for the public collection of mercury-containing household products (potentially including thermometers and other gauges, batteries, fluorescent and other lamps, switches, relays, sensors and thermostats);

ii. A schedule for assisting the Regional Board staff in conducting an assessment of the contribution of air pollution sources to mercury in the Dischargers' urban runoff

(potentially including an identification of significant mercury air emission sources, an inventory of relevant mercury air emissions and a review of options for reducing or eliminating mercury air emissions);

iii. Assessment of the sediment mercury concentrations and percentage of fine material at the base of key watersheds, above the tide line;

iv. A public education, outreach and participation program designed to reach residential, commercial and industrial users or sources of mercury-containing products or emissions; and

v. Participation with other organizations to encourage the electric light bulb manufacturing industry to reduce mercury associated with the disposal of fluorescent lights through product reformulation.

The Mercury Plan shall be submitted to the Executive Officer by March 1, 2002. The Mercury Plan may be incorporated in the Program's submittal of the FY 2002/03 Workplan. The Plan shall include a schedule for implementation, although implementation of early action priorities should take place before the due date of the Mercury Plan, and shall include provisions addressing training and technical assistance needed to help municipalities implement the Mercury Plan. To facilitate the development of the actions specified above, the Dischargers may coordinate with publicly owned treatment works and other agencies to develop cooperative plans and programs.

d. **Control Program for Pesticides**. To address the impairment of urban streams by diazinon, the Dischargers shall implement a pesticide toxicity control plan (Pesticide Plan) that addresses their own use of pesticides including diazinon, and, other lower priority pesticides no longer in use such as chlordane, dieldrin and DDT and the use of such pesticides by other sources within their jurisdictions. The Dischargers may address this requirement by building upon their prior submissions to the Regional Board. They may also coordinate with BASMAA, the Urban Pesticide Committee, and other agencies and organizations.

i. **Pesticide Use by Dischargers**

The Pesticide Plan shall include a program to quantitatively identify each Discharger's pesticide use by preparing a periodically updated inventory of pesticides used by all internal departments, divisions, and other operational units as applicable to each Discharger. The Pesticide Plan shall include goals and implementing actions to replace pesticide use (especially diazinon use) with least toxic alternatives. Schools and special district operations shall be included in the Pesticide Plan to the full extent of each Discharger's authority. The Dischargers shall adopt and verifiably implement policies, procedures, and/or ordinances requiring the minimization of pesticide use and the use of integrated pest management (IPM) techniques in the Dischargers' operations. The policies, procedures, and/or ordinances shall include 1) commitments to reduce use, phase-out, and ultimately eliminate use of pesticides that cause impairment of surface waters, and 2) commitments to not increase the Dischargers' use of organophosphate pesticides without justifying the necessity and minimizing adverse water quality impacts. The Dischargers shall implement training programs for all municipal employees who use or could use pesticides, including pesticides available over the counter. These programs shall address pesticide-related surface water toxicity, proper use and disposal of such

pesticides, and least toxic methods of pest prevention and control, including IPM. The Pesticide Plan shall be subject to updating via the Dischargers' continuous improvement process.

ii. **Other Pesticide Sources** To address other pesticide users within the Dischargers' jurisdictions (including schools and special district operations that are not owned or operated by the Dischargers), the Pesticide Plan shall include the following elements:

- Public education and outreach programs. Such programs shall be designed for residential and commercial pesticide users and pest control operators. These programs shall provide targeted information concerning proper pesticide use and disposal, potential adverse impacts on water quality, and alternative, least toxic methods of pest prevention and control, including IPM. These programs shall also target pesticide retailers to encourage the sale of least toxic alternatives and to facilitate point-of-sale public outreach efforts. These programs may also recognize local least toxic pest management practitioners.
- Mechanisms to discourage pesticide use at new development sites. Such mechanisms shall encourage the consideration of pest-resistant landscaping and design features, minimization of impervious surfaces, and incorporation of stormwater detention and retention techniques in the design, landscaping, and/or environmental reviews of proposed development projects. Education programs shall target individuals responsible for these reviews and focus on factors affecting water quality impairment.
- Coordination with household hazardous waste collection agencies. The Dischargers shall support, enhance, and help publicize programs for proper pesticide disposal.

The Pesticide Plan shall include a schedule for implementation and a mechanism for reviewing and amending the plan, as necessary, in subsequent years. The Pesticide Plan shall be submitted to the Executive Officer by July 1, 2001.

iii. **Other Pesticide Activities**

The Dischargers shall work with the Urban Pesticide Committee and other municipal stormwater management agencies in the Bay Area to assess which diazinon products and uses and previous uses of dieldren, chlordane, and DDT pose the greatest risks to surface water quality. Along with incorporating this information into the programs described above, the Dischargers shall work with the Urban Pesticide Committee and other municipal stormwater management agencies to encourage US EPA, the California Department of Pesticide Regulation (DPR), and pesticide manufacturers to understand the adverse impacts of diazinon, dieldren, chlordane, and DDT on urban creeks, monitor US EPA and DPR activities related to the registration of diazinon products and uses, and actively encourage US EPA, DPR, and pesticide manufacturers to eliminate, reformulate, or otherwise curtail, to the extent possible, the sale and use of diazinon when it poses substantial risks to surface water quality (e.g., when there is a high potential for runoff).

The Dischargers shall also work with the Regional Board and other agencies in developing a TMDL for diazinon in impaired urban creeks. The Dischargers will participate in stakeholder forums and collaborative technical studies necessary to assist

the Regional Board in completing the TMDL. These studies may include, but shall not be limited to, additional diazinon monitoring and toxicity testing.

e. **Control Program for Polychlorinated Biphenyls (PCBs) and Dioxin Compounds**. To determine if urban runoff is a conveyance mechanism associated with the impairment of San Francisco Bay for PCBs and dioxin-like compounds (including, but not limited to furans) associated with other sources, the Dischargers shall work with the other municipal stormwater management agencies in the Bay Area to implement a plan to identify, assess, and manage controllable sources of PCBs and dioxin-like compound found in urban runoff, if any (PCBs/Dioxin Plans). The PCBs/Dioxin Plan shall include actions to:

i. Characterize the representative distribution of PCBs and dioxin-like compounds in the urban areas of the Santa Clara basin to determine if: a) PCBs and dioxin-like compounds are present in urban runoff, b) if any such PCBs or dioxin-like compounds are distributed relatively uniformly in urban areas, and c) whether storm drains or other surface drainage pathways are sources of PCBs or dioxin-like compounds in themselves, or whether there are specific locations within urban watersheds where prior or current uses result in land sources contributing to discharges of PCBs or dioxin-like compounds to San Francisco Bay via urban runoff conveyance systems;

ii. Provide information to allow calculation of PCBs and dioxin-like compound loads to San Francisco Bay from urban runoff conveyance systems;

iii. Identify control measures and/or management practices to eliminate or reduce discharges of PCBs or dioxin-like compounds conveyed by urban runoff conveyance systems; and

iv. Implement actions to eliminate or reduce discharges of PCBs or dioxin-like compounds from urban runoff conveyance systems from controllable sources (if any).

The portion of the PCBs/Dioxin Plan addressing action areas i and ii shall be implemented forthwith for PCBs. A workplan for the PCBs/Dioxin Plan addressing action areas i and ii shall be submitted by March 1, 2002 for dioxin-like compounds, with implementation of characterization work to begin by no later than October 1, 2002. The portion of the PCBs/Dioxin Plan addressing action areas iii, including a schedule for implementation shall be submitted by June 1, 2001 for PCBs and by March 1, 2003 for dioxin-like compounds; implementation shall begin no later than July 1, 2001 for PCBs and July 1, 2003 for dioxin-like compounds. The portion of the PCBs/Dioxin Plan addressing action areas iv, including a schedule for implementation shall be submitted by March 1, 2002 for PCBs and by March 1, 2004 for dioxin-like compounds; implementation shall begin no later than July 1, 2002 for PCBs and July 1, 2004 for dioxin-like compounds, although implementation of early action priorities should take place before that date. The Dischargers may coordinate with other stormwater programs and/or other organizations to implement cooperative plans and programs to facilitate implementation of the specified actions.

f. **Control Program for Sediment.** The Dischargers shall conduct an analyses of excess sediment impairment in urban streams and assess management practices that are currently being implemented and additional management practices that will be implemented to prevent or reduce excess sediment impairment in urban creeks, and implement any additional

management practices necessary to prevent or reduce excess sediment impairment in urban creeks in accordance with the following:

i. **San Francisquito Creek** - Submit a plan and time schedule for implementation acceptable to the Executive Officer by September 1, 2001 to conduct a watershed analysis of San Francisquito Creek in cooperation with the San Mateo Countywide Stormwater Pollution Prevention Program (STOPPP). The plan will provide for: (1) quantitative characterization of sediment and water inputs to the creek; (2) relative roles of sediment associated with natural and anthropogenic land use discharges; (3) sediment conveyance from headwaters to the Bay, and (4) development of a rapid sediment budget.

ii. **San Francisquito Creek** - Submit a plan and time schedule for implementation acceptable to the Executive Officer by March 1, 2002 to conduct, in cooperation with STOPPP, an assessment of management practices that are currently being implemented and additional management practices that will be implemented to prevent or reduce excess sediment impairment in urban creeks, and implement any additional management practices necessary to prevent or reduce excess sediment impairment in San Francisquito Creeks. Such management practices may include but are not limited to: management and/or removal of large woody debris and live vegetation from channels; streambank stabilization projects; road construction, operation, maintenance, and repairs to prevent and control road-related erosion; management of construction related sediment; and management of post-construction sediment from areas of new development or redevelopment.

iii. **Other Creeks** - Submit a report acceptable to the Executive Officer by March 1, 2002 that identifies the other creeks that may be impaired by excessive sediment production from erosion due to anthropogenic activities.

Other Creeks - Submit a plan and time schedule for implementation acceptable to the Executive Officer by September 1, 2002 to conduct a watershed analysis and management practice assessment in the other creeks which may be impaired by excessive sediment production from erosion due to anthropogenic activities.

10. Watershed Management

The Dischargers shall implement watershed management measures based on identification of appropriate watershed characteristics and identification of control measures and other actions in the Management Plan that are appropriately implemented on a watershed basis with the recognition that there may be unique values, problems, goals, and strategies specific to individual watersheds. Watershed management measures also seek to develop and implement the most cost effective approaches to solving identified problems and to coordinate these activities with other related programs.

a. The Dischargers shall submit to the Regional Board by July 1, 2001 a report concerning the integration of watershed management activities into the Management Plan. The report shall, at a minimum:

i. Identify the watersheds that are relevant to each Discharger;

ii. Identify key characteristics related to urban runoff in each watershed and program elements related to such characteristics; and

iii. Provide a priority listing of watersheds to be assessed and a schedule for conducting such assessments in conjunction with the SCBWMI.

b. Consistent with the schedule submitted pursuant to Provision 10.a.iii, the Dischargers shall submit to the Regional Board, summary assessment reports for each of the subject watersheds, that at a minimum, include the following:

i. The Dischargers' support for the SCBWMI by, among other things: (1) investigating beneficial uses and causes of impairment, (2) reviewing, compiling, and disseminating environmental data, (3) developing and implementing strategies for controlling adverse impacts of land use on beneficial uses, and (4) facilitating, implementing, and supporting relevant SCBWMI subgroups;

ii. An assessment of each Discharger's implementation of watershed management activities; and,

iii. A consideration of steps needed for continuous improvement in addressing priorities within each watershed.

c. As the SCBWMI moves toward implementation, the Program and the Dischargers shall, as appropriate, develop examples, model language and planning tools to implement programmatic and watershed specific actions as well as facilitate the assessment of additional watersheds. The Program should also work with Regional Board staff to apply a regulatory strategy that allows the Dischargers to find ways to coordinate with other agencies within a specific watershed to protect beneficial uses.

11. It is anticipated that the Management Plan may need to be modified, revised, or amended from time to time to respond to changed conditions and to incorporate more effective approaches to pollutant control. Requests for changes may be initiated by the Executive Officer or by the Dischargers. Minor changes may be made with the Executive Officer's approval and will be brought to the Regional Board as information items and the Dischargers and interested parties will be notified accordingly. If proposed changes imply a major revision of the Program, the Executive Officer shall bring such changes before the Regional Board as permit amendments and notify the Dischargers and interested parties accordingly.

12. This Order may be modified, or alternatively, revoked or reissued, prior to the expiration date as follows:

a. To address significant changed conditions identified in the technical reports required by the Regional Board that were unknown at the time of the issuance of this Order;

b. To incorporate applicable requirements of statewide water quality control plans adopted by the State Board or amendments to the Basin Plan approved by the State Board; or

c. To comply with any applicable requirements, guidelines, or regulations issued or approved under Section 402(p) of the CWA, if the requirement, guideline, or regulation so issued or approved contains different conditions or additional requirements not provided for in this

Order. The Order as modified or reissued under this paragraph shall also contain any other requirements of the CWA then applicable.

13. Each of the Dischargers shall comply with all parts of the Standard Provisions contained in Appendix A of this Order.

14. This Order expires on February 21, 2006. The Dischargers must file a Report of Waste Discharge in accordance with Title 23, California Code of Regulations, not later than 360 days in advance of such date as application for reissuance of waste discharge requirements.

15. Order Nos. 93-164, 95-180 and 99-050 are hereby rescinded.

I, Loretta K. Barsamian, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an order adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on April 21, 2001.

Loretta K. Barsamian
Executive Officer

APPENDIX A - STANDARD PROVISIONS

APPENDIX B - COPPER CONTROL ACTIONS

APPENDIX C - NICKEL CONTROL ACTIONS

ATTACHMENTS - Location and Political Jurisdiction Map
Basin Watersheds Map
Urban Runoff Management Plan - Title Page and Table of Contents

Received
September 15, 2011
Commission on
State Mandates

Documentation in Support of Rebuttal to San Francisco Bay Regional Water Quality Control Board's and the California Department of Finance's Response to Test Claim 10-TC-03 Municipal Regional Stormwater Permit—

Santa Clara County

Received
September 15, 2011
Commission on
State Mandates

INDEX TO DOCUMENTATION IN SUPPORT OF REBUTTAL
VOLUME II—FEDERAL AND STATE CASES, STATUTES, CONSTITUTIONAL REFERENCES AND OTHER AUTHORITY

Received
September 15, 2011
Commission on
State Mandates

CALIFORNIA STATUTES AND CONSTITUTION	
California Constitution	
Article XIIIB, § 6	26
Article XIIIC, § 1	27
California Government Code	
Cal. Govt. Code § 17552	28
Cal. Govt. Code § 17556	29
Cal. Govt. Code § 17564	30
California Water Code	
Cal. Wat. Code § 13370	31

Received
September 15, 2011
Commission on
State Mandates

TAB NO. 1

--- F.3d ----, 2011 WL 2712963 (C.A.9 (Cal.)), 11 Cal. Daily Op. Serv. 8752, 2011 Daily Journal D.A.R. 10,555
(Cite as: 2011 WL 2712963 (C.A.9 (Cal.)))

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Only the Westlaw citation is currently available.

United States Court of Appeals,
Ninth Circuit.
NATURAL RESOURCES DEFENSE COUNCIL, INC.; Santa Monica Baykeeper,
Plaintiffs–Appellants,
v.
COUNTY OF LOS ANGELES; Los Angeles County Flood Control District; Michael Antonovich, in his Official Capacity as Supervisor; Yvonne Burke, in her Official Capacity as Supervisor; Gloria Molina, in her official capacity as Supervisor; Zev Yaroslavsky, in his official capacity as Supervisor; Dean D. Efstathiou, in his official capacity as Acting Director of Los Angeles County Department of Public Works; Don Knabe, in his official capacity as Supervisor, Defendants–Appellees.

No. 10–56017.
Argued and Submitted Dec. 10, 2010.
Filed July 13, 2011.

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Gregory Thomas Broderick, Downey Brand, LLP, Sacramento, CA, for amicus curiae California State Association of Counties.

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Kamala D. Harris, Attorney General of California; Kathleen A. Kenealy, Senior Assistant Attorney General; James R. Potter, Jennifer Novak, Deputy Attorneys General, Office of the California Attorney General, Los Angeles, CA, for amicus curiae California Regional Water Quality Control Board, Los Angeles Region.

Appeal from the United States District Court for the Central District of California, A. Howard Matz, District Judge, Presiding. D.C. No. 2:08–cv–01467–AHM–PLA.

Before HARRY PREGERSON, and MILAN D. SMITH, JR., Circuit Judges, and H. RUSSEL HOLLAND, Senior District Judge.[FN*]

FN* The Honorable H. Russel Holland, Senior United States District Judge for the District of Alaska, sitting by designation.

ORDER and OPINION

M. SMITH, Circuit Judge:

ORDER

*1 This Court's Opinion, filed March 10, 2011, and published at 636 F.3d 1235 (9th Cir.2011), is withdrawn and replaced by the attached Opinion.

With this filing, the panel has voted unanimously to deny Appellees' petition for panel rehearing. Judge Pregerson and Judge M. Smith have voted to deny Appellees' petition for rehearing en banc, and Judge Holland so recommends.

The full court has been advised of the Opinion and petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

Accordingly, Appellees' petition for rehearing or for rehearing en banc is DENIED.

No further petitions for rehearing or rehearing

en banc will be entertained in this case.

OPINION

Plaintiffs–Appellants Natural Resources Defense Council and Santa Monica Baykeeper appeal the district court's grant of summary judgment in favor of two municipal entities that Plaintiffs allege are discharging polluted stormwater in violation of the Federal Water Pollution Control Act (the Clean Water Act, Act, or CWA), 86 Stat. 816, codified as amended at 33 U.S.C. § 1251 *et seq.* Plaintiffs contend that Defendants–Appellees County of Los Angeles (County) and Los Angeles County Flood Control District (District) are discharging polluted urban stormwater runoff collected by municipal separate storm sewer systems (ms4) into navigable waters in Southern California. The levels of pollutants detected in four rivers—the Santa Clara River, the Los Angeles River, the San Gabriel River, and Malibu Creek (collectively, the Watershed Rivers)—exceed the limits allowed in a National Pollutant Discharge Elimination System (NPDES) permit which governs municipal stormwater discharges in the County. Although all parties agree that numerous water-quality standards have been exceeded in the Watershed Rivers, Defendants contend that there is no evidence establishing their responsibility for, or discharge of, stormwater carrying pollutants to the rivers. The district court agreed with Defendants and entered a partial final judgment.

We conclude that the district court erred with respect to the evidence of discharges by the District into two of the Watershed Rivers—the Los Angeles River and San Gabriel River. Specifically, Plaintiffs provided evidence that the monitoring stations for the Los Angeles and San Gabriel Rivers are located in a section of ms4 owned and operated by the District and, after stormwater known to contain standards-exceeding pollutants passes through these monitoring stations, this polluted stormwater is discharged into the two rivers. Accordingly, Plaintiffs were entitled to summary judgment on the District's liability for discharges into the Los Angeles River and San Gabriel River, and therefore we reverse the district court's grant of summary judgment in favor of the District on these claims.

Plaintiffs, however, failed to meet their evidentiary burden with respect to discharges by the District into the Santa Clara River and Malibu Creek. Plaintiffs did not provide evidence sufficient for the district court to determine if stormwater discharged from an ms4 controlled by the District caused or contributed to pollution exceedances located in these two rivers.

*2 Similarly, Plaintiffs did not delineate how stormwater from ms4s controlled by the County caused or contributed to exceedances in any of the Watershed Rivers. Accordingly, we affirm the district court's grant of summary judgment in favor of the Defendants on these claims.

FACTUAL AND PROCEDURAL BACKGROUND

I. Stormwater Runoff in Los Angeles County

A. The MS4

Stormwater runoff is surface water generated by precipitation events, such as rainstorms, which flows over streets, parking lots, commercial sites, and other developed parcels of land. Whereas natural, vegetated soil can absorb rainwater and capture pollutants, paved surfaces and developed land can do neither. When stormwater flows over urban environs, it collects "suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants[.]" *Envtl. Def. Ctr., Inc. v. EPA,* 344 F.3d 832, 840 (9th Cir.2003). This runoff is a major contributor to water pollution in Southern California rivers and the Pacific Ocean and contributes to the sickening of many ocean users each year.

The County is a sprawling 4,500 square-mile amalgam of populous incorporated cities and significant swaths of unincorporated land. The District is

a public entity governed by the Los Angeles County Board of Supervisors and the Department of Public Works. The District is comprised of 84 cities and some unincorporated areas of the County. The County and the District are separate legal entities.

In the District, stormwater runoff is collected by thousands of storm drains located in each municipality and channeled to a storm sewer system. The municipalities in the District operate ms4s [FN1] to collect and channel stormwater. The County also operates an ms4 for certain unincorporated areas. Unlike a sanitary sewer system, which transports municipal sewage for treatment at a wastewater facility, or a combined sewer system, which transports sewage and stormwater for treatment, ms4s contain and convey only untreated stormwater. *See* 40 C.F.R. § 122.26(a)(7), (b)(8). In the County, municipal ms4s are "highly interconnected" because the District allows each municipality to connect its storm drains to the District's extensive flood-control and storm-sewer infrastructure (the MS4).[FN2] That infrastructure includes 500 miles of open channels and 2,800 miles of storm drains. The length of the MS4 system and the locations of all storm drain connections are not known exactly because a comprehensive map of the storm drain system does not exist. While the number and location of storm drains are too numerous to catalogue, it is undisputed that the MS4 collects and channels stormwater runoff from across the County. That stormwater is channeled in the MS4 to various watercourses including the four Watershed Rivers at the heart of this litigation: the Los Angeles River, the San Gabriel River, the Santa Clara River, and Malibu Creek. The Watershed Rivers drain into the Pacific Ocean at Santa Monica Bay, Los Angeles Harbor, and Long Beach Harbor.

FN1. Under Federal Regulations, an ms4 is:

> a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):
>
> (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body ... having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity ...
>
> (ii) Designed or used for collecting or conveying storm water;
>
> (iii) Which is not a combined sewer; and
>
> (iv) Which is not part of a Publicly Owned Treatment Works (POTW)....
>
> 40 C.F.R. § 122.26(b)(8).

FN2. Throughout this Opinion, reference is made to both "ms4" and "*the* MS4." The former is a generic reference to municipal separate storm sewer systems without regard to their particular location, while the latter specifically refers to the flood control and storm-sewer infrastructure described *supra* that exists in the County and is controlled by the District.

***3** The gravamen of Plaintiffs' action is that by allowing untreated and heavily-polluted stormwater to flow unabated from the MS4 into the Watershed Rivers, and eventually into the Pacific Ocean, Defendants have violated the Clean Water Act.

B. The Clean Water Act and NPDES Permit

The Clean Water Act is the nation's primary water-pollution-control law. The Act's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "To serve those ends, the Act prohibits 'the discharge of any pollutant by any person' unless done in compliance with some provision of the Act." *S. Fl. Water Mgmt. Dist. v. Mic-*

cosukee Tribe of Indians, 541 U.S. 95, 102 (2004) (quoting 33 U.S.C. § 1311(a)). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source[.]" 33 U.S.C. § 1362(12); *see Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.,* 13 F.3d 305, 308 (9th Cir.1993) (characterizing "discharge" as " 'add[ing]' pollutants from the outside world to navigable water").

Under the Clean Water Act, ms4s fall under the definition of "point sources." 33 U.S.C. § 1362(14). A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

A person or entity wishing to add pollutants to navigable waters must comply with the NPDES, which "requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *Miccosukee Tribe,* 541 U.S. at 102; 33 U.S.C. § 1342(a), (p). The Act "generally prohibits the 'discharge of any pollutant' ... *from a 'point source'* into the navigable waters of the United States' " unless the point source is covered by an NPDES permit. *Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1163 (9th Cir.1999) (quoting 33 U.S.C. §§ 1311(a), 1362(12)(A)) (emphasis added); *see also Arkansas v. Oklahoma,* 503 U.S. 91, 101–02 (1992) (describing NPDES permitting system). An NPDES permit requires its holder—the "permittee"—to follow the requirements of numerous Clean Water Act provisions, *see* 33 U.S.C. § 1342(a), which include effluent limitations, water-quality standards, water monitoring obligations, public reporting mechanisms, and certain discharge requirements. *See id.* §§ 1311, 1312, 1314, 1316, 1317, 1318, 1343.

The Act uses two water-quality-performance standards, by which a discharger of water may be evaluated—"effluent limitations" and "water quality standards." *Arkansas v. Oklahoma,* 503 U.S. at 101 (citing 33 U.S.C. §§ 1311, 1313, 1314); *see also Sierra Club v.. Union Oil Co. of Calif.,* 813 F.2d 1480, 1483 (9th Cir.1987), *vacated on other grounds,* 485 U.S. 931 (1988), *reinstated,* 853 F.2d 667 (9th Cir.1988). An effluent limitation is "any restriction established by a State or the [Environmental Protection Agency (EPA)] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters...." 33 U.S.C. § 1362(11). An effluent-limitation guideline is determined in light of " 'the best practicable control technology currently available.' " *Union Oil,* 813 F.2d at 1483 (quoting 33 U.S.C. § 1311(b)(1)(A)).

***4** Water-quality standards "are used as a supplementary basis for effluent limitations, so that numerous dischargers, despite their individual compliance with technology-based limitations, can be regulated to prevent water quality from falling below acceptable levels." *Union Oil,* 813 F.2d at 1483 (citing *EPA v. Calif. ex rel. State Water Res. Control Bd.,* 426 U.S. 200, 205 n.12 (1976) (hereafter *EPA v. Calif.*)). Water-quality standards are developed in a two-step process. First, the EPA, or state water authorities establish a waterway's "beneficial use." *Natural Res. Def. Council, Inc. v. EPA,* 16 F.3d 1395, 1400 (4th Cir.1993); *see also* Cal. Water Code § 13050(f) (" 'Beneficial uses' of the waters of the state that may be protected against quality degradation include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves."). Once the beneficial use is determined, water quality criteria that will yield the desired water conditions are formulated and implemented. *See NRDC v. EPA,* 16 F.3d at 1400; *see also* 33 U.S.C. § 1313(a), (c)(2)(A); 40 C.F.R. § 131.3(i) ("Water quality standards are provisions of State or Federal law which consist of a designated

use or uses for the waters of the United States and water quality criteria for such waters based upon such uses.").

Unlike effluent limitations, which are promulgated by the EPA to achieve a certain level of pollution reduction in light of available technology, water-quality standards emanate from the state boards charged with managing their domestic water resources. *See Arkansas v. Oklahoma,* 503 U.S. at 101. The EPA gives the states guidance in drafting water-quality standards and "state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards."*Id.*

The EPA has authorized the State of California to develop water-quality standards and issue NPDES permits. Under the Porter–Cologne Water Quality Control Act, California state law designates the State Water Resources Control Board and nine regional boards as the principal state agencies for enforcing federal and state water pollution law and for issuing permits. *See* Cal. Water Code §§ 13000, 13001, 13140, 13240, 13370, 13377. Beginning in 1990, the California State Water Resources Control Board for the Los Angeles Region (the Regional Board) issued an NPDES permit (the Permit) to cover stormwater discharges by the County, the District, and 84 incorporated municipalities in the County (collectively the Permittees or Co–Permittees).[FN3] *See City of Arcadia v. State Water Res. Control Bd.,* 119 Cal.Rptr.3d 232, 240–41 (Cal.Ct.App.2010). The Permit was renewed in 1996, 2001, 2006, and 2007.

> FN3. "Co-permittee means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator." 40 C.F.R. § 122.26(b)(1).

The Permit is divided into two broad sections: findings by the Regional Board and an order authorizing and governing the Permittees' discharges (Order). The findings cover many introductory and background subjects, including a history of NPDES permitting in the County; applicable state and federal laws governing stormwater discharges; studies conducted by the County and researchers about the deleterious effects of polluted stormwater; coverage and implementation provisions; and guidelines for administrative review of Permit provisions. The Permit covers "all areas within the boundaries of the Permittee municipalities ... over which they have regulatory jurisdiction as well as unincorporated areas in Los Angeles County within the jurisdiction of the Regional Board." In total, the Permit governs municipal stormwater discharge across more than 3,100 square miles of land in the County.

***5** The Permit relates the many federal and state regulations governing stormwater discharges to Southern California's watercourses. Among these regulations is the Water Quality Control Plan for the Los Angeles Region (the Basin Plan). Under California law, the regional boards' "water quality plans, called 'basin plans,' must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation." *City of Arcadia,* 119 Cal.Rptr.3d at 240 (quoting *City of Burbank v. State Water Res. Control Bd.,* 108 P.3d 862, 865 (Cal.2005) (citing Cal. Water Code § 13050(j))). The Permit provides that "[t]he Basin Plan designates beneficial uses of receiving waters and specifies both narrative and numerical water quality objectives for the receiving water in Los Angeles County." "Receiving waters" are defined as all surface water bodies in the Los Angeles Region that are identified in the Basin Plan. Permittees are to assure that storm water discharges from the MS4 shall neither cause nor contribute to the exceedance of water quality standards and objectives nor create conditions of nuisance in the receiving waters, and that the discharge of non-storm water to the MS4 has been effectively prohibited. The Permit incorporates and adopts the Basin Plan, which sets limits on bacteria and contaminants for the receiving waters of Southern California. The water-quality standards limit, among other pollutants, the levels of ammonia, fecal coli-

form bacteria, arsenic, mercury, and cyanide in Southern California's inland rivers.

The Permit contains myriad prohibitions and conditions regarding discharges into and from the MS4. Under Part 1, the Permittees are directed to "effectively prohibit non-storm water discharges into the MS4 and watercourses" unless allowed by an NPDES permit. Under Part 2, titled "Receiving Water Limitations," "discharges from the MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives are prohibited." The "Water Quality Standards and Water Quality Objectives" are defined in the Permit as "water quality criteria contained in the Basin Plan, the California Ocean Plan, the National Toxics Rule, the California Toxics Rule, and other state or federal approved surface water quality plans. Such plans are used by the Regional Board to regulate all discharges, including storm water discharges."

The Permit, in Part 2.3, provides that Permittees "shall comply" with the MS4 discharge prohibitions, set forth in Parts 2.1 and 2.2, "through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with [the Los Angeles Stormwater Quality Management Program (SQMP)] and its components and other requirements of this Order...." The SQMP includes "descriptions of programs, collectively developed by the Permittees in accordance with provisions of the NPDES Permit, to comply with applicable federal and state law." Part 2.3 further provides that "[i]f exceedances of Water Quality Objectives or Water Quality Standards [ ] persist, notwithstanding implementation of the SQMP and its components and other requirements of this permit," Permittees "shall assure compliance with discharge prohibitions and receiving water limitations" by engaging in an "iterative process" procedure:

> ***6** a) Upon a determination by either the Permittee or the Regional Board that discharges are causing or contributing to an exceedance of an applicable Water Quality Standard, the Permittee shall promptly notify and thereafter submit a Receiving Water Limitations (RWL) Compliance Report ... to the Regional Board that describes [Best Management Practices (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 exceedances of Water Quality Standards.
>
> ...
>
> c) Within 30 days following the approval of the RWL Compliance Report, the Permittee shall revise the SQMP and its components and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, an implementation schedule, and any additional monitoring required.
>
> d) Implement the revised SQMP and its components and monitoring program according to the approved schedule.
>
> [Part 2.4] So long as the Permittee has complied with the procedures set forth above and is implementing the revised SQMP and its components, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional BMPs.

When a violation arises, a Permittee must adhere to the procedures in its Compliance Report until the exceedances abate.

Part 3 of the Permit, titled "Storm Water Quality Management Program (SQMP) Implementation," provides that "[e]ach Permittee shall, at a minimum, implement the SQMP." Part 3.A.3 requires Permittees to "implement additional controls, where necessary, to reduce the discharge of pollutants in storm water to the [Maximum Extent Practicable (MEP)]." Part 3.B requires the implementation of BMPs by the Permittees. Part 3.G spe-

cifies that each Permittee is vested with the "necessary legal authority" to prohibit discharges to the MS4, and the Permittees are directed to develop stormwater and urban runoff ordinances for its jurisdiction.

The Permit has both self-monitoring and public-reporting requirements, which include: (1) monitoring of "mass emissions" at seven mass emission monitoring stations; (2) Water Column Toxicity Monitoring; (3) Tributary Monitoring; (4) Shoreline Monitoring; (5) Trash Monitoring; (6) Estuary Sampling; (7) Bioassessment; and (8) Special Studies.

This case concerns high levels of pollutants, particularly heavy metals and fecal bacteria, identified by mass-emissions monitoring stations for the four Watershed Rivers (the Monitoring Stations). Mass-emissions monitoring measures *all* constituents present in water, and the readings give a cumulative picture of the pollutant load in a waterbody. According to the Permit, the purpose of mass-emissions monitoring is to (1) estimate the mass emissions from the MS4, (2) assess trends in the mass emissions over time, and (3) determine if the MS4 is contributing to exceedances of Water Quality Standards by comparing results to the applicable standards in the Basin Plan. The Permit establishes that the Principal Permittee, which is the District, shall monitor the mass-emissions stations. The Permit requires that mass-emission readings be taken five times per year for the Watershed Rivers.

*7 The Los Angeles River and San Gabriel River Monitoring Stations are located in a channelized portion of the MS4 that is owned and operated by the District. *See* Excerpts of Record at 11; *see also* Dist. Ct. Docket No. 101: Declaration of Aaron Colangelo Ex. N: Deposition of Mark Pestrella at 476–78. The Los Angeles River Monitoring Station is located in the City of Long Beach in "a concrete lined trapezoidal channel." [FN4] The Los Angeles River Monitoring Station measures "total upstream tributary drainage" of 825 square miles, as the Los Angeles River is the largest watershed outlet in the County. The San Gabriel River Monitoring Station is located in Pico Rivera and measures an upstream tributary watershed of 450 square miles.

> FN4. "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* http://dpw.lacounty.gov/wmd/npdes/9899_report/ SiteDesc.pdf (last accessed July 6, 2011); *see also* "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* http://dpw.lacounty.gov/wmd/NPDES/2006–07_ report*Section 2 .pdf (last accessed July 6, 2011).

The Malibu Creek Monitoring Station is not located within a channelized portion of the MS4 but at an "existing stream gage station" near Malibu Canyon Road. It measures 105 miles of tributary watershed. The Santa Clara River Monitoring Station is located in the City of Santa Clara and measures an upstream tributary area of 411 square miles. [FN5]

> FN5. "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* http://dpw.lacounty.gov/wmd/NPDES/2006–07_ report*Section2 .pdf (last accessed July 6, 2011).

C. Water–Quality Exceedances in the Watershed Rivers

Between 2002 and 2008, the four Monitoring Stations identified hundreds of exceedances of the Permit's water-quality standards. These water-quality exceedances are not disputed. For instance, monitoring for the Los Angeles and San Gabriel Rivers showed 140 separate exceedances. These included high levels of aluminum, copper, cyanide, fecal coliform bacteria, and zinc in the rivers. Further, ocean monitoring at Surfrider Beach showed that there were 126 separate bacteria exceedances on 79 days, including 29 days where the fecal coli-

form bacteria limit was exceeded.

The District admits that it conveys pollutants via the MS4, but contends that its infrastructure alone does not generate or discharge pollutants. According to Defendants, the District conveys the collective discharges of the numerous "up-sewer" municipalities. Moreover, Defendants identify thousands of permitted dischargers whose pollutants are reaching the Watershed Rivers:

(1) Los Angeles River watershed: (a) at least 1,344 NPDES-permitted industrial and 488 construction stormwater dischargers allowed to discharge during the time period relevant to the case; (b) three wastewater treatment plants; and (c) 42 separate incorporated cities within the Los Angeles River watershed discharging into the river upstream of the mass emission station.

(2) San Gabriel River watershed: (a) at least 276 industrial and 232 construction stormwater dischargers during the relevant time period; (b) at least 20 other industrial dischargers that were specifically permitted to discharge pollutants in excess of the water quality standards at issue in this action; (c) two wastewater treatment plants; and (d) 21 separate incorporated cities discharging into the watershed upstream of the mass emission station.

(3) Santa Clara River watershed: (a) eight dischargers permitted by industrial wastewater discharge permits where the limits in the permit allowed discharges of pollutants at concentrations higher than the water quality standards which plaintiffs contend were exceeded; (b) approximately 26 industrial and 187 construction stormwater dischargers; and (c) the Saugus Wastewater Reclamation Plant.

*8 (4) Malibu Creek watershed: (a) seven industrial wastewater dischargers; and (b) at least five permitted discharges under the general industrial stormwater permit and at least 16 construction sites permitted to discharge under the general construction stormwater permit.

II. Proceedings before the District Court

Based on data self-reported by Defendants, Plaintiffs catalogued the water-quality exceedances in the Watershed Rivers. Beginning on May 31, 2007, Plaintiffs sent a series of notice letters to Defendants concerning these exceedances. On March 3, 2008, based on these purported violations, Plaintiffs commenced this citizen-enforcement action. After the district court dismissed certain elements of Plaintiffs' initial complaint because notice of the Permit violations was defective, Plaintiffs sent Defendants an adequate notice letter on July 3, 2008.

Plaintiffs filed the First Amended Complaint (Complaint) on September 18, 2008. In the Complaint, Plaintiffs assert six causes of action under the Clean Water Act. Only the first four of Plaintiffs' claims, which relate to the exceedances in the Watershed Rivers, and which the district court designated the "Watershed Claims," are before us. The first three Watershed Claims allege that, beginning in 2002 or 2003, the District and the County caused or contributed to exceedances of water-quality standards in the Santa Clara River (Claim 1), the Los Angeles River (Claim 2), and the San Gabriel River (Claim 3), in violation of 33 U.S.C. §§ 1311(a), 1342(p). The fourth Watershed Claim alleges that, beginning in 2002, Defendants caused or contributed to exceedances of the water quality standards and violated the Total Maximum Daily Load (TMDL) limits in Malibu Creek. Plaintiffs' four Watershed Claims each rest on the same premise: (1) the Permit sets water-quality limits for each of the four rivers; (2) the mass-emissions stations have recorded exceedances of those standards; (3) an exceedance is non-compliance with the Permit and, thereby, the Clean Water Act; and (4) Defendants, as holders of the Permit and operators of the MS4, are liable under the Act.

Before the district court, Plaintiffs moved for partial summary judgment on two of the Watershed

Claims: the Los Angeles River and San Gabriel River exceedances. Defendants cross-moved for summary judgment on all four Watershed Claims.

In a March 2, 2010 Order, the district court denied each cross-motion for summary judgment on the Watershed Claims. *NRDC v.. County of Los Angeles,* No. 08 Civ. 1467(AHM), 2010 WL 761287 (C.D.Cal. Mar. 2, 2010), *amended on other grounds,* 2011 WL 666875 (C.D.Cal. Jan. 27, 2011) . Although the district court accepted Plaintiffs' arguments that the Permit "clearly prohibits 'discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives,' " 2010 WL 761287, at *6, and that mass-monitoring stations "are the proper monitoring locations to determine if the MS4 is contributing to exceedances [of the Water Quality Standards or water quality objectives,]" *id.,* the district court held that Plaintiffs were attempting to establish liability without presenting evidence of who was responsible for the stormwater discharge. The district court observed that although "the District is responsible for the pollutants in the MS4" at the time they pass the mass-emissions stations, "that does not necessarily determine the question of whether the water passing by these points is a 'discharge' within the meaning of the Permit and the Clean Water Act." *Id.* at *7. Unable to decipher from the record where the MS4 ended and the Watershed Rivers begin, or whether any upstream outflows were contributing stormwater to the MS4, the district court stated that "Plaintiffs would need to present some evidence (monitoring data or an admission) that some amount of a standards-exceeding pollutant is being discharged though at least one District outlet." *Id.* at *8.

***9** Following supplemental briefing, the district court again determined that "Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow." The district court thereupon entered summary judgment for Defendants on all four Watershed Claims.

Under Fed.R.Civ.P. 54(b), the district court entered a partial final judgment on the Watershed Claims because they were "factually and legally severable" from the other claims and "[t]he parties and the Court would benefit from appellate resolution of the central legal question underlying the watershed claims: what level of proof is necessary to establish defendants' liability." Plaintiffs timely appeal.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291.

We review the district court's grant of summary judgment in a Clean Water Act enforcement action de novo. *Assoc. to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.,* 299 F.3d 1007, 1009 (9th Cir.2002) (citing *Waste Action Project v. Dawn Mining Corp.,* 137 F.3d 1426, 1428 (9th Cir.1998)).

DISCUSSION

Determining whether the County or the District violated the Permit's conditions, and thereby the Clean Water Act, requires us to examine whether an exceedance at a mass-emission monitoring station is a Permit violation, and, if so, whether it is beyond dispute that Defendants discharged pollutants that caused or contributed to water-quality exceedances.

I. Whether Exceedances at Mass–Emission Stations Constitute Permit Violations

"The Clean Water Act regulates the discharge of pollutants into navigable waters, prohibiting their discharge unless certain statutory exceptions apply." *Russian River Watershed Protection Comm. v. City of Santa Rosa,* 142 F.3d 1136, 1138 (9th Cir.1998) (citing 33 U.S.C. § 1311(a)). One such exception is for discharges by entities or individuals who hold NPDES permits. *Id.* The NPDES per-

mitting program is the "centerpiece" of the Clean Water Act and the primary method for enforcing the effluent and water-quality standards established by the EPA and state governments. *Am. Iron & Steel Inst. v. EPA,* 115 F.3d 979, 990 (D.C.Cir.1997); *see also Nw. Envtl. Advocates v. City of Portland,* 56 F.3d 979, 986–90 (9th Cir.1995) ("Citizen suits to enforce water quality standards effectuate complementary provisions of the CWA and the underlying purpose of the statute as a whole."); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.,* 570 F.3d 1210, 1225 (11th Cir.2009) (citing *Nat'l Wildlife Fed'n v. Gorsuch,* 693 F.2d 156,175–76 (D.C.Cir.1982) ("There is indeed some basis in the legislative history for the position that Congress viewed the NPDES program as its most effective weapon against pollution.")).

***10** To decipher the meaning and enforceability of NPDES permit terms, we interpret the unambiguous language contained in the permit. *Russian River,* 142 F.3d at 1141. We review a permit's provisions and meaning as we would any contract or legal document. *See Nw. Envtl. Advocates,* 56 F.3d at 982. As described *supra,* the Permit prohibits MS4 discharges into receiving waters that exceed the Water Quality Standards established in the Basin Plan and elsewhere. Specifically, Section 2.1 provides: "[D]ischarges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited." Section 2.2 of the Permit reads: "Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for, shall not cause or contribute to a condition of nuisance."

Nevertheless, Defendants contend that exceedances observed at mass-emissions stations cannot establish liability on behalf of any individual Permittee. Their argument in this respect, as we discuss more thoroughly *infra,* relies heavily on their belief that the record is bereft of evidence connecting Defendants to the water-quality exceedances. Defendants also assert that the mass-emissions stations are "neither designed nor intended" to measure the compliance of any Permittee and, therefore, cannot form the basis for a Permit violation. Defendants also argue that municipal compliance with an NPDES stormwater permit cannot be reviewed under the same regulatory framework as a private entity or an individual. In support of this contention, Defendants cite to a 1990 EPA rule:

> When enacting this provision, Congress was aware of the difficulties in regulating discharges from municipal separate storm sewers solely through traditional end-of-pipe treatment and intended for EPA and NPDES States to develop permit requirements that were much broader in nature than requirements which are traditionally found in NPDES permits for industrial process discharges or POTWs. The legislative history indicates, municipal storm sewer system "permits will not necessarily be like industrial discharge permits." Often, an end-of-the-pipe treatment technology is not appropriate for this type of discharge.

Brief of Appellees 33 (quoting "National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges," 55 Fed.Reg. 47,990, 48,037–38 (Nov. 16, 1990)).

As we detail *infra,* neither the statutory development of the Clean Water Act nor the plain language of EPA regulations supports Defendants' arguments that NPDES permit violations are less enforceable or unenforceable in the municipal-stormwater context. In fact, since the inception of the NPDES, Congress has expanded NPDES permitting to bring municipal dischargers within the Clean Water Act's coverage.

A. Regulating MS4 Operators

The NPDES permitting program originated in the 1972 amendments to the Clean Water Act. Pub.L. 92–500, § 2, 86 Stat. 88, *reprinted in* 1972 U.S.C.C.A.N. 3668 (codified as amended at 33 U.S.C. § 1342). At the time, the NPDES program was viewed "as the primary means of enforcing the Act's effluent limitations." *Natural Res. Def. Coun-*

cil v. Costle, 568 F.2d 1369, 1371 (D.C.Cir.1977); *see also Natural Res. Def. Council, Inc. v. EPA,* 966 F.2d 1292, 1295 (9th Cir.1992) (examining statutory history of 1972 amendments to the Clean Water Act) (hereafter *NRDC v. EPA*). The permitting program is codified at Section 402 of the Clean Water Act. 33 U.S.C. § 1342. In 1973, the EPA promulgated regulations categorically exempting "discharges from a number of classes of point sources ... including ... separate storm sewers containing only storm runoff uncontaminated by any industrial or commercial activity ." *Costle,* 568 F.2d at 1372 (citing 40 C.F.R. § 125.4 (1975)). The EPA's exemption of certain point sources, including ms4s, from Section 402's blanket requirement was invalidated by the United States Court of Appeals for the District of Columbia Circuit in *Costle. Id.* at 1376–77. The *Costle* court highlighted that "[t]he wording of the [CWA], legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402." *Id.* at 1377.

***11** In the ten-year period following the *Costle* decision, the EPA did not promulgate regulations addressing discharges by ms4 operators. *See NRDC v. EPA,* 966 F.2d at 1296 (citing "National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadlines," 56 Fed.Reg. 56,548 (1991)). In 1987, after continued nonfeasance by the EPA, Congress enacted the Water Quality Act amendments to the Clean Water Act to regulate stormwater discharges from, *inter alia,* ms4s. *See Defenders of Wildlife,* 191 F.3d at 1163 ("Ultimately, in 1987, Congress enacted the Water Quality Act amendments to the CWA."); *NRDC v. EPA,* 966 F.2d at 1296 ("Recognizing both the environmental threat posed by storm water runoff and EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987[.]") (internal citations omitted); *see also* 55 Fed.Reg. 47,994 ("[P]ermits for discharges from municipal separate storm sewer systems must require controls to reduce the discharge of pollutants to the maximum extent practicable, and where necessary water quality-based controls, and must include a requirement to effectively prohibit non-storm water discharges into the storm sewers. Furthermore, EPA in consultation with State and local officials must develop a comprehensive program to designate and regulate other storm water discharges to protect water quality.").

The principal effect of the 1987 amendments was to expand the coverage of Section 402's permitting requirements. *NRDC v. EPA,* 966 F.2d at 1296. Section 402(p) established a "phased and tiered approach" for NPDES permitting. *Nw. Envtl. Def. Ctr. v. Brown,* 640 F.3d 1063, 1081–82 (9th Cir.2011) (citing 33 U.S. § 1342(p)). "The purpose of this approach was to allow EPA and the states to focus their attention on the most serious problems first." *NRDC v. EPA,* 966 F.2d at 1296. "Phase I" included "five categories of stormwater discharges," deemed "the most significant sources of stormwater pollution," who were required to obtain an NPDES permit for their stormwater discharge by 1990. *Brown,* 640 F.3d at 1082 (citing 33 U.S. § 1342(p)(2)). The five categories of the most serious discharge were:

> (p) Municipal and industrial stormwater discharges
>
> ...
>
> (2) ...
>
> ...
>
> (A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.
>
> (B) A discharge associated with industrial activity.
>
> (C) *A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.*

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

***12** 33 U.S.C. § 1342(p)(2) (emphases added). Of the five categories of Phase I dischargers required to obtain the first permits, two are ms4 operators: municipalities with populations over 250,000, and municipalities with populations between 100,000 and 250,000. *Id.* § 1342(p)(2)(C)-(D). Indeed, as noted *supra,* the Permit at issue here was first authorized in 1990 pursuant to the 1987 amendments.

Rather than regulate individual sources of runoff, such as churches, schools and residential property (which one Congressman described as a potential "nightmare"),[FN6] and as regulations prior to 1987 theoretically required, Congress put the NPDES permitting requirement at the municipal level to ease the burden of administering the program. *Brown,* 640 F.3d at 1085–86. That assumption of municipal control is found in the Permit at issue here-Part 3.G.2 of the Permit states that "Permittees shall possess adequate legal authority to ... [r]equire persons within their jurisdiction to comply with conditions in Permittee's ordinances, permits, contracts, model programs, or orders (i.e. hold dischargers to its MS4 accountable for their contributions of pollutants and flows.)[.]"

> FN6. *See* 131 Cong. Rec. 15616, 15657 (Jun. 13, 1985) (Statement of Sen. Wallop) ("[The regulations] can be interpreted to require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source.... Requiring a permit for these kinds of stormwater runoff conveyance systems would be an administrative nightmare.").

Defendants' position that they are subject to a less rigorous or unenforceable regulatory scheme for their stormwater discharges cannot be reconciled with the significant legislative history showing Congress's intent to bring ms4 operators under the NPDES-permitting system. Even the selectively excerpted regulatory language Defendants present to us—"Congress was aware of the difficulties in regulating discharges from municipal separate storm sewers ... [and] intended for EPA and NPDES States to develop permit requirements that were much broader in nature than requirements which are traditionally found in NPDES permits"—does not support Defendants' view. Indeed, this excerpt is but one paragraph from a longer section titled, "Site–Specific Storm Water Quality Management Programs for Municipal Systems." 55 Fed.Reg. 48,037–38. The quoted language follows a paragraph which reads:

> Section 402(p)(3)(iii) of the CWA *mandates* that permits for discharges from municipal separate storm sewers *shall require controls to reduce the discharge of pollutants* to the maximum extent practicable (MEP), including management practices, control techniques and systems, design and engineering methods, and such other provisions as the Director determines appropriate for the control of such pollutants.

55 Fed.Reg. 48,038 (emphasis added). The use of such language—employing "mandates" and commands to regulate—hardly supports Defendants' notion that NPDES permits are unenforceable against municipalities for their stormwater discharges. Moreover, the paragraphs that follow the excerpt explain why developing system-wide controls to manage municipal stormwater is preferable to controlling pollution through end-of-pipe effluent technologies. *Id.* The regulations highlight that "Congress recognized that permit requirements for municipal separate storm sewer systems should be developed in a flexible manner to allow site-

specific permit conditions to reflect the wide range of impacts that can be associated with these discharges." *Id.* Rather than evincing any intent to treat permitting "differently" for municipalities, the EPA merely explains why state authorities that issue permits should draft site-specific rules, as the Regional Board did here, and why water-quality standards may be preferable over more-difficult-to-enforce effluent limitations. Avoiding wooden permitting requirements and granting states flexibility in setting forth requirements is not equivalent to immunizing municipalities for stormwater discharges that violate the provisions of a permit.

B. Enforcement of Mass–Emissions Violations

***13** Part and parcel with Defendants' argument that they are subject to a relaxed regulatory structure is their view that the Permit's language indicates that mass-emissions monitoring is not intended to be enforcement mechanism against municipal dischargers. Defendants claim that measuring water-quality serves only an hortatory purpose-as Defendants state, "the mass emission monitoring program ... neither measures nor was designed to measure any individual permittee's compliance with the Permit." This proposition, which if accepted would emasculate the Permit, is unsupported by either our case law or the plain language of the Permit conditions.

"The plain language of CWA § 505 authorizes citizens to enforce *all* permit conditions." *Nw. Envtl. Advocates,* 56 F.3d at 986 (emphasis in original). We used these words and emphasized *all* permit conditions because the language of the Clean Water Act is clear in its intent to guard against all sources and superintendents of water pollution and "clearly contemplates citizen suits to enforce 'a permit or condition thereof.' " *Id.* (citing 33 U.S.C. § 1365(f)(2), (f)(6)); *see also W. Va. Highlands Conservancy, Inc. v. Huffman,* 625 F.3d 159, 167 (4th Cir .2010) ("In other words, the statute takes the water's point of view: water is indifferent about who initially polluted it so long as pollution continues to occur.").

We have previously addressed, and rejected, municipal attempts to avoid NPDES permit enforcement. In *Northwest Environmental Advocates,* we considered a citizen-suit challenging the City of Portland's operation of a combined sewer system which periodically overflowed and discharged raw sewage into two rivers. 56 F.3d at 981–82. The plaintiffs brought suit on the basis of an NPDES permit condition which "prohibit[ed] any discharges that would violate Oregon water quality standards." *Id.* at 985. Reviewing the history of the 1972 amendments and the Supreme Court's decision in *PUD No.1 of Jefferson County v. Washington Department of Ecology,* 511 U.S. 700 (1994), we recognized that Congress had authorized enforcement of state water-quality standards, lest municipalities be immunized on the technicality that not all water standards can be expressed as effluent limitations. *Id.* at 988–89. The overflows from the Portland sewer system were "caused primarily by uncontrollable events—*i.e.,* the amount of stormwater entering the system[.]" *Id.* at 989. Because the total amount of water entering and leaving the sewer system was unknown, it was impossible to articulate effluent standards which would "ensure that the gross amount of pollution discharged [would] not violate water quality standards." *Id.* Only by enforcing the water-quality standards themselves as the limits could the purpose of the CWA and the NPDES system be effectuated. *Id.* at 988–90. Indeed, we noted that prior to the 1972 incorporation of effluent limitations, the Clean Water Act depended entirely on enforcement based on water-quality standards. *Id.* at 986. However, troubled by the " 'almost total lack of enforcement' " under the old system, Congress added the effluent limitation standards "not to supplant the old system" but to "improve enforcement." *Id.* at 986 (quoting S.Rep. No. 414, 92d Cong., 2d Sess. 2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3671).

***14** Our prior case law emphasizes that NPDES permit enforcement is not scattershot—each permit term is simply enforced as written. *See Union Oil,* 813 F.2d at 1491 ("It is unclear whether the

court intended to excuse these violations under the upset defense or under a de minimis theory. In either event, the district court erred. The Clean Water Act and the regulations promulgated under it make no provision for 'rare' violations."); *see also United States v. CPS Chem. Co.*, 779 F.Supp. 437, 442 (D.Ark.1991) ("For enforcement purposes, a permittee's [Discharge Monitoring Reports] constitute admissions regarding the levels of effluents that the permittee has discharged."). As we explained in *Union Oil,* Congress structured the CWA to function by self-monitoring and self-reporting of violations to " 'avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement.' " 813 F.2d at 1492 (quoting S.Rep. No. 414, 92d Cong., 1st Sess. 64, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730). When self-reported exceedances of an NPDES permit occur, the Clean Water Act allows citizens to bring suit to enforce the terms of the Permit.

The plain language of the Permit countenances enforcement of the water-quality standards when exceedances are detected by the various compliance mechanisms, including mass-emissions monitoring. First, the Permit incorporates and adopts the Basin Plan, which sets the water-quality standards for bacteria and contaminants for the receiving waters of Southern California, including the Watershed Rivers. The Permit then sets out a multi-part monitoring program for those standards, the goals of which explicitly include"[a]ssessing compliance with this Order[.]" "Compliance" under the Clean Water Act primarily means adhering to the terms and conditions of an NPDES permit. *EPA v. Calif.,* 426 U.S. at 223 ("Thus, the principal means of enforcing the pollution control and abatement provisions of the Amendments is to enforce compliance with a permit."). The first monitoring program listed in the Permit is "Mass Emissions." While Defendants are correct to note that mass-emissions monitoring has as one of its goals "estimat[ing] the mass emissions from the MS4," Defendants fail to mention that another goal, listed just below "estimating," is "[d]etermin[ing] if the MS4 is contributing to exceedances of Water Quality Standards."

Although Defendants argue that compliance with other Permit provisions, in particular Part 2.3's iterative process, forgives violations of the discharge prohibitions in Parts 2.1 and 2.2, no such "safe harbor" is present in this Permit.[FN7] Rather, Part 2.3 first provides that Permittees shall comply with the Water Quality Standards "through timely implementation of control measures and other actions ... in accordance with the SQMP and its components." Part 2.3 clarifies that Parts 2 and 3 of the Permit interact, but it offers no textual support for the proposition that compliance with certain provisions shall forgive non-compliance with the discharge prohibitions. As opposed to absolving non-compliance or exclusively adopting the MEP standard, the iterative process ensures that if water quality exceedances "persist," despite prior abatement efforts, a process will commence whereby a responsible Permittee amends its SQMP. Given that Part 3 of the Permit states that SQMP implementation is the "minimum" required of each Permittee, the discharge prohibitions serve as additional requirements that operate as enforceable water-quality-based performance standards required by the Regional Board. *See e.g., Bldg. Indus. Ass'n of San Diego Cnty. v. State Water Res. Control Bd.,* 22 Cal.Rptr.3d 128, 141 (Cal.Ct.App.2004) (rejecting arguments that "under federal law the'maximum extent practicable' standard is the 'exclusive' measure that may be applied to municipal storm sewer discharges and [that] a regulatory agency may not require a Municipality to comply with a state water quality standard if the required controls exceed a 'maximum extent practicable' standard").

> FN7. We also note, as did the district court, that when the validity of this Permit was challenged in California state court by various municipal entities, including the District, the argument that the Permit's discharge prohibitions were invalid for not containing a "safe harbor" was rejected.

> *See In re L.A. Cnty. Mun. Storm Water Permit Litig.*, No. BS 080548, at 4–5, 7 (L.A.Super.Ct. Mar. 24, 2005) ("In sum, the Regional Board acted within its authority when it included Parts 2.1 and 2.2. in the Permit without a 'safe harbor,' whether or not compliance therewith requires efforts that exceed the 'MEP' standard.").

***15** Part 6.D of the Permit, titled "Duty to Comply," lays any doubts about municipal compliance to rest: "Each Permittee must comply with all terms, requirements, and conditions of this Order. Any violation of this order constitutes a violation of the Clean Water Act ... and is grounds for enforcement action, Order termination, Order revocation and reissuance, denial of an application for reissuance; or a combination thereof[.]" This unequivocal language is unsurprising given that all NPDES permits must include monitoring provisions ensuring that permit conditions are satisfied. *See* 33 U.S.C. § 1318(a)(A) ("[T]he Administrator[of the EPA] shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), [and] (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe) [.]"); 40 C.F.R. § 122.44(i)(1) (specifying the monitoring requirements for compliance, "mass ... for each pollutant limited in the permit," and volume of effluent discharged); *Ackels v. EPA*, 7 F.3d 862, 866 (9th Cir.1993) ("[T]he Act grants EPA broad authority to require NPDES permitees to monitor, at such intervals as the Administrator shall prescribe, whenever it is required to carry out the objectives of the Act.").

In sum, the Permit's provisions plainly specify that the mass-emissions monitoring is intended to measure compliance and that "[a]ny violation of this Order" is a Clean Water Act violation. The Permit is available for public inspection to aid this purpose. Accordingly, we agree with the district court's determination that an exceedance detected through mass-emissions monitoring is a Permit violation that gives rise to liability for contributing dischargers.

II. Evidence of Discharge

We next turn to the factual issue on which the district court granted summary judgement in favor of Defendants—whether any evidence in the record shows Defendants discharged stormwater that caused or contributed to water-quality violations. The district court determined that a factual basis was lacking:

> Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow. Plaintiffs do represent in their supplemental briefing that their monitoring data reflects sampling conducted at or near Defendants' outflows.... However, the declarations on which Plaintiffs rely do *not* clearly indicate that the sampling in question was conducted at an outflow (as opposed to in-stream).
>
> ...
>
> In short, Plaintiffs have failed to follow the Court's instructions and present data which could establish that "standards-exceeding pollutants ... passed through Defendants' MS4 *outflows* at or near the time the exceedances were observed." That the pollutants must have passed through an outflow is key because, as the Court found in the March 2 Order, standards-exceeding pollutants must have passed through a County or District outflow in order to constitute a discharge under the Clean Water Act and the Permit.

***16** Plaintiffs have argued throughout this litigation that the measured exceedances in the Watershed Rivers *ipso facto* establish Permit violations

by Defendants. Because these points are designated in the Permit for purposes of assessing "compliance," this argument is facially appealing. But the Clean Water Act does not prohibit "undisputed" exceedances; it prohibits "discharges" that are *not* in compliance with the Act, which means in compliance with the NPDES. *See* 33 U.S.C. § 1311(a); *see also Miccosukee Tribe,* 541 U.S. at 102. While it may be undisputed that exceedances have been detected, responsibility for those exceedances requires proof that some entity discharged a pollutant. Indeed, the Permit specifically states that "*discharges* from the MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives *are prohibited.*"

"[D]ischarge of pollutant" is defined as "any addition of any pollutant to navigable waters from any point source[.]" 33 U.S.C. § 1362(12). Under the Clean Water Act, the MS4 is a "Point Source." *See* 33 U.S.C. § 1342(p)(2), 1362(14). "Navigable waters" is used interchangeably with "waters of the United States." *See Headwaters, Inc. v. Talent Irrigation Dist.,* 243 F.3d 526, 532 (9th Cir.2001). Those terms mean, *inter alia,* "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide[.]" 40 C.F.R. § 122.2. The Watershed Rivers are all navigable waters.

Thus, the primary factual dispute between the parties is whether the evidence shows any *addition* of pollutants by Defendants to the Watershed Rivers. Defendants contend that the "District does not generate any of the pollutants in the system, but only transports them from other permitted and non-permitted sources." Moreover, Defendants contend that by measuring mass-emissions downstream from where the pollutants entered the sewer system, it is not possible to pinpoint which entity, if any, is responsible for adding them to the rivers. In the words of the district court, there is no evidence that "standards-exceeding pollutants ... passed through Defendants' MS4 *outflows* at or near the time the exceedances were observed." Plaintiffs counter that the Monitoring Stations are downstream from hundreds of miles of storm drains which have generated the pollutants being detected. To Plaintiffs, it is irrelevant which of the thousands of storm drains were the source of polluted stormwater—as holders of the Permit, Defendants bear responsibility for the detected exceedances.

Resolving this dispute over whether Defendants added pollutants depends heavily on the level of generality at which the facts are viewed. At the broadest level, all sides agree with basic hydrology—upland water becomes polluted as it runs over urbanized land and begins a downhill flow, first through municipal storm drains, then into the MS4 which carries the water (and everything in it) to the Watershed Rivers, which flow into the Pacific Ocean. More narrowly, it is, as Plaintiffs concede, impossible to identify the particular storm drains that had, for instance, some fecal bacteria which contributed to a water-quality violation. Ultimately, each side fails to rebut the other's arguments. Defendants ignore their role as controllers of thousands of miles of MS4 and the stormwater it conveys [FN8] by demanding that Plaintiffs engage in the Sisyphean task of testing particular storm drains in the County for the source of each pollutant. Likewise, Plaintiffs did not enlighten the district court with sufficient evidence for certain claims and assumed it was obvious to anyone how stormwater makes its way from a parking lot in Pasadena into the MS4, through a mass-emissions station, and then to a Watershed River.

FN8. Defendants' untenable position about their responsibility for discharges is confirmed by the testimony of their Rule 30(b)(6) witness:

Question: What if those flows [which exceeded water-quality standards] were so polluted with oil and grease that they were on fire as they came out of the system? Would your view be the same, that

--- F.3d ----, 2011 WL 2712963 (C.A.9 (Cal.)), 11 Cal. Daily Op. Serv. 8752, 2011 Daily Journal D.A.R. 10,555
(Cite as: 2011 WL 2712963 (C.A.9 (Cal.)))

> the District is not contributing to exceedances?
>
> *Answer:* That the system the District maintains is not contributing to, yes.

*17 Despite shortcomings in each side's arguments, there is evidence in the record showing that polluted stormwater from the MS4 was added to two of the Watershed Rivers: the Los Angeles River and San Gabriel River. Because the mass-emissions stations, as the appropriate locations to measure compliance, for these two rivers are located in a section of the MS4 owned and operated by the District, when pollutants were detected, they had not yet exited the point source into navigable waters. As such, there is no question over who controlled the polluted stormwater at the time it was measured or who caused or contributed to the exceedances when that water was again discharged to the rivers—in both cases, the District. As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state man-made construction—not a naturally occurring Watershed River. *See Headwaters,* 243 F.3d at 533 ("The EPA has interpreted 'waters of the United States' to include 'intrastate lakes, rivers, streams (including intermittent streams) ... the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce' and 'tributaries of [those] waters.' " (quoting 40 C.F.R. § 122.2(c), (e)). At least some outfalls for the MS4 were downstream from the mass-emissions stations. *See* 40 C.F.R. § 122.26(9) ("Outfall means a point source ... at the point where a municipal separate storm sewer discharges to waters of the United States...."). The discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways. We agree with Plaintiffs that the precise location of each outfall is ultimately irrelevant because there is no dispute that MS4 eventually adds stormwater to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations.

Although the District argues that merely channeling pollutants created by other municipalities or industrial NPDES permittees should not create liability because the District is not an instrument of "addition" or "generation," [FN9] the Clean Water Act does not distinguish between those who add and those who convey what is added by others—the Act is indifferent to the originator of water pollution. As Judge Wilkinson of the Fourth Circuit cogently framed it: "[The Act] bans 'the discharge of any pollutant by any person' regardless of whether that 'person' was the root cause or merely *the current superintendent of the discharge.* " *Huffman,* 625 F.3d at 167 (emphasis added). "Point sources" include instruments that channel water, such as "any pipe, ditch, *channel,* tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged ." 33 U.S.C. § 1362(14) (emphasis added). The EPA's regulations further specify that ms4 operators require permits for channeling: "Discharge of a pollutant ... includes additions of pollutants into waters of the United States from: surface runoff which is collected or *channelled* by man; discharges through pipes, sewers, or other conveyances owned by a State[or] municipality." 40 C.F.R. § 122.2 (emphasis added). "[M]ost urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the CWA. These discharges are subject to the NPDES program." 55 Fed.Reg. 47,991. Finally, the Supreme Court stated in *Miccosukee Tribe* that "the definition of 'discharge of a pollutant' contained in § 1362(12) ... *includes* within its reach point sources that do not themselves generate pollutants." 541 U.S. at 105 (emphasis added).

> FN9. This issue does not usually arise in Clean Water Act litigation because it is generally assumed that ms4s "discharge" stormwater. *See, e.g., Miss. River Revival*

--- F.3d ----, 2011 WL 2712963 (C.A.9 (Cal.)), 11 Cal. Daily Op. Serv. 8752, 2011 Daily Journal D.A.R. 10,555
(Cite as: 2011 WL 2712963 (C.A.9 (Cal.)))

> *v. Adm'r, E.P.A.*, 107 F.Supp.2d 1008, 1009 (D.Minn.2000) ("These lawsuits involve the discharge of storm water into the Mississippi River through the Cities' storm sewers. Thus, and this is not in dispute, the storm water discharge is subject to the NPDES permitting requirements.").

***18** Accordingly, the district court erred in stating that "Plaintiffs have not provided the Court with the necessary evidence to establish that the Los Angeles River and the San Gabriel River below the mass emissions monitoring stations are bodies of water that are distinct from the MS4 above these monitoring stations." In light of the evidence that the Los Angeles River and San Gabriel River mass-emission stations are in concrete portions of the MS4 controlled by the District, it is beyond dispute that the District is discharging pollutants from the MS4 to the Los Angeles River and San Gabriel River in violation of the Permit. Thus, Plaintiffs are entitled to summary judgment on Claims 2 and 3.

However, we agree with the district court that, as the record is currently constituted, it is not possible to mete out responsibility for exceedances detected in the Santa Clara River and Malibu Creek (Claims 1 and 4). Like the district court, we are unable to identify the relationship between the MS4 and these mass-emissions stations. From the record, it appears that both monitoring stations are located within the rivers themselves. Plaintiffs have not endeavored to provide the Court with a map or cogent explanation of the interworkings or connections of this complicated drainage system. We recognize that both the Santa Clara and Malibu Creek Monitoring Stations are downstream from hundreds or thousands of storm drains and MS4 channels. It is highly likely, but on this record nothing more than assumption, that polluted stormwater exits the MS4 controlled by the District and the County, and flows downstream in these rivers past the mass-emissions stations. To establish a violation, Plaintiffs were obligated to spell out this process for the district court's consideration and to spotlight how the flow of water from an ms4 "contributed" to a water-quality exceedance detected at the Monitoring Stations. *See, e.g., Nicholas Acoustics & Specialty Co. v. H & M Constr. Co.*, 695 F.2d 839, 846–47 (5th Cir.1983) ("We wish to emphasize most strongly that it is fool-hardy for counsel to rely on a court to find disputed issues of material fact not highlighted by counsel's paperwork; a party that has suffered the consequences of summary judgment below has a definite and specific duty to point out the thwarting facts.... Judges are not ferrets!"). Contrary to Plaintiffs' contention, this would not require independent sampling of the District's outfalls. Indeed, simply ruling out the other contributors of stormwater to these two rivers or following up to vague answers given by Defendants' witnesses could have satisfied Plaintiffs' evidentiary obligation. In the alternative, prior to commencing actions such as this one, Plaintiffs could heed the district court's sensible observation and, for purposes of their evidentiary burden, "sample from *at least one* outflow that included a standards-exceeding pollutant[.]"

Finally, for all four Watershed Rivers, the record is silent regarding the path stormwater takes from the unincorporated land controlled by the County to the Monitoring Stations. The district court correctly demanded evidence for the County's liability, which Plaintiffs did not proffer.

***19** In sum, Plaintiffs were entitled to summary judgment on Claims 2 and 3 against the District for the Los Angeles River and San Gabriel River because (1) the Monitoring Stations for these two rivers are located in a portion of the MS4 owned and operated by the District, (2) these Monitoring Stations detected pollutants in excess of the amount authorized by the NPDES permit, and (3) this polluted water "discharged" into the Los Angeles River and San Gabriel River. The Plaintiffs, however, have not met their burden on summary judgment for their other claims because they did not provide the district court with evidence that the MS4 controlled by the District "discharged" pollutants that passed through the Monitoring Stations in

the Santa Clara River and Malibu Creek, or that ms4s controlled by the County "discharged" pollutants that passed through the Monitoring Stations in any of the four rivers in question.

CONCLUSION

The district court's judgment for Defendant District on Claims 2 and 3 of the First Amended Complaint is REVERSED, and this matter is REMANDED to the district court for further proceedings consistent with this opinion. The district court's grant of summary judgment for Defendant District on Claims 1 and 4 and for Defendant County on all Watershed Claims is AFFIRMED.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

Each side shall bear its own costs.

C.A.9 (Cal.),2011.
Natural Resources Defense Council, Inc. v. County of Los Angeles
--- F.3d ----, 2011 WL 2712963 (C.A.9 (Cal.)), 11 Cal. Daily Op. Serv. 8752, 2011 Daily Journal D.A.R. 10,555

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TAB NO. 2

636 F.3d 1235, 72 ERC 1385, 11 Cal. Daily Op. Serv. 3086, 2011 Daily Journal D.A.R. 3665
(Cite as: 636 F.3d 1235)

United States Court of Appeals,
Ninth Circuit.
NATURAL RESOURCES DEFENSE COUNCIL, INC.; Santa Monica Baykeeper,
Plaintiffs–Appellants,
v.
COUNTY OF LOS ANGELES; Los Angeles County Flood Control District; Michael Antonovich, in his official capacity as Supervisor; Yvonne Burke, in her official capacity as Supervisor; Gloria Molina, in her official capacity as Supervisor; Zev Yaroslavsky, in his official capacity as Supervisor; Dean D. Efstathiou, in his official capacity as Acting Director of Los Angeles County Department of Public Works; Don Knabe, in his official capacity as Supervisor, Defendants–Appellees.

No. 10–56017.
Argued and Submitted Dec. 10, 2010.
Filed March 10, 2011.

Background: Environmental organizations brought action against California municipal entities, alleging that they were discharging urban stormwater runoff into navigable waters in violation of the Federal Water Pollution Control Act (Clean Water Act). The United States District Court for the Central District of California, Howard Matz, J., entered a partial final judgment in favor of defendants, and plaintiffs appealed.

Holdings: The Court of Appeals, M. Smith, Circuit Judge, held that:
(1) exceedance detected through mass-emissions monitoring was a National Pollution Discharge Elimination System (NPDES) permit violation that gave rise to liability of municipalities for contributing stormwater discharges into navigable waters, and
(2) evidence established that flood control district was discharging pollutants from storm sewer systems to the Los Angeles River and San Gabriel River in violation of NPDES permit, but did not establish that district was responsible for exceedances detected in the Santa Clara River and Malibu Creek.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Environmental Law 149E ⚿682

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek682 k. Water pollution. Most Cited Cases

Court interprets the unambiguous language contained in National Pollutant Discharge Elimination System (NPDES), and reviews a permit's provisions and meaning as it would any contract or legal document. Federal Water Pollution Control Act, § 402, 33 U.S.C.A. § 1342.

[2] Environmental Law 149E ⚿206

149E Environmental Law
149EV Water Pollution
149Ek204 Compliance and Enforcement
149Ek206 k. Violations and liability in general. Most Cited Cases

Exceedance detected through mass-emissions monitoring was a National Pollution Discharge Elimination System (NPDES) permit violation that gave rise to liability of municipalities for contributing stormwater discharges into navigable waters in violation of the Federal Water Pollution Control Act (Clean Water Act). Federal Water Pollution Control Act, § 402, 33 U.S.C.A. § 1342.

[3] Environmental Law 149E ⚿206

149E Environmental Law

636 F.3d 1235, 72 ERC 1385, 11 Cal. Daily Op. Serv. 3086, 2011 Daily Journal D.A.R. 3665
(Cite as: 636 F.3d 1235)

149EV Water Pollution
149Ek204 Compliance and Enforcement
149Ek206 k. Violations and liability in general. Most Cited Cases

Evidence that the Los Angeles River and San Gabriel River mass-emission stations were in concrete portions of municipal separate storm sewer systems controlled by county flood control district established that district was discharging pollutants from storm sewer systems to the Los Angeles River and San Gabriel River in violation of National Pollution Discharge Elimination System (NPDES) permit, but evidence did not establish that district was responsible for exceedances detected in the Santa Clara River and Malibu Creek; polluted stormwater from the storm sewer systems was added to the Los Angeles and San Gabriel rivers, and because the mass-emissions stations, as the appropriate locations to measure compliance, for those two rivers were located in a section of the storm sewer systems owned and operated by the district, when pollutants were detected, they had not yet exited the point source into navigable waters, and, as such, there was no question that district controlled the polluted stormwater at the time it was measured and caused or contributed to the exceedances when that water was again discharged to the rivers. Federal Water Pollution Control Act, § 301(a), 33 U.S.C.A. § 1311(a); 40 C.F.R. § 122.2.

***1236** Aaron Colangelo, Esquire, Natural Resources Defense Council, Washington, D.C.; Daniel Cooper, Esquire, Lawyers for Clean Water, San Francisco, CA, for plaintiffs-appellants Natural Resources Defense Council, Inc. and Santa Monica Baykeeper.

Andrea Sheridan Ordin, Esquire, Judith A. Fries, Esquire, Laurie Dods, Esquire, Los Angeles County Department of County Counsel, Los Angeles, CA; Howard Gest, Esq., David W. Burhenn, Esq., Burhenn & Gest LLP, Los Angeles, CA, for defendants-appellees County of Los Angeles, et al.

Appeal from the United States District Court for the Central District of California, Howard Matz, District Judge, Presiding. D.C. No. 2:08–cv–01467–AHM–PLA.

Before: HARRY PREGERSON, and MILAN D. SMITH, JR., Circuit Judges, and H. RUSSEL HOLLAND, Senior District Judge.[FN*]

FN* The Honorable H. Russel Holland, Senior United States District Judge for the District of Alaska, sitting by designation.

OPINION

M. SMITH, Circuit Judge:

Plaintiffs–Appellants Natural Resources Defense Council and Santa Monica Baykeeper appeal the district court's grant of summary judgment in favor of two municipal entities that Plaintiffs allege are discharging polluted stormwater in violation of the Federal Water Pollution Control Act (the Clean Water Act, Act, or CWA), 86 Stat. 816, codified as amended at 33 U.S.C. § 1251 *et seq.* Plaintiffs contend that Defendants–Appellees County of Los Angeles (County) and Los Angeles County Flood Control District (District) are discharging polluted urban stormwater runoff collected by municipal separate storm sewer systems (ms4) into navigable waters in Southern California. The levels of pollutants detected in four rivers—the Santa Clara River, the Los Angeles River, the San Gabriel River, and Malibu Creek (collectively, the Watershed Rivers)—exceed the limits allowed in a National Pollutant Discharge***1237** Elimination System (NPDES) permit which governs municipal stormwater discharges in the County. Although all parties agree that numerous water-quality standards have been exceeded in the Watershed Rivers, Defendants contend that there is no evidence establishing their responsibility for, or discharge of, stormwater carrying pollutants to the rivers. The district court agreed with Defendants and entered a partial final judgment.

We conclude that the district court erred with

respect to the evidence of discharges by the District into two of the Watershed Rivers—the Los Angeles River and San Gabriel River. Specifically, Plaintiffs provided evidence that the monitoring stations for the Los Angeles and San Gabriel Rivers are located in a section of ms4 owned and operated by the District and, after stormwater known to contain standards-exceeding pollutants passes through these monitoring stations, this polluted stormwater is discharged into the two rivers. Accordingly, Plaintiffs were entitled to summary judgment on the District's liability for discharges into the Los Angeles River and San Gabriel River, and therefore we reverse the district court's grant of summary judgment in favor of the District on these claims.

Plaintiffs, however, failed to meet their evidentiary burden with respect to discharges by the District into the Santa Clara River and Malibu Creek. Plaintiffs did not provide evidence sufficient for the district court to determine if stormwater discharged from an ms4 controlled by the District caused or contributed to pollution exceedances located in these two rivers. Similarly, Plaintiffs did not delineate how stormwater from ms4s controlled by the County caused or contributed to exceedances in any of the Watershed Rivers. Accordingly, we affirm the district court's grant of summary judgment in favor of the Defendants on these claims.

FACTUAL AND PROCEDURAL BACKGROUND

I. Stormwater Runoff in Los Angeles County

A. The MS4

Stormwater runoff is surface water generated by precipitation events, such as rainstorms, which flows over streets, parking lots, commercial sites, and other developed parcels of land. Whereas natural, vegetated soil can absorb rainwater and capture pollutants, paved surfaces and developed land can do neither. When stormwater flows over urban environs, it collects "suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants[.]" *Envtl. Def. Ctr., Inc. v. EPA,* 344 F.3d 832, 840 (9th Cir.2003). This runoff is a major contributor to water pollution in Southern California rivers and the Pacific Ocean and contributes to the sickening of many ocean users each year.

The County is a sprawling 4,500 square-mile amalgam of populous incorporated cities and significant swaths of unincorporated land. The District is a public entity governed by the Los Angeles County Board of Supervisors and the Department of Public Works. The District is comprised of 84 cities and some unincorporated areas of the County. The County and the District are separate legal entities.

In the District, stormwater runoff is collected by thousands of storm drains located in each municipality and channeled to a storm sewer system.[FN1] The municipalities in the District operate ms4s to collect and ***1238** channel stormwater. The County also operates an ms4 for certain unincorporated areas. Unlike a sanitary sewer system, which transports municipal sewage for treatment at a wastewater facility, or a combined sewer system, which transports sewage and stormwater for treatment, ms4s contain and convey only untreated stormwater. *See* 40 C.F.R. § 122.26(a)(7), (b)(8). In the County, municipal ms4s are "highly interconnected" because the District allows each municipality to connect its storm drains to the District's extensive flood-control and storm-sewer infrastructure (the MS4).[FN2] That infrastructure includes 500 miles of open channels and 2,800 miles of storm drains. The length of the [MS4] system, and the locations of all storm drain connections, are not known exactly, as a comprehensive map of the storm drain system does not exist. While the number and location of storm drains are too numerous to catalogue, it is undisputed that the MS4 collects and channels stormwater runoff from across the County. That stormwater is channeled in the MS4 to various watercourses including the four Watershed Rivers at the heart of this litigation: the Los Angeles River, the San Gabriel River, the Santa

636 F.3d 1235, 72 ERC 1385, 11 Cal. Daily Op. Serv. 3086, 2011 Daily Journal D.A.R. 3665
(Cite as: 636 F.3d 1235)

Clara River, and Malibu Creek. The Watershed Rivers drain into the Pacific Ocean at Santa Monica Bay, Los Angeles Harbor, and Long Beach Harbor.

> FN1. Under Federal Regulations, an ms4 is:
>
> a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):
>
> (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body ... having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity ...
>
> (ii) Designed or used for collecting or conveying storm water;
>
> (iii) Which is not a combined sewer; and
>
> (iv) Which is not part of a Publicly Owned Treatment Works (POTW)....
>
> 40 C.F.R. § 122.26(b)(8).
>
> FN2. Throughout this Opinion, reference is made to both "ms4" and "*the* MS4." The former is a generic reference to municipal separate storm sewer systems without regard to their particular location, while the latter specifically refers to the flood control and storm-sewer infrastructure described *supra* that exists in the County and is controlled by the District.

The gravamen of Plaintiffs' action is that by allowing untreated and heavily-polluted stormwater to flow unabated from the MS4 into the Watershed Rivers, and eventually into the Pacific Ocean, Defendants have violated the Clean Water Act.

B. The Clean Water Act and NPDES Permit

The Clean Water Act is the nation's primary water-pollution-control law. The Act's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "To serve those ends, the Act prohibits 'the discharge of any pollutant by any person' unless done in compliance with some provision of the Act." *S. Fl. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95, 102, 124 S.Ct. 1537, 158 L.Ed.2d 264 (2004) (quoting 33 U.S.C. § 1311(a)). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source[.]" 33 U.S.C. § 1362(12); see *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.,* 13 F.3d 305, 308 (9th Cir.1993) (characterizing "discharge" as " 'add[ing]' pollutants from the outside world to navigable water").

Under the Clean Water Act, ms4s fall under the definition of "point sources." 33 U.S.C. § 1362(14). A point source is "any discernible, confined and discrete ***1239** conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

A person or entity wishing to add pollutants to navigable waters must comply with the NPDES, which "requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *Miccosukee Tribe,* 541 U.S. at 102, 124 S.Ct. 1537; 33 U.S.C. § 1342(a), (p). The Act "generally prohibits the 'discharge of any pollutant' ... *from a 'point source* ' into the navigable waters of the United States' " unless the point source is covered by an NPDES permit. *Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1163 (9th Cir.1999) (quoting 33 U.S.C. §§ 1311(a), 1362(12)(A)) (emphasis added); *see also Arkansas v. Oklahoma,* 503 U.S. 91,

101–02, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992) (describing NPDES permitting system). An NPDES permit requires its holder—the "permittee"—to follow the requirements of numerous Clean Water Act provisions, *see* 33 U.S.C. § 1342(a), which include effluent limitations, water-quality standards, water monitoring obligations, public reporting mechanisms, and certain discharge requirements. *See id.* §§ 1311, 1312, 1314, 1316, 1317, 1318, 1343.

The Act uses two water-quality-performance standards, by which a discharger of water may be evaluated—"effluent limitations" and "water quality standards." *Arkansas v. Oklahoma,* 503 U.S. at 101, 112 S.Ct. 1046 (citing 33 U.S.C. §§ 1311, 1313, 1314); *see also Sierra Club v. Union Oil Co. of Calif.,* 813 F.2d 1480, 1483 (9th Cir.1987), *vacated on other grounds,* 485 U.S. 931, 108 S.Ct. 1102, 99 L.Ed.2d 264 (1988), *reinstated,* 853 F.2d 667 (9th Cir.1988). An effluent limitation is "any restriction established by a State or the [Environmental Protection Agency (EPA)] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters...." 33 U.S.C. § 1362(11). An effluent-limitation guideline is determined in light of " 'the best practicable control technology currently available.' " *Union Oil,* 813 F.2d at 1483 (quoting 33 U.S.C. § 1311(b)(1)(A)).

Water-quality standards "are used as a supplementary basis for effluent limitations, so that numerous dischargers, despite their individual compliance with technology-based limitations, can be regulated to prevent water quality from falling below acceptable levels." *Union Oil,* 813 F.2d at 1483 (citing *EPA v. Calif. ex rel. State Water Res. Control Bd.,* 426 U.S. 200, 205 n. 12, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976) (hereafter *EPA v. Calif.*)). Water-quality standards are developed in a two-step process. First, the EPA, or state water authorities establish a waterway's "beneficial use." *Natural Res. Def. Council, Inc. v. EPA,* 16 F.3d 1395, 1400 (4th Cir.1993); *see also* Cal. Water Code § 13050(f) (" 'Beneficial uses' of the waters of the state that may be protected against quality degradation include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves."). Once the beneficial use is determined, water quality criteria that will yield the desired water conditions are formulated and implemented. *See NRDC v. EPA,* 16 F.3d at 1400; *see also* 33 U.S.C. § 1313(a), (c)(2)(A); 40 C.F.R. § 131.3(i) ("Water quality standards are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria*1240 for such waters based upon such uses.").

Unlike effluent limitations, which are promulgated by the EPA to achieve a certain level of pollution reduction in light of available technology, water-quality standards emanate from the state boards charged with managing their domestic water resources. *See Arkansas v. Oklahoma,* 503 U.S. at 101, 112 S.Ct. 1046. The EPA gives the states guidance in drafting water-quality standards and "state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards." *Id.*

The EPA has authorized the State of California to develop water-quality standards and issue NPDES permits. Under the Porter–Cologne Water Quality Control Act, California state law designates the State Water Resources Control Board and nine regional boards as the principal state agencies for enforcing federal and state water pollution law and for issuing permits. *See* Cal. Water Code §§ 13000, 13001, 13140, 13240, 13370, 13377. Beginning in 1990, the California State Water Resources Control Board for the Los Angeles Region (the Regional Board) issued an NPDES permit (the Permit) to cover stormwater discharges by the County, the District, and 84 incorporated municipalities in the County (collectively the Permittees or Co–Permittees). [FN3] *See City of Arcadia v. State*

636 F.3d 1235, 72 ERC 1385, 11 Cal. Daily Op. Serv. 3086, 2011 Daily Journal D.A.R. 3665
(Cite as: 636 F.3d 1235)

Water Res. Control Bd., 191 Cal.App.4th 156, 119 Cal.Rptr.3d 232, 240–41 (2010). The Permit was renewed in 1996, 2001, 2006, and 2007.

> FN3. "Co-permittee means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator." 40 C.F.R. § 122.26(b)(1).

The Permit is divided into two broad sections: findings by the Regional Board and an order authorizing and governing the Permittees' discharges (Order). The findings cover many introductory and background subjects, including a history of NPDES permitting in the County; applicable state and federal laws governing stormwater discharges; studies conducted by the County and researchers about the deleterious effects of polluted stormwater; coverage and implementation provisions; and guidelines for administrative review of Permit provisions. The Permit covers "all areas within the boundaries of the Permittee municipalities ... over which they have regulatory jurisdiction as well as unincorporated areas in Los Angeles County within the jurisdiction of the Regional Board." In total, the Permit governs municipal stormwater discharge across more than 3,100 square miles of land in the County.

The Permit relates the many federal and state regulations governing stormwater discharges to Southern California's watercourses. Among these regulations is the Water Quality Control Plan for the Los Angeles Region (the Basin Plan). Under California law, the regional boards' "water quality plans, called 'basin plans,' must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation." *City of Arcadia,* 119 Cal.Rptr.3d at 240 (quoting *City of Burbank v. State Water Res. Control Bd.,* 35 Cal.4th 613, 26 Cal.Rptr.3d 304, 108 P.3d 862, 865 (2005) (citing Cal. Water Code § 13050(j))). The Permit provides that "[t]he Basin Plan designates beneficial uses of receiving waters and specifies both narrative and numerical water quality objectives for the receiving water in Los Angeles County." "Receiving waters" are defined as "all surface water bodies in the Los Angeles Region that are identified in the Basin Plan." "Permittees are to assure that storm water ***1241** discharges from the MS4 shall neither cause nor contribute to the exceedance of water quality standards and objectives nor create conditions of nuisance in the receiving waters, and that the discharge of non-storm water to the MS4 has been effectively prohibited." The Permit incorporates and adopts the Basin Plan, which sets limits on bacteria and contaminants for the receiving waters of Southern California. The water-quality standards limit, among other pollutants, the levels of ammonia, fecal coliform bacteria, arsenic, mercury, and cyanide in Southern California's inland rivers.

The Permit contains myriad prohibitions and conditions regarding discharges into and from the MS4. Under Part 1, the Permittees are directed to "effectively prohibit non-storm water discharges into the MS4 and watercourses" unless allowed by an NPDES permit. Under Part 2, titled "Receiving Water Limitations," "discharges from the MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives are prohibited." The "Water Quality Standards and Water Quality Objectives" are defined in the Permit as "water quality criteria contained in the Basin Plan, the California Ocean Plan, the National Toxics Rule, the California Toxics Rule, and other state or federal approved surface water quality plans. Such plans are used by the Regional Board to regulate all discharges, including storm water discharges."

The Permit provides that Permittees "shall comply" with the MS4 discharge prohibitions "through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with [the Los Angeles Storm-water Quality Management Program (SQMP)] and its components and other requirements of this Order...." The SQMP includes "descriptions of programs, collectively developed by the Permittees in accordance with provisions of

the NPDES Permit, to comply with applicable federal and state law." The Permit sets out a procedure to ensure Permittee compliance when any water-quality standards are breached:

> a) Upon a determination by either the Permittee or the Regional Board that discharges are causing or contributing to an exceedance of an applicable Water Quality Standard, the Permittee shall promptly notify and thereafter submit a Receiving Water Limitations (RWL) Compliance Report ... to the Regional Board that describes [Best Management Practices (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 exceedances of Water Quality Standards.
>
> ...
>
> c) Within 30 days following the approval of the RWL Compliance Report, the Permittee shall revise the SQMP and its components and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, an implementation schedule, and any additional monitoring required.
>
> d) Implement the revised SQMP and its components and monitoring program according to the approved schedule.
>
> ... So long as the Permittee has complied with the procedures set forth above and is implementing the revised SQMP and its components, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional BMPs.

When a violation arises, a Permittee must adhere to the procedures in its Compliance Report until the exceedances abate.

***1242** The Permit requires the Permittees, *inter alia,* to reduce pollution in stormwater to the "maximum extent practicable [(MEP)]." Each Permittee is vested with the "necessary legal authority" to prohibit discharges to the MS4, and is directed to develop stormwater and urban runoff ordinances for its jurisdiction.

The Permit has both self-monitoring and public-reporting requirements, which include: (1) monitoring of "mass emissions" at seven mass emission monitoring stations; (2) Water Column Toxicity Monitoring; (3) Tributary Monitoring; (4) Shoreline Monitoring; (5) Trash Monitoring; (6) Estuary Sampling; (7) Bioassessment; and (8) Special Studies.

This case concerns high levels of pollutants, particularly heavy metals and fecal bacteria, identified by mass-emissions monitoring stations for the four Watershed Rivers (the Monitoring Stations). Mass-emissions monitoring measures *all* constituents present in water, and the readings give a cumulative picture of the pollutant load in a waterbody. According to the Permit, the purpose of mass-emissions monitoring is to (1) estimate the mass emissions from the MS4, (2) assess trends in the mass emissions over time, and (3) determine if the MS4 is contributing to exceedances of Water Quality Standards by comparing results to the applicable standards in the Basin Plan. The Permit establishes that the Principal Permittee, which is the District, shall monitor the mass-emissions stations. The Permit requires that mass-emission readings be taken five times per year for the Watershed Rivers.

The Los Angeles River and San Gabriel River Monitoring Stations are located in a channelized portion of the MS4 that is owned and operated by the District. *See* Excerpts of Record at 11; *see also* Dist. Ct. Docket No. 101: Declaration of Aaron Colangelo Ex. N: Deposition of Mark Pestrella at 476–78. The Los Angeles River Monitoring Station is located in the City of Long Beach in "a concrete lined trapezoidal channel." [FN4] The Los Angeles River Monitoring Station measures "total upstream tributary drainage" of 825 square miles, as the Los Angeles River is the largest watershed outlet in the

636 F.3d 1235, 72 ERC 1385, 11 Cal. Daily Op. Serv. 3086, 2011 Daily Journal D.A.R. 3665
(Cite as: 636 F.3d 1235)

County. The San Gabriel River Monitoring Station is located in Pico Rivera and measures an upstream tributary watershed of 450 square miles.

> FN4. "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* http:// dpw. lacounty. gov/ wmd/ npdes/ 9899_ report/ Site Desc. pdf (last accessed Mar. 2, 2011); *see also* "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* http:// dpw. lacounty. gov/ wmd/ NPDES/ 2006– 07_ reportECTION% 202.PDF (LAST ACCESSED MAR. 2, 2011).

The Malibu Creek Monitoring Station is not located within a channelized portion of the MS4 but at an "existing stream gage station" near Malibu Canyon Road. It measures 105 miles of tributary watershed. The Santa Clara River Monitoring Station is located in the City of Santa Clara and measures an upstream tributary area of 411 square miles. FN5

> FN5. "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, available at http:// dpw. lacounty. gov/ wmd/ NPDES/ 2006– 07_ report ECTION% 202.PDF (LAST ACCESSED MAR. 2, 2011).

C. Water–Quality Exceedances in the Watershed Rivers

Between 2002 and 2008, the four Monitoring Stations identified hundreds of exceedances of the Permit's water-quality standards. These water-quality exceedances are not disputed. For instance, monitoring for the Los Angeles and San Gabriel Rivers showed 140 separate exceedances. These included high levels of aluminum,***1243** copper, cyanide, fecal coliform bacteria, and zinc in the rivers. Further, ocean monitoring at Surfrider Beach showed that there were 126 separate bacteria exceedances on 79 days, including 29 days where the fecal coliform bacteria limit was exceeded.

The District admits that it conveys pollutants via the MS4, but contends that its infrastructure alone does not generate or discharge pollutants. According to Defendants, the District conveys the collective discharges of the numerous "up-sewer" municipalities. Moreover, Defendants identify thousands of permitted dischargers whose pollutants are reaching the Watershed Rivers:

(1) Los Angeles River watershed: (a) at least 1,344 NPDES-permitted industrial and 488 construction stormwater dischargers allowed to discharge during the time period relevant to the case; (b) three wastewater treatment plants; and (c) 42 separate incorporated cities within the Los Angeles River watershed discharging into the river upstream of the mass emission station.

(2) San Gabriel River watershed: (a) at least 276 industrial and 232 construction stormwater dischargers during the relevant time period; (b) at least 20 other industrial dischargers that were specifically permitted to discharge pollutants in excess of the water quality standards at issue in this action; (c) two wastewater treatment plants; and (d) 21 separate incorporated cities discharging into the watershed upstream of the mass emission station.

(3) Santa Clara River watershed: (a) eight dischargers permitted by industrial wastewater discharge permits where the limits in the permit allowed discharges of pollutants at concentrations higher than the water quality standards which plaintiffs contend were exceeded; (b) approximately 26 industrial and 187 construction stormwater dischargers; and (c) the Saugus Wastewater Reclamation Plant.

(4) Malibu Creek watershed: (a) seven industrial wastewater dischargers; and (b) at least five permitted discharges under the general industrial stormwater permit and at least 16 construction sites permitted to discharge under the general construction stormwater permit.

636 F.3d 1235, 72 ERC 1385, 11 Cal. Daily Op. Serv. 3086, 2011 Daily Journal D.A.R. 3665
(Cite as: 636 F.3d 1235)

II. Proceedings before the District Court

Based on data self-reported by Defendants, Plaintiffs catalogued the water-quality exceedances in the Watershed Rivers. Beginning on May 31, 2007, Plaintiffs sent a series of notice letters to Defendants concerning these exceedances. On March 3, 2008, based on these purported violations, Plaintiffs commenced this citizen-enforcement action. After the district court dismissed certain elements of Plaintiffs' initial complaint because notice of the Permit violations was defective, Plaintiffs sent Defendants an adequate notice letter on July 3, 2008.

Plaintiffs filed the First Amended Complaint (Complaint) on September 18, 2008. In the Complaint, Plaintiffs assert six causes of action under the Clean Water Act. Only the first four of Plaintiffs' claims, which relate to the exceedances in the Watershed Rivers, and which the district court designated the "Watershed Claims," are before us. The first three Watershed Claims allege that, beginning in 2002 or 2003, the District and the County caused or contributed to exceedances of water-quality standards in the Santa Clara River (Claim 1), the Los Angeles River (Claim 2), and the San Gabriel River (Claim 3), in violation of 33 U.S.C. §§ 1311(a), 1342(p). The fourth Watershed Claim alleges that, beginning in 2002, Defendants caused or contributed to exceedances***1244** of the water quality standards and violated the Total Maximum Daily Load (TMDL) limits in Malibu Creek. Plaintiffs' four Watershed Claims each rest on the same premise: (1) the Permit sets water-quality limits for each of the four rivers; (2) the mass-emissions stations have recorded exceedances of those standards; (3) an exceedance is non-compliance with the Permit and, thereby, the Clean Water Act; and (4) Defendants, as holders of the Permit and operators of the MS4, are liable under the Act.

Before the district court, Plaintiffs moved for partial summary judgment on two of the Watershed Claims: the Los Angeles River and San Gabriel River exceedances. Defendants cross-moved for summary judgment on all four Watershed Claims.

In a March 2, 2010 Order, the district court denied each cross-motion for summary judgment on the Watershed Claims. *NRDC v. County of Los Angeles,* No. 08 Civ. 1467(AHM), 2010 WL 761287 (C.D.Cal. Mar.2, 2010), *amended on other grounds,* 2011 WL 666875 (C.D.Cal. Jan.27, 2011). Although the district court accepted Plaintiffs' arguments that the Permit "clearly prohibits 'discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives,' " 2010 WL 761287, at *6, and that mass-monitoring stations "are the proper monitoring locations to determine if the MS4 is contributing to exceedances [of the Water Quality Standards or water quality objectives,]" *id.,* the district court held that Plaintiffs were attempting to establish liability without presenting evidence of who was responsible for the stormwater discharge. The district court observed that although "the District is responsible for the pollutants in the MS4" at the time they pass the mass-emissions stations, "that does not necessarily determine the question of whether the water passing by these points is a 'discharge' within the meaning of the Permit and the Clean Water Act." *Id.* at *7. Unable to decipher from the record where the MS4 ended and the Watershed Rivers begin, or whether any upstream outflows were contributing stormwater to the MS4, the district court stated that "Plaintiffs would need to present some evidence (monitoring data or an admission) that some amount of a standards-exceeding pollutant is being discharged though at least one District outlet." *Id.* at *8.

Following supplemental briefing, the district court again determined that "Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow." The district court

636 F.3d 1235, 72 ERC 1385, 11 Cal. Daily Op. Serv. 3086, 2011 Daily Journal D.A.R. 3665
(Cite as: 636 F.3d 1235)

thereupon entered summary judgment for Defendants on all four Watershed Claims.

Under Fed.R.Civ.P. 54(b), the district court entered a partial final judgment on the Watershed Claims because they were "factually and legally severable" from the other claims and "[t]he parties and the Court would benefit from appellate resolution of the central legal question underlying the watershed claims: what level of proof is necessary to establish defendants' liability." Plaintiffs timely appeal.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291.

We review the district court's grant of summary judgment in a Clean Water Act enforcement action de novo. *Assoc. to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir.2002) (citing ***1245***Waste Action Project v. Dawn Mining Corp.*, 137 F.3d 1426, 1428 (9th Cir.1998)).

DISCUSSION

Determining whether the County or the District violated the Permit's conditions, and thereby the Clean Water Act, requires us to examine whether an exceedance at a mass-emission monitoring station is a Permit violation, and, if so, whether it is beyond dispute that Defendants discharged pollutants that caused or contributed to water-quality exceedances.

I. Whether Exceedances at Mass–Emission Stations Constitute Permit Violations

"The Clean Water Act regulates the discharge of pollutants into navigable waters, prohibiting their discharge unless certain statutory exceptions apply." *Russian River Watershed Protection Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1138 (9th Cir.1998) (citing 33 U.S.C. § 1311(a)). One such exception is for discharges by entities or individuals who hold NPDES permits. *Id.* The NPDES permitting program is the "centerpiece" of the Clean Water Act and the primary method for enforcing the effluent and water-quality standards established by the EPA and state governments. *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 990 (D.C.Cir.1997); *see also Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 986–90 (9th Cir.1995) ("Citizen suits to enforce water quality standards effectuate complementary provisions of the CWA and the underlying purpose of the statute as a whole."); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1225 (11th Cir.2009) (citing *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175–76 (D.C.Cir.1982) ("There is indeed some basis in the legislative history for the position that Congress viewed the NPDES program as its most effective weapon against pollution.")).

[1] To decipher the meaning and enforceability of NPDES permit terms, we interpret the unambiguous language contained in the permit. *Russian River*, 142 F.3d at 1141. We review a permit's provisions and meaning as we would any contract or legal document. *See Nw. Envtl. Advocates*, 56 F.3d at 982. As described *supra*, the Permit prohibits MS4 discharges into receiving waters that exceed the Water Quality Standards established in the Basin Plan and elsewhere. Specifically, Section 2.1 provides: "[D]ischarges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited." Section 2.2 of the Permit reads: "Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for, shall not cause or contribute to a condition of nuisance."

[2] Nevertheless, Defendants contend that exceedances observed at mass-emissions stations cannot establish liability on behalf of any individual Permittee. Their argument in this respect, as we discuss more thoroughly *infra*, relies heavily on their belief that the record is bereft of evidence connecting Defendants to the water-quality exceedances. Defendants also assert that the mass-emissions stations are "neither designed nor intended" to measure the compliance of any Permittee and, therefore,

cannot form the basis for a Permit violation. Defendants also argue that municipal compliance with an NPDES stormwater permit cannot be reviewed under the same regulatory framework as a private entity or individual. In support of this contention, Defendants cite to a 1990 EPA rule:

> When enacting this provision, Congress was aware of the difficulties in regulating discharges from municipal separate storm sewers solely through traditional end-of-pipe treatment and intended for *1246 EPA and NPDES States to develop permit requirements that were much broader in nature than requirements which are traditionally found in NPDES permits for industrial process discharges or POTWs. The legislative history indicates, municipal storm sewer system "permits will not necessarily be like industrial discharge permits." Often, an end-of-the-pipe treatment technology is not appropriate for this type of discharge.

Brief of Appellees 33 (quoting "National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges," 55 Fed.Reg. 47,990, 48,037–38 (Nov. 16, 1990)).

As we detail *infra,* neither the statutory development of the Clean Water Act nor the plain language of EPA regulations supports Defendants' arguments that NPDES permit violations are less enforceable or unenforceable in the municipal-stormwater context. In fact, since the inception of the NPDES, Congress has expanded NPDES permitting to bring municipal dischargers within the Clean Water Act's coverage.

A. Regulating MS4 Operators

The NPDES permitting program originated in the 1972 amendments to the Clean Water Act. Pub.L. 92–500, § 2, 86 Stat. 88, *reprinted in* 1972 U.S.C.C.A.N. 3668 (codified as amended at 33 U.S.C. § 1342). At the time, the NPDES program was viewed "as the primary means of enforcing the Act's effluent limitations." *Natural Res. Def. Council v. Costle,* 568 F.2d 1369, 1371 (D.C.Cir.1977); *see also Natural Res. Def. Council, Inc. v. EPA,* 966 F.2d 1292, 1295 (9th Cir.1992) (examining statutory history of 1972 amendments to the Clean Water Act) (hereafter *NRDC v. EPA*). The permitting program is codified at Section 402 of the Clean Water Act. 33 U.S.C. § 1342. In 1973, the EPA promulgated regulations categorically exempting "discharges from a number of classes of point sources ... including ... separate storm sewers containing only storm runoff uncontaminated by any industrial or commercial activity." *Costle,* 568 F.2d at 1372 (citing 40 C.F.R. § 125.4 (1975)). The EPA's exemption of certain point sources, including ms4s, from Section 402's blanket requirement was invalidated by the United States Court of Appeals for the District of Columbia Circuit in *Costle. Id.* at 1376–77. The *Costle* court highlighted that "[t]he wording of the [CWA], legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402." *Id.* at 1377.

In the ten-year period following the *Costle* decision, the EPA did not promulgate regulations addressing discharges by ms4 operators. *See NRDC v. EPA,* 966 F.2d at 1296 (citing "National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadlines," 56 Fed.Reg. 56,548 (1991)). In 1987, after continued nonfeasance by the EPA, Congress enacted the Water Quality Act amendments to the Clean Water Act to regulate stormwater discharges from, *inter alia,* ms4s. *See Defenders of Wildlife,* 191 F.3d at 1163 ("Ultimately, in 1987, Congress enacted the Water Quality Act amendments to the CWA."); *NRDC v. EPA,* 966 F.2d at 1296 ("Recognizing both the environmental threat posed by storm water runoff and EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987[.]") (internal citations omitted); *see also* 55 Fed.Reg. 47,994 ("[P]ermits for discharges from municipal separate storm sewer systems must require controls to reduce the discharge of pollutants to the maximum extent practic-

able, and where necessary water quality-based controls, and must include a requirement to effectively prohibit non-storm water*1247 discharges into the storm sewers. Furthermore, EPA in consultation with State and local officials must develop a comprehensive program to designate and regulate other storm water discharges to protect water quality.").

The principal effect of the 1987 amendments was to expand the coverage of Section 402's permitting requirements. *NRDC v. EPA,* 966 F.2d at 1296. Section 402(p) established a "phased and tiered approach" for NPDES permitting. *Nw. Envtl. Def. Ctr. v. Brown,* 617 F.3d 1176, 1193 (9th Cir.2010) (citing 33 U.S. § 1342(p)(2)). "The purpose of this approach was to allow EPA and the states to focus their attention on the most serious problems first." *NRDC v. EPA,* 966 F.2d at 1296. "Phase I" included "five categories of stormwater discharges," deemed "the most significant sources of stormwater pollution," who were required to obtain an NPDES permit for their stormwater discharge by 1990. *Brown,* 617 F.3d at 1193 (citing 33 U.S. § 1342(p)(2)). The five categories of the most serious discharge were:

> (p) Municipal and industrial stormwater discharges
>
> ...
>
> (2) ...
>
> ...
>
> (A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.
>
> (B) A discharge associated with industrial activity.
>
> (C) *A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.*
>
> (D) *A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.*
>
> (E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

33 U.S.C. § 1342(p)(2) (emphases added). Of the five categories of Phase I dischargers required to obtain the first permits, two are ms4 operators: municipalities with populations over 250,000, and municipalities with populations between 100,000 and 250,000. *Id.* § 1342(p)(2)(C)-(D). Indeed, as noted *supra,* the Permit at issue here was first authorized in 1990 pursuant to the 1987 amendments.

Rather than regulate individual sources of runoff, such as churches, schools and residential property (which one Congressman described as a potential "nightmare"),[FN6] and as regulations prior to 1987 theoretically required, Congress put the NPDES permitting requirement at the municipal level to ease the burden of administering the program. *Brown,* 617 F.3d at 1193. That assumption of municipal control is found in the Permit at issue here—Part 3.G.2 of the Permit states that "Permittees shall posses adequate legal authority to ... [r]equire persons within their jurisdiction to comply with conditions in Permittee's ordinances, permits, contracts, model programs, or orders (i.e. hold dischargers to its MS4 accountable for their contributions of pollutants and flows.)[.]"

> FN6. *See* 131 Cong. Rec. 15616, 15657 (Jun. 13, 1985) (Statement of Sen. Wallop) ("[The regulations] can be interpreted to require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source.... Requiring a permit for these kinds of stormwater runoff conveyance systems would be an administrative nightmare.").

Defendants' position that they are subject to a less rigorous or unenforceable ***1248** regulatory scheme for their storm-water discharges cannot be reconciled with the significant legislative history showing Congress's intent to bring ms4 operators under the NPDES-permitting system. Even the selectively excerpted regulatory language Defendants present to us—"Congress was aware of the difficulties in regulating discharges from municipal separate storm sewers ... [and] intended for EPA and NPDES States to develop permit requirements that were much broader in nature than requirements which are traditionally found in NPDES permits"—does not support Defendants' view. Indeed, this excerpt is but one paragraph from a longer section titled, "Site–Specific Storm Water Quality Management Programs for Municipal Systems." 55 Fed.Reg. 48,037–38. The quoted language follows a paragraph which reads:

> Section 402(p)(3)(iii) of the CWA mandates that permits for discharges from municipal separate storm sewers *shall require controls to reduce the discharge of pollutants* to the maximum extent practicable (MEP), including management practices, control techniques and systems, design and engineering methods, and such other provisions as the Director determines appropriate for the control of such pollutants.

55 Fed.Reg. 48,038 (emphasis added). The use of such language—employing "mandates" and commands to regulate—hardly supports Defendants' notion that NPDES permits are unenforceable against municipalities for their stormwater discharges. Moreover, the paragraphs that follow the excerpt explain why developing system-wide controls to manage municipal stormwater is preferable to controlling pollution through end-of-pipe effluent technologies. *Id.* The regulations highlight that "Congress recognized that permit requirements for municipal separate storm sewer systems should be developed in a flexible manner to allow site-specific permit conditions to reflect the wide range of impacts that can be associated with these discharges." *Id.* Rather than evincing any intent to treat permitting "differently" for municipalities, the EPA merely explains why state authorities that issue permits should draft site-specific rules, as the Regional Board did here, and why *water-quality standards* may be preferable over more-difficult-to-enforce effluent limitations. Avoiding wooden permitting requirements and granting states flexibility in setting forth requirements is not equivalent to immunizing municipalities for stormwater discharges that violate the provisions of a permit.

B. Enforcement of Mass–Emissions Violations

Part and parcel with Defendants' argument that they are subject to a relaxed regulatory structure is their view that the Permit's language indicates that mass-emissions monitoring is not intended to be enforced against municipal dischargers. Defendants claim that measuring water-quality serves only an hortatory purpose—as Defendants state, "the mass emission monitoring program ... neither measures nor was designed to measure any individual permittee's compliance with the Permit." This proposition, which if accepted would emasculate the Permit, is unsupported by either our case law or the plain language of the Permit conditions.

"The plain language of CWA § 505 authorizes citizens to enforce *all* permit conditions." *Nw. Envtl. Advocates,* 56 F.3d at 986 (emphasis in original). We used these words, and emphasized "*all* " permit conditions, because the language of the Clean Water Act is clear in its intent to guard against all sources and superintendents of water pollution and "clearly contemplates citizen suits to enforce 'a permit or condition thereof.' " *Id.* (citing 33 U.S.C. § 1365(f)(2), (f)(6)); *see also* ***1249***W. Va. Highlands Conservancy, Inc. v. Huffman,* 625 F.3d 159, 167 (4th Cir.2010) ("In other words, the statute takes the water's point of view: water is indifferent about who initially polluted it so long as pollution continues to occur.").

We have previously addressed, and rejected, municipal attempts to avoid NPDES permit enforcement. In *Northwest Environmental Advocates,*

we considered a citizen-suit challenging the City of Portland's operation of a combined sewer system which periodically overflowed and discharged raw sewage into two rivers. 56 F.3d at 981–82. The plaintiffs brought suit on the basis of an NPDES permit condition which "prohibit[ed] any discharges that would violate Oregon water quality standards." *Id.* at 985. Reviewing the history of the 1972 amendments and the Supreme Court's decision in *PUD No.1 of Jefferson County v. Washington Department of Ecology,* 511 U.S. 700, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994), we recognized that Congress had authorized enforcement of state water-quality standards, lest municipalities be immunized on the technicality that not all water standards can be expressed as effluent limitations. *Id.* at 988–89. The overflows from the Portland sewer system were "caused primarily by uncontrollable events—*i.e.,* the amount of stormwater entering the system[.]" *Id.* at 989. Because the total amount of water entering and leaving the sewer system was unknown, it was impossible to articulate effluent standards which would "ensure that the gross amount of pollution discharged [would] not violate water quality standards." *Id.* Only by enforcing the water-quality standards *themselves* as the limits could the purpose of the CWA and the NPDES system be effectuated. *Id.* at 988–90. Indeed, we noted that prior to the 1972 incorporation of effluent limitations, the Clean Water Act depended entirely on enforcement *based on water-quality standards. Id.* at 986. However, troubled by the " 'almost total lack of enforcement' " under the old system, Congress added the effluent limitation standards "not to supplant the old system" but to "improve enforcement." *Id.* at 986 (quoting S.Rep. No. 414, 92d Cong., 2d Sess. 2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3671).

Moreover, the plain language of the Permit countenances enforcement of the water-quality standards when exceedances are detected by the various compliance mechanisms, including mass-emissions monitoring. First, the Permit incorporates and adopts the Basin Plan, which sets the water-quality standards for bacteria and contaminants for the receiving waters of Southern California, including the Watershed Rivers. The Permit then sets out a multi-part monitoring program for those standards, the goals of which explicitly include "[a]ssessing compliance with this Order[.]" "Compliance" under the Clean Water Act primarily means adhering to the terms and conditions of an NPDES permit. *EPA v. Calif.,* 426 U.S. at 223, 96 S.Ct. 2022 ("Thus, the principal means of enforcing the pollution control and abatement provisions of the Amendments is to enforce compliance with a permit."). The first monitoring program listed in the Permit is "Mass Emissions." While Defendants are correct in noting that mass-emissions monitoring has as one of its goals "estimat[ing] the mass emissions from the MS4," Defendants fail to mention that another goal, listed just below "estimating," is "[d]etermin[ing] if the MS4 is contributing to exceedances of Water Quality Standards."

Part 6.D of the Permit, titled "Duty to Comply," lays any doubts about municipal compliance to rest: "Each Permittee *must comply with all terms,* requirements, and conditions of this Order. Any violation of this order constitutes a violation of the ***1250** Clean Water Act *... and is grounds for enforcement action,* Order termination, Order revocation and reissuance, denial of an application for reissuance; or a combination thereof[.]" This unequivocal language is unsurprising given that all NPDES permits must include monitoring provisions ensuring that permit conditions are satisfied. *See* 33 U.S.C. § 1318(a)(A) ("[T]he Administrator[of the EPA] shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), [and] (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe)[.]"); 40 C.F.R. § 122.44(i)(1) (specifying the monitoring requirements for compliance, "mass ... for each pollutant limited in the

permit," and volume of effluent discharged); *Ackels v. EPA,* 7 F.3d 862, 866 (9th Cir.1993) ("[T]he Act grants EPA broad authority to require NPDES permitees to monitor, at such intervals as the Administrator shall prescribe, whenever it is required to carry out the objectives of the Act.").

Our prior case law emphasizes that NPDES permit enforcement is not scattershot—each permit term is simply enforced as written. *See Union Oil,* 813 F.2d at 1491 ("It is unclear whether the court intended to excuse these violations under the upset defense or under a de minimis theory. In either event, the district court erred. The Clean Water Act and the regulations promulgated under it make no provision for 'rare' violations."); *see also United States v. CPS Chem. Co.,* 779 F.Supp. 437, 442 (D.Ark.1991) ("For enforcement purposes, a permittee's [Discharge Monitoring Reports] constitute admissions regarding the levels of effluents that the permittee has discharged."). As we explained in *Union Oil,* Congress structured the CWA to function by self-monitoring and self-reporting of violations to " 'avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement.' " 813 F.2d at 1492 (quoting S.Rep. No. 414, 92d Cong., 1st Sess. 64, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730). When self-reported exceedances of an NPDES permit occur, the Clean Water Act allows citizens to bring suit to enforce the terms of the Permit.

In sum, the Permit's provisions plainly specify that the mass-emissions monitoring is intended to measure compliance and that "[a]ny violation of this Order" is a Clean Water Act violation. The Permit is available for public inspection to aid this purpose. Accordingly, we agree with the district court's determination that an exceedance detected through mass-emissions monitoring is a Permit violation that gives rise to liability for contributing dischargers.

II. Evidence of Discharge

We next turn to the factual issue on which the district court granted summary judgement in favor of Defendants—whether any evidence in the record shows Defendants discharged stormwater that caused or contributed to water-quality violations. The district court determined that a factual basis was lacking:

> Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow. Plaintiffs do represent in their supplemental briefing that their monitoring data reflects sampling conducted at or near Defendants' outflows.... However, the declarations on which Plaintiffs ***1251** rely do *not* clearly indicate that the sampling in question was conducted at an outflow (as opposed to in-stream).
>
> ...
>
> In short, Plaintiffs have failed to follow the Court's instructions and present data which could establish that "standards-exceeding pollutants ... passed through Defendants' MS4 *outflows* at or near the time the exceedances were observed." That the pollutants must have passed through an outflow is key because, as the Court found in the March 2 Order, standards-exceeding pollutants must have passed through a County or District outflow in order to constitute a discharge under the Clean Water Act and the Permit.

Plaintiffs have argued throughout this litigation that the measured exceedances in the Watershed Rivers *ipso facto* establish Permit violations by Defendants. Because these points are designated in the Permit for purposes of assessing "compliance," this argument is facially appealing. But the Clean Water Act does not prohibit "undisputed" exceedances; it prohibits "discharges" that are *not* in compliance with the Act (which means in compliance with the NPDES). *See* 33 U.S.C. § 1311(a); *see also Miccosukee Tribe,* 541 U.S. at 102, 124 S.Ct. 1537.

636 F.3d 1235, 72 ERC 1385, 11 Cal. Daily Op. Serv. 3086, 2011 Daily Journal D.A.R. 3665
(Cite as: 636 F.3d 1235)

While it may be undisputed that exceedances have been detected, responsibility for those exceedances requires proof that some entity discharged a pollutant. Indeed, the Permit specifically states that "*discharges* from the MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives *are prohibited.*"

"[D]ischarge of pollutant" is defined as "any addition of any pollutant to navigable waters from any point source[.]" 33 U.S.C. § 1362(12). Under the Clean Water Act, the MS4 is a "Point Source." *See* 33 U.S.C. § 1342(p)(2), 1362(14). "Navigable waters" is used interchangeably with "waters of the United States." *See Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir.2001). Those terms mean, *inter alia,* "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide[.]" 40 C.F.R. § 122.2. The Watershed Rivers are all navigable waters.

[3] Thus, the primary factual dispute between the parties is whether the evidence shows any *addition* of pollutants by Defendants to the Watershed Rivers. Defendants contend that the "District does not generate any of the pollutants in the system, but only transports them from other permitted and non-permitted sources." Moreover, Defendants contend that by measuring mass-emissions downstream from where the pollutants entered the sewer system, it is not possible to pinpoint which entity, if any, is responsible for adding them to the rivers. In the words of the district court, there is no evidence that "standards-exceeding pollutants ... passed through Defendants' MS4 *outflows* at or near the time the exceedances were observed." Plaintiffs counter that the monitoring stations are downstream from hundreds of miles of storm drains which have generated the pollutants being detected. To Plaintiffs, it is irrelevant which of the thousands of storm drains were the source of polluted stormwater—as holders of the Permit, Defendants bear responsibility for the detected exceedances.

Resolving this dispute over whether Defendants added pollutants depends heavily on the level of generality at which the facts are viewed. At the broadest level, all sides agree with basic hydrology—upland water becomes polluted as it runs over urbanized land and begins a downhill flow, first through municipal storm drains, then into the MS4 which carries the water (and ***1252** everything in it) to the Watershed Rivers, which flow into the Pacific Ocean. More narrowly, it is, as Plaintiffs concede, impossible to identify the particular storm drains that had, for instance, some fecal bacteria which contributed to a water-quality violation. Ultimately, each side fails to rebut the other's arguments. Defendants ignore their role as controllers of thousands of miles of MS4 and the stormwater it conveys [FN7] by demanding that Plaintiffs engage in the Sisyphean task of testing *particular* storm drains in the County for the source of each pollutant. Likewise, Plaintiffs did not enlighten the district court with sufficient evidence for certain claims and assumed it was obvious to anyone how stormwater makes its way from a parking lot in Pasadena into the MS4, through a mass-emissions station, and then to a Watershed River.

> FN7. Defendants' untenable position about their responsibility for discharges is confirmed by the testimony of their Rule 30(b)(6) witness:
>
> > *Question:* What if those flows [which exceeded water-quality standards] were so polluted with oil and grease that they *were on fire as they came out of the system?* Would your view be the same, that the District is not contributing to exceedances?
> >
> > *Answer:* That the system the District maintains is not contributing to, yes.

Despite shortcomings in each side's arguments, there is evidence in the record showing that polluted stormwater from the MS4 was added to two of the Watershed Rivers: the Los Angeles River and

San Gabriel River. Because the mass-emissions stations, as the appropriate locations to measure compliance, for these two rivers are located in a section of the MS4 owned and operated by the District, when pollutants were detected, they had *not* yet exited the point source into navigable waters. As such, there is no question over who controlled the polluted stormwater at the time it was measured or who caused or contributed to the exceedances when that water was again discharged to the rivers—in both cases, the District. As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state man-made construction—not a naturally occurring Watershed River. *See Headwaters,* 243 F.3d at 533 ("The EPA has interpreted 'waters of the United States' to include 'intrastate lakes, rivers, streams (including intermittent streams) ... the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce' and 'tributaries of [those] waters.' ") (quoting 40 C.F.R. § 122.2(c), (e)). At least some outfalls for the MS4 were downstream from the mass-emissions stations. *See* 40 C.F.R. § 122.26 (9) ("Outfall means a point source ... at the point where a municipal separate storm sewer discharges to waters of the United States...."). The discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways. We agree with Plaintiffs that the precise location of each outfall is ultimately irrelevant because there is no dispute that MS4 eventually adds storm-water to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations.

Although the District argues that merely channeling pollutants created by other municipalities or industrial NPDES permittees should not create liability because the District is not[FN8] an instrument of "addition" or "generation," the Clean Water Act does not distinguish between those ***1253** who add and those who convey what is added by others—the Act is indifferent to the originator of water pollution. As Judge Wilkinson of the Fourth Circuit cogently framed it: "[The Act] bans 'the discharge of any pollutant by any person' regardless of whether that 'person' was the root cause or merely *the current superintendent of the discharge.*" *Huffman,* 625 F.3d at 167 (emphasis added). "Point sources" include instruments that channel water, such as "any pipe, ditch, *channel,* tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). The EPA's regulations further specify that ms4 operators require permits for channeling: "Discharge of a pollutant ... includes additions of pollutants into waters of the United States from: surface runoff which is collected or *channelled* by man; discharges through pipes, sewers, or other conveyances owned by a State[or] municipality." 40 C.F.R. § 122.2 (emphasis added). "[M]ost urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the CWA. These discharges are subject to the NPDES program." 55 Fed.Reg. 47,991. Finally, the Supreme Court stated in *Miccosukee Tribe* that "the definition of 'discharge of a pollutant' contained in § 1362(12) ... *includes* within its reach point sources that do not themselves generate pollutants." 541 U.S. at 105, 124 S.Ct. 1537 (emphasis added).

> FN8. This issue does not usually arise in Clean Water Act litigation because it is generally assumed that ms4s "discharge" stormwater. *See, e.g., Miss. River Revival v. Adm'r, E.P.A.,* 107 F.Supp.2d 1008, 1009 (D.Minn.2000) ("These lawsuits involve the discharge of storm water into the Mississippi River through the Cities' storm sewers. Thus, and this is not in dispute, the storm water discharge is subject to the NPDES permitting requirements.").

Accordingly, the district court erred in stating that "Plaintiffs have not provided the Court with the necessary evidence to establish that the Los

Angeles River and the San Gabriel River below the mass emissions monitoring stations are bodies of water that are distinct from the MS4 above these monitoring stations." In light of the evidence that the Los Angeles River and San Gabriel River mass-emission stations are in concrete portions of the MS4 controlled by the District, it is beyond dispute that the District is discharging pollutants from the MS4 to the Los Angeles River and San Gabriel River in violation of the Permit. Thus, Plaintiffs are entitled to summary judgment on Claims 2 and 3.

However, we agree with the district court that, as the record is currently constituted, it is not possible to mete out responsibility for exceedances detected in the Santa Clara River and Malibu Creek (Claims 1 and 4). Like the district court, we are unable to identify the relationship between the MS4 and these mass-emissions stations. From the record, it appears that both monitoring stations are located within the rivers themselves. Plaintiffs have not endeavored to provide the Court with a map or cogent explanation of the interworkings or connections of this complicated drainage system. We recognize that both the Santa Clara and Malibu Creek Monitoring Stations are downstream from hundreds or thousands of storm drains and MS4 channels. It is highly likely, but on this record nothing more than assumption, that polluted stormwater exits the MS4 controlled by the District and the County, and flows downstream in these rivers past the mass-emissions stations. To establish a violation, Plaintiffs were obligated to spell out this process for the district court's consideration and to spotlight how the flow of water from an ms4 "contributed" to a water-quality exceedance detected at the Monitoring Stations. *See, e.g.,* ***1254***_Nicholas Acoustics & Specialty Co. v. H & M Constr. Co.,_ 695 F.2d 839, 846–47 (5th Cir.1983) ("We wish to emphasize most strongly that it is foolhardy for counsel to rely on a court to find disputed issues of material fact not highlighted by counsel's paperwork; a party that has suffered the consequences of summary judgment below has a definite and specific duty to point out the thwarting facts.... Judges are not ferrets!"). Contrary to Plaintiffs' contention, this would not require independent sampling of the District's outfalls. Indeed, simply ruling out the other contributors of stormwater to these two rivers or following up to vague answers given by Defendants' witnesses could have satisfied Plaintiffs' evidentiary obligation. In the alternative, prior to commencing actions like this one, Plaintiffs could heed the district court's sensible observation and, for purposes of their evidentiary burden, "sample from *at least one* outflow that included a standards-exceeding pollutant[.]"

Finally, for all four Watershed Rivers, the record is silent regarding the path stormwater takes from the unincorporated land controlled by the County to the Monitoring Stations. The district court correctly demanded evidence for the County's liability, which Plaintiffs did not proffer.

In sum, Plaintiffs were entitled to summary judgment on Claims 2 and 3 against the District for the Los Angeles River and San Gabriel River because (1) the Monitoring Stations for these two rivers are located in a portion of the MS4 owned and operated by the District, (2) these Monitoring Stations detected pollutants in excess of the amount authorized by the NPDES permit, and (3) this polluted water "discharged" into the Los Angeles River and San Gabriel River. The Plaintiffs, however, have not met their burden on summary judgment for their other claims because they did not provide the district court with evidence that the MS4 controlled by the District "discharged" pollutants that passed through the Monitoring Stations in the Santa Clara River and Malibu Creek, or that ms4s controlled by the County "discharged" pollutants that passed through the Monitoring Stations in any of the four rivers in question.

CONCLUSION

The district court's judgment for Defendant District on Claims 2 and 3 of the First Amended Complaint is REVERSED, and this matter is REMANDED to the district court for further proceedings consistent with this opinion. The district

court's grant of summary judgment for Defendant District on Claims 1 and 4, and for Defendant County on all Watershed Claims, is AFFIRMED.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

Each party shall bear its own costs on appeal.

C.A.9 (Cal.),2011.
Natural Resources Defense Council, Inc. v. County of Los Angeles
636 F.3d 1235, 72 ERC 1385, 11 Cal. Daily Op. Serv. 3086, 2011 Daily Journal D.A.R. 3665

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TAB NO. 3

344 F.3d 832, 57 ERC 1039, 33 Envtl. L. Rep. 20,269, 03 Cal. Daily Op. Serv. 8398, 2003 Daily Journal D.A.R. 10,479
(Cite as: 344 F.3d 832)

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United States Court of Appeals,
Ninth Circuit.
ENVIRONMENTAL DEFENSE CENTER, INC., Petitioner,
Natural Resources Defense Council, Inc., Petitioner-Intervenor,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.
American Forest & Paper Association; National Association of Home Builders, Petitioners,
v.
United States Environmental Protection Agency, Respondent,
Natural Resources Defense Council, Inc., Applicant-Intervenor.
Texas Cities Coalition on Stormwater; Texas Counties Storm Water Coalition, Petitioners,
v.
United States Environmental Protection Agency, Respondent,
Natural Resources Defense Council, Inc., Respondent-Intervenor.

Nos. 00-70014, 00-70734, 00-70822.
Argued and Submitted Dec. 3, 2001.
Filed Sept. 15, 2003.

Environmental, municipal, and industry groups brought petitions for review of Environmental Protection Agency (EPA) rule mandating that discharges from small municipal storm sewers and construction sites be subject to National Pollutant Discharge Elimination System (NPDES) permitting requirements. On denial of rehearing, the Court of Appeals, James R. Browning, Circuit Judge, held that: (1) EPA had authority to impose rule; (2) rule did not violate the Tenth Amendment; (3) rule improperly failed to provide for review of notices of intent and public participation in NPDES permitting process; (4) EPA's failure to designate industrial sources of storm water pollution for permitting requirements was not arbitrary and capricious; (5) challenge to rule's exclusion of forest roads was not time-barred; (6) forestry trade association lacked standing to challenge rule; (7) EPA properly consulted with state and local officials; (8) sites subject to rule were properly designated; and (9) EPA properly retained authority to designate future sources of storm water pollution for regulation.

Petitions for review granted in part and denied in part.

Tallman, Circuit Judge, filed opinion concurring in part and dissenting in part, and would have granted petition for rehearing.

Opinion, 319 F.3d 398, vacated.

West Headnotes

[1] Environmental Law 149E ⇐176

149E Environmental Law
149EV Water Pollution
149Ek174 Substances, Sources, and Activities Regulated
149Ek176 k. Sewage and Sewers. Most Cited Cases

Environmental Law 149E ⇐196

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek196 k. Discharge of Pollutants. Most Cited Cases

Storm sewers are established "point sources" subject to National Pollutant Discharge Elimination System (NPDES) permitting requirements under Clean Water Act (CWA). Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

[2] Environmental Law 149E ⇐175

149E Environmental Law
149EV Water Pollution
149Ek174 Substances, Sources, and Activities Regulated
149Ek175 k. In General. Most Cited Cases

Diffuse runoff, such as rainwater that is not channeled through point source, is considered "nonpoint source" pollution and is not subject to federal regulation under Clean Water Act (CWA). Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

[3] Constitutional Law 92 ⚿976

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k976 k. Resolution of Non-Constitutional Questions Before Constitutional Questions. Most Cited Cases
(Formerly 92k46(1))

Court of Appeals avoids considering constitutionality of a rule if an issue may be resolved on narrower grounds.

[4] Environmental Law 149E ⚿196

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek196 k. Discharge of Pollutants. Most Cited Cases

Environmental Protection Agency (EPA) interpretation of rule promulgated under Clean Water Act (CWA), whereby EPA would require that discharges from small municipal storm sewers and construction sites be subject to National Pollutant Discharge Elimination System (NPDES) permitting requirements, was reasonable, and thus EPA acted within its statutory mandate in formulating permit program under rule; even though permitting was not included on statutory list of elements for EPA's comprehensive program to regulate small sewer systems, list was non-exclusive, and statutory language requiring imposition of permits for "municipal storm sewers" was reasonably interpreted to extend to small systems. Federal Water Pollution Control Act Amendments of 1972, § 402(p)(6), 33 U.S.C.A. § 1342(p)(6).

[5] Environmental Law 149E ⚿197

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek197 k. Conditions and Limitations. Most Cited Cases

Minimum measures set forth by rule as conditions for issuance of stormwater discharge permit to operator of small municipal storm sewers did not exceed authority of Environmental Protection Agency (EPA) under Clean Water Act (CWA), as statute's list of elements for regulatory program was nonexclusive, and rule included at least one alternative to minimum measures. Federal Water Pollution Control Act Amendments of 1972, § 402(p)(6), 33 U.S.C.A. § 1342(p)(6); 40 C.F.R. §§ 122.26(d), 122.26, 122.33(b)(1), 122.34(b), (d)(1)(i).

[6] States 360 ⚿4.16(3)

360 States
360I Political Status and Relations
360I(A) In General
360k4.16 Powers of United States and Infringement on State Powers
360k4.16(3) k. Surrender of State Sovereignty and Coercion of State. Most Cited Cases

Under the Tenth Amendment, the Federal Government may not compel States to implement, by legislation or executive action, federal regulatory programs. U.S.C.A. Const.Amend. 10.

[7] States 360 ⚿4.16(3)

360 States
360I Political Status and Relations
360I(A) In General
360k4.16 Powers of United States and In-

fringement on State Powers
360k4.16(3) k. Surrender of State Sovereignty and Coercion of State. Most Cited Cases

Under the Tenth Amendment, the federal government may not force the States to regulate third parties in furtherance of a federal program. U.S.C.A. Const.Amend. 10.

[8] States 360 ⇐4.16(1)

360 States
360I Political Status and Relations
360I(A) In General
360k4.16 Powers of United States and Infringement on State Powers
360k4.16(1) k. In General. Most Cited Cases

Protections of Tenth Amendment, whereby federal government may not compel States to implement federal regulatory programs by legislation or executive action, nor force the States to regulate third parties in furtherance of a federal program, extend to municipalities. U.S.C.A. Const.Amend. 10.

[9] United States 393 ⇐82(2)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(2) k. Aid to State and Local Agencies in General. Most Cited Cases

While federal government may not compel them to do so, it may encourage States and municipalities to implement federal regulatory programs; for example, the federal government may make certain federal funds available only to those States or municipalities that enact a given regulatory regime. U.S.C.A. Const.Amend. 10.

[10] States 360 ⇐4.16(3)

360 States
360I Political Status and Relations
360I(A) In General
360k4.16 Powers of United States and Infringement on State Powers
360k4.16(3) k. Surrender of State Sovereignty and Coercion of State. Most Cited Cases

The crucial proscribed element under the Tenth Amendment, as to federal government's ability to have states implement federal programs, is coercion; the residents of the State or municipality must retain the ultimate decision as to whether or not the State or municipality will comply with the federal regulatory program, but as long as the alternative to implementing a federal regulatory program does not offend the Constitution's guarantees of federalism, the fact that the alternative is difficult, expensive, or otherwise unappealing is insufficient to establish a Tenth Amendment violation. U.S.C.A. Const.Amend. 10.

[11] Environmental Law 149E ⇐166

149E Environmental Law
149EV Water Pollution
149Ek163 Constitutional Provisions, Statutes, and Ordinances
149Ek166 k. Validity. Most Cited Cases

States 360 ⇐4.16(3)

360 States
360I Political Status and Relations
360I(A) In General
360k4.16 Powers of United States and Infringement on State Powers
360k4.16(3) k. Surrender of State Sovereignty and Coercion of State. Most Cited Cases

Environmental Protection Agency (EPA) rule promulgated under Clean Water Act (CWA), whereby discharges from small municipal storm sewers and construction sites were subject to National Pollutant Discharge Elimination System (NPDES) permitting requirements, did not wrongfully compel municipalities to regulate third parties under federal law as condition of receiving permit to operate, as would contravene Tenth Amendment; although one means of obtaining permit would require municipality to adopt various enforcement procedures, permit applicants retained option of ap-

344 F.3d 832, 57 ERC 1039, 33 Envtl. L. Rep. 20,269, 03 Cal. Daily Op. Serv. 8398, 2003 Daily Journal D.A.R. 10,479
(Cite as: 344 F.3d 832)

plying for Alternative Permit. U.S.C.A. Const.Amend. 10; Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.; 40 C.F.R. §§ 122.26(d), 122.34.

[12] Constitutional Law 92 ⚿1681

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(F) Politics and Elections
92k1681 k. Political Speech, Beliefs, or Activity in General. Most Cited Cases
(Formerly 92k90.1(4))

Environmental Law 149E ⚿196

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek196 k. Discharge of Pollutants. Most Cited Cases

Environmental Protection Agency (EPA) adoption of "Public Education" and "Illicit Discharge" Minimum Measures within rules governing discharges from small municipal storm sewers and construction sites, whereby such discharges would be subject to National Pollutant Discharge Elimination System (NPDES) permitting requirements under Clean Water Act (CWA), did not wrongfully compel municipalities to deliver EPA's political messages, and thus did not violate municipalities' free speech rights under First Amendment; requiring providers of storm sewers that discharged into national waters to educate public about impacts of storm water discharge, and to inform affected parties, including public, about hazards of improper waste disposal fell short of compelling political speech, since they did not dictate specific ideological message. U.S.C.A. Const.Amend. 1; Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

[13] Administrative Law and Procedure 15A ⚿395

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak392 Proceedings for Adoption
15Ak395 k. Notice and Comment, Sufficiency. Most Cited Cases

In determining whether notice to interested parties was adequate under informal rulemaking strictures of Administrative Procedure Act (APA) when final regulation has varied from proposal, court must consider whether new round of notice and comment would have provided first opportunity for interested parties to offer comments that could have persuaded agency to modify its ruling. 5 U.S.C.A. § 553.

[14] Environmental Law 149E ⚿218

149E Environmental Law
149EV Water Pollution
149Ek215 Administrative Agencies and Proceedings
149Ek218 k. Notice and Comment. Most Cited Cases

Environmental Protection Agency (EPA) adoption of Alternative Permit option within rules governing discharges from small municipal storm sewers and construction sites, whereby such discharges would be subject to National Pollutant Discharge Elimination System (NPDES) permitting requirements under Clean Water Act (CWA), properly complied with minimum notice and comment procedures required in informal rulemaking under Administrative Procedure Act (APA), since Alternative Permit option was logical outgrowth of comments received by EPA in response to proposed rule, and option contained no elements that were not part of proposed rule, even though it was configured differently. 5 U.S.C.A. § 553; Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

[15] Environmental Law 149E ⚿662

149E Environmental Law

149EXIII Judicial Review or Intervention
149Ek662 k. Ripeness. Most Cited Cases

Challenge to Environmental Protection Agency (EPA) rule allowing operators of small municipal storm sewers to pursue general permit option to meet National Pollutant Discharge Elimination System (NPDES) requirements under Clean Water Act (CWA) was ripe for review, as issue did not involve merits of any specific permit but was purely one of statutory interpretation that would not benefit from further factual development; issue specifically was whether EPA accomplished the substantive controls for municipal stormwater that Congress mandated in the CWA. Federal Water Pollution Control Act Amendments of 1972, § 402(p), 33 U.S.C.A. § 1342(p).

[16] Environmental Law 149E ⚿196

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek196 k. Discharge of Pollutants. Most Cited Cases

General permitting scheme of Environmental Protection Agency (EPA) rules governing discharges from small municipal storm sewers and construction sites, whereby such discharges would be subject to National Pollutant Discharge Elimination System (NPDES) requirements under Clean Water Act (CWA), improperly allowed sewer system operators to design storm water pollution control programs without adequate regulatory and public oversight, and thus contravened CWA, since permitting scheme did not require EPA to review content of dischargers' notices of intent, and did not contain express requirements for public participation in NPDES permitting process. Federal Water Pollution Control Act Amendments of 1972, § 402(p)(3), 33 U.S.C.A. § 1342(p)(3); 40 C.F.R. § 122.34.

[17] Administrative Law and Procedure 15A ⚿413

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak412 Construction
15Ak413 k. Administrative Construction. Most Cited Cases

Administrative Law and Procedure 15A ⚿753

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak753 k. Theory and Grounds of Administrative Decision. Most Cited Cases

Court of Appeals normally defers to an agency's interpretations of its own regulations, but it may decline to defer to the post hoc rationalizations of appellate counsel.

[18] Environmental Law 149E ⚿196

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek196 k. Discharge of Pollutants. Most Cited Cases

Failure of Environmental Protection Agency (EPA) to designate industrial sources of storm water pollution for discharge permit program, whereby such discharges would become subject to National Pollutant Discharge Elimination System (NPDES) requirements, was not arbitrary and capricious, and thus did not violate Clean Water Act (CWA); rather than designating industrial discharge sources on nationwide basis under NPDES program, EPA sought to establish local and regional designation authority for such sources. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., as amended, 33 U.S.C.A. § 1251 et seq.

[19] Environmental Law 149E ⚿671

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek668 Time for Proceedings

149Ek671 k. Accrual, Computation, and Tolling. Most Cited Cases

Petitioners' challenge to failure of Environmental Protection Agency (EPA) to regulate stormwater drainage from forest roads did not have to be raised either when EPA initially promulgated silviculture regulations excluding certain silvicultural activities from National Pollutant Discharge Elimination System (NPDES) permitting requirements, or when EPA considered amending such regulations but chose not to do so, and challenge was thus not time-barred, to extent that present challenge was made to EPA's decision not to address forest roads under later-enacted portion of Clean Water Act (CWA) directed to municipal and industrial stormwater discharges. Federal Water Pollution Control Act Amendments of 1972, §§ 402(p), 509(b)(1), 33 U.S.C.A. §§ 11342(p), 1369(b)(1); 40 C.F.R. § 122.27(b)(1).

[20] Environmental Law 149E ⚿641

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek636 Administrative Decisions or Actions Reviewable in General
149Ek641 k. Water Pollution. Most Cited Cases

Petitioners' comments during rulemaking process in connection with Environmental Protection Agency (EPA) rule governing municipal and industrial stormwater discharges pursuant to Clean Water Act (CWA) were not so inadequate as to preclude appellate court jurisdiction to hear petitioners' subsequent challenge to rule's failure to address stormwater drainage from forest roads; comments comprised two paragraphs, with footnotes, stating objections and providing support, EPA was aware of forest road sedimentation problem at time of rulemaking, and EPA responded to comments without disputing that problem was serious. Federal Water Pollution Control Act Amendments of 1972, § 402(p), 33 U.S.C.A. § 1342(p).

[21] Environmental Law 149E ⚿652

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek649 Persons Entitled to Sue or Seek Review; Standing
149Ek652 k. Organizations, Associations, and Other Groups. Most Cited Cases

Forestry and paper association lacked sufficient standing to challenge Environmental Protection Agency (EPA) rule mandating that discharges from small municipal storm sewers and construction sites be subject to National Pollutant Discharge Elimination System (NPDES) permitting requirements under Clean Water Act (CWA), since association's interest in avoiding future regulation of forest roads was not actually or imminently affected by rule at issue. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

[22] Environmental Law 149E ⚿220

149E Environmental Law
149EV Water Pollution
149Ek215 Administrative Agencies and Proceedings
149Ek220 k. Permit and Certification Proceedings. Most Cited Cases

Environmental Protection Agency (EPA), in promulgating rule mandating that discharges from small municipal storm sewers and construction sites be subject to National Pollutant Discharge Elimination System (NPDES) permitting requirements, properly consulted with state and local officials, and thus did not violate Clean Water Act (CWA); draft of first report pertaining to proposed rule was circulated to states and municipalities, EPA regional offices, professional associations and other stakeholders, and rule was revised based upon comments received. Federal Water Pollution Control Act Amendments of 1972, § 402(p), 33 U.S.C.A. § 1342(p).

[23] Environmental Law 149E ⚿652

149E Environmental Law
149EXIII Judicial Review or Intervention

149Ek649 Persons Entitled to Sue or Seek Review; Standing
149Ek652 k. Organizations, Associations, and Other Groups. Most Cited Cases

Environmental Law 149E ⚿654

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek649 Persons Entitled to Sue or Seek Review; Standing
149Ek654 k. Government Entities, Agencies, and Officials. Most Cited Cases

Home builders' association and municipalities possessed sufficient standing to challenge designation by Environmental Protection Agency (EPA) of municipal storm sewers and construction sites for regulation under Clean Water Act (CWA), whereby National Pollutant Discharge Elimination System (NPDES) permits would be required for discharges by such entities, since association and municipalities were able to allege procedural harm from purported lack of notice or from effects of regulation itself. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

[24] Environmental Law 149E ⚿196

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek196 k. Discharge of Pollutants. Most Cited Cases

Designation by Environmental Protection Agency (EPA) of municipal storm sewers to be subject to National Pollutant Discharge Elimination System (NPDES) permitting requirements, according to areas defined by Census Bureau as "urbanized," was not arbitrary and capricious, as would violate Clean Water Act (CWA), since EPA articulated reasoned basis for its conclusion that Census Bureau's designation was correlated to actual levels of pollution runoff in storm water; record evidence demonstrated compelling and widespread relationship between urban storm water runoff and deleterious impacts on water quality. Federal Water Pollution Control Act Amendments of 1972, § 402(p), 33 U.S.C.A. § 1342(p).

[25] Environmental Law 149E ⚿196

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek196 k. Discharge of Pollutants. Most Cited Cases

Decision by Environmental Protection Agency (EPA) to subject construction sites disturbing between one and five acres of land to National Pollutant Discharge Elimination System (NPDES) permitting requirements was not arbitrary and capricious, as would violate Clean Water Act (CWA); record evidence included numerous studies of sedimentation from construction sites, which EPA specifically reviewed in promulgating challenged regulation, and EPA's extrapolation of data from studies involving larger sites had reasonable basis. Federal Water Pollution Control Act Amendments of 1972, § 402(p), 33 U.S.C.A. § 1342(p).

[26] Environmental Law 149E ⚿196

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek196 k. Discharge of Pollutants. Most Cited Cases

Allowance by Environmental Protection Agency (EPA) of regulatory waivers for small construction sites not likely to cause adverse water quality impacts, as would exempt such sites from National Pollutant Discharge Elimination System (NPDES) permit requirements, was not arbitrary and capricious, as would violate Clean Water Act (CWA); EPA's waiver approach promoted fairness and efficiency in permitting process, and did not create presumption applicable to evidentiary hearing. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

[27] Environmental Law 149E ⚿196

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek196 k. Discharge of Pollutants. Most Cited Cases

Decision by Environmental Protection Agency (EPA) to subject small construction sites to National Pollutant Discharge Elimination System (NPDES) permitting requirements was consistent with its decisions to exempt other potential storm water runoff sources from such requirements, notwithstanding alleged lack of quantifiable data regarding runoff, and thus was not arbitrary and capricious, as would violate Clean Water Act (CWA); record evidence demonstrated that construction sites of all sizes had greater erosion rates than almost any other land use, and thus were not similarly situated to potential polluters that EPA chose not to regulate. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

[28] Environmental Law 149E ⚿175

149E Environmental Law
149EV Water Pollution
149Ek174 Substances, Sources, and Activities Regulated
149Ek175 k. In General. Most Cited Cases

Language in Clean Water Act (CWA) conferring authority to Environmental Protection Agency (EPA) to regulate "a discharge" determined to threaten water quality does not preclude EPA from designating entire categories of discharge sources for regulation. Federal Water Pollution Control Act Amendments of 1972, § 402(p), 33 U.S.C.A. § 1342(p).

[29] Environmental Law 149E ⚿196

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek196 k. Discharge of Pollutants. Most Cited Cases

Residual designation authority retained by Environmental Protection Agency (EPA) for subjecting storm water discharge sites to future regulation under National Pollutant Discharge Elimination System (NPDES) permitting system was not ultra vires as to Clean Water Act (CWA); applicable statutory sections authorized designation of class of discharges to be identified on case-by-case, location-specific bases by NPDES permitting authority, consistent with comprehensive program to protect water quality. Federal Water Pollution Control Act Amendments of 1972, § 402(p), 33 U.S.C.A. § 1342(p).

[30] Constitutional Law 92 ⚿2419

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2410 To Executive, Particular Issues and Applications
92k2419 k. Environment and Natural Resources. Most Cited Cases
(Formerly 92k62(10))

Environmental Law 149E ⚿196

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek196 k. Discharge of Pollutants. Most Cited Cases

Residual designation authority retained by Environmental Protection Agency (EPA) for subjecting storm water discharge sites to future regulation under National Pollutant Discharge Elimination System (NPDES) permitting system under Clean Water Act (CWA) did not effect unconstitutional delegation of legislative power, since such authority manifested statutory directive to restore and maintain chemical, physical and biological integrity of national waters. U.S.C.A. Const. Art. 1, § 1; Federal Water Pollution Control Act Amendments

of 1972, § 402(p), 33 U.S.C.A. § 1342(p).

[31] Environmental Law 149E ⚿218

149E Environmental Law
149EV Water Pollution
149Ek215 Administrative Agencies and Proceedings
149Ek218 k. Notice and Comment. Most Cited Cases

Environmental Protection Agency (EPA) provided proper notice and comment for rule allowing agency to retain residual designation authority subjecting categories of storm water discharge sites to future regulation under National Pollutant Discharge Elimination System (NPDES) permitting system under Clean Water Act (CWA), even though proposed rule would have only allowed such designation on case-by-case basis, since final rule was logical outgrowth of comments received by EPA; elements in proposed rule explicitly envisioned categorical designation of sources at watershed level. Federal Water Pollution Control Act Amendments of 1972, § 402(p), 33 U.S.C.A. § 1342(p).

[32] Administrative Law and Procedure 15A ⚿405.5

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak404 Form
15Ak405.5 k. Economic or Social Impact Statement. Most Cited Cases

Under Regulatory Flexibility Act (RFA), federal agency must prepare regulatory flexibility analysis and assessment of economic impact of proposed rule on small business entities, unless agency certifies that proposed rule will not have significant economic impact on a substantial number of small entities, and provides a factual basis for that certification. 5 U.S.C.A. § 604.

[33] Environmental Law 149E ⚿220

149E Environmental Law
149EV Water Pollution
149Ek215 Administrative Agencies and Proceedings
149Ek220 k. Permit and Certification Proceedings. Most Cited Cases

Environmental Protection Agency (EPA), in promulgating rule subjecting categories of storm water discharge sites to National Pollutant Discharge Elimination System (NPDES) permitting requirements under Clean Water Act (CWA), reasonably certified that rule would not have significant economic impact on small business entities, as required under Regulatory Flexibility Act (RFA); EPA convened small business advocacy review panel before publishing notice of proposed rule, and included provisions in rule designed to minimize impacts on such entities. 5 U.S.C.A. § 604; Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

***839** Victoria Clark, Environmental Defense Center, Santa Barbara, CA, for petitioner Environmental Defense Center, Inc.

Andrew G. Frank and Arlene Yang, Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY, and Nancy K. Stoner, Natural Resources Defense Council, Washington, DC, for intervenor National Resources Defense Council, Inc.

R. Timothy McCrum, Ellen B. Steen, and Donald J. Kochan, Crowell & Moring, Washington, DC, for petitioners American Forest & Paper Association and National Association of Home Builders.

Steven P. Quarles and J. Michael Klise, Crowell & Moring, Washington, DC, and William R. Murray, American Forest & Paper Association, Washington, DC, for petitioner American Forest & Paper Association.

Jim Mathews and Clarence Joe Freeland, Mathews & Freeland, Austin, TX, for petitioner Texas Cities Coalition on Stormwater.

344 F.3d 832, 57 ERC 1039, 33 Envtl. L. Rep. 20,269, 03 Cal. Daily Op. Serv. 8398, 2003 Daily Journal D.A.R. 10,479
(Cite as: 344 F.3d 832)

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John C. Cruden, Daniel M. Flores and Kent E. Hanson, United States Department of Justice, Washington, DC, and Stephen J. Sweeny, United States Environmental Protection Agency, Washington, DC, for respondent United States Environmental Protection Agency.

On Petition for Review of an Order of the Environmental Protection Agency. EPA No. Clean Water 40 CFR.

Before BROWNING, REINHARDT, and TALLMAN, Circuit Judges.

Opinion by Judge JAMES R. BROWNING; Partial Concurrence and Partial Dissent by Judge TALLMAN.

ORDER AND OPINION

ORDER

The opinion and dissent filed in this case on January 14, 2003, and published at 319 F.3d 398 are vacated. They are replaced by the Opinion and Dissent filed today.

With the filing of the new Opinion and Dissent, the panel has voted to deny the petitions for rehearing and the petition for rehearing en banc. (Judge Tallman would grant the petition for rehearing filed by ***840** the Environmental Protection Agency.) The full court has been advised of the new Opinion, new Dissent, and petition for rehearing en banc. No judge has requested a vote on the petition for rehearing en banc. Fed. R.App. P. 35.

The petitions for rehearing and the petition for rehearing en banc are DENIED. The clerk is instructed not to accept for filing any new petitions for rehearing or petitions for rehearing en banc in this case.

Each party shall bear its own costs in this appeal.

OPINION

JAMES R. BROWNING, Circuit Judge.

Petitioners challenge a rule issued by the United States Environmental Protection Agency pursuant to the Clean Water Act, 33 U.S.C. §§ 1251 -1387, to control pollutants introduced into the nation's waters by storm sewers.

Storm sewers drain rainwater and melted snow from developed areas into water bodies that can handle the excess flow. Draining stormwater picks up a variety of contaminants as it filters through soil and over pavement on its way to sewers. Sewers are also used on occasion as an easy (if illicit) means for the direct discharge of unwanted contaminants. Since storm sewer systems generally channel collected runoff into federally protected water bodies, they are subject to the controls of the Clean Water Act.

In October of 1999, after thirteen years in process, the Environmental Protection Agency ("EPA") promulgated a final administrative rule (the "Phase II Rule" [FN1] or "the Rule") under § 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p) , mandating that discharges from small municipal separate storm sewer systems and from construction sites between one and five acres in size be subject to the permitting requirements of the National Pollutant Discharge Elimination System ("NPDES"), 33 U.S.C. §§ 1311(a), 1342. EPA preserved authority to regulate other harmful stormwater discharges in the future.

> FN1. The "Phase II Rule" reviewed here is the product of the second stage of EPA's two-phase stormwater rulemaking effort. The "Phase I Rule," governing larger-scale stormwater discharges, was issued in 1990 and reviewed by this court in *Natural Res. Def. Council v. EPA,* 966 F.2d 1292 (9th

344 F.3d 832, 57 ERC 1039, 33 Envtl. L. Rep. 20,269, 03 Cal. Daily Op. Serv. 8398, 2003 Daily Journal D.A.R. 10,479
(Cite as: 344 F.3d 832)

Cir.1992).

In the three cases consolidated here, petitioners and intervenors challenge the Phase II Rule on twenty-two constitutional, statutory, and procedural grounds. We remand three aspects of the Rule concerning the issuance of notices of intent under the Rule's general permitting scheme, and a fourth aspect concerning the regulation of forest roads. We affirm the Rule against all other challenges.

I.
BACKGROUND

A. The Problem of Stormwater Runoff

Stormwater runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." [FN2] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, ***841** and estuaries across the United States. [FN3] In 1985, three-quarters of the States cited urban stormwater runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. [FN4] Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. [FN5] Among the sources of stormwater contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems. [FN6]

FN2. Richard G. Cohn-Lee and Diane M. Cameron, *Urban Stormwater Runoff Contamination of the Chesapeake Bay: Sources and Mitigation,* THE ENVIRONMENTAL PROFESSIONAL, Vol. 14, p. 10, at 10 (1992); *see also Natural Res. Def. Council,* 966 F.2d at 1295 (citing a study by the Nationwide Urban Runoff Program).

FN3. Regulation for Revision of the Water Pollution Control Program Addressing Storm Water, 64 Fed. Reg. 68,722, 68,724, 68,727 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122, 123, and 124).

FN4. *Id.* at 68,726.

FN5. *Id.*

FN6. *Id.* at 68,725-31.

B. Stormwater and the Clean Water Act

Congress enacted the Clean Water Act in 1948 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (originally codified as the Federal Water Pollution Control Act, 62 Stat. 1155). The Clean Water Act prohibits the discharge of pollutants from a "point source" [FN7] into the waters of the United States without a permit issued under the terms of the National Pollutant Discharge Elimination System, 33 U.S.C. §§ 1311(a), 1342, which requires dischargers to comply with technology-based pollution limitations (generally according to the "best available technology economically achievable," or "BAT" standard). 33 U.S.C. § 1311(b)(2)(A). NPDES permits are issued by EPA or by States that have been authorized by EPA to act as NPDES permitting authorities. 33 U.S.C. § 1342(a)-(b). The permitting authority must make copies of all NPDES permits and permit applications available to the public, 33 U.S.C. §§ 1342(j), 1342(b)(3); state permitting authorities must provide EPA notice of each permit application, 33 U.S.C. § 1342(b)(4); and a permitting authority must provide an opportunity for a public hearing before issuing any permit, 33 U.S.C. §§ 1342(a)(1), 1342(b)(3); *cf.* 33 U.S.C. § 1251(e) (requiring public participation).

FN7. A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or

may be discharged." 33 U.S.C. § 1362(14).

[1][2] Storm sewers are established point sources subject to NPDES permitting requirements. *Natural Res. Def. Council v. Costle,* 568 F.2d 1369, 1379 (D.C.Cir.1977) (holding unlawful EPA's exemption of stormwater discharges from NPDES permitting requirements); *Natural Res. Def. Council v. EPA,* 966 F.2d 1292, 1295 (9th Cir.1992).[FN8] In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), "Municipal and Industrial Stormwater Discharges." Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges "associated with industrial activity," discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a ***842** two-phase overall program of stormwater regulation. *Id.* at § 1342(p)(2)-(4); *Natural Res. Def. Council,* 966 F.2d at 1296. In 1990, pursuant to § 402(p)(4), EPA issued the Phase I Rule regulating large discharge sources.[FN9]

FN8. Diffuse runoff, such as rainwater that is not channeled through a point source, is considered nonpoint source pollution and is not subject to federal regulation. *Oregon Natural Desert Ass'n v. Dombeck,* 172 F.3d 1092, 1095 (9th Cir.1998).

FN9. National Pollutant Discharge Elimination System Permit Application Regulations for Stormwater Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at 40 C.F.R. pt. 122-124). The Phase I rule was challenged in this court in *Natural Res. Def. Council,* 966 F.2d at 1292. We held, *inter alia,* that EPA must impose deadlines for permit approvals, *id.* at 1300, that EPA's decision to regulate construction sites only over five acres in size was arbitrary and capricious, *id.* at 1306, and that EPA did not act capriciously in defining "municipal," *id.* at 1304, or in placing differently-sized municipalities on different permitting schedules, *id.* at 1301.

C. The Phase II Stormwater Rule

In Clean Water Act § 402(p), Congress also directed a second stage of stormwater regulation by ordering EPA to identify and address sources of pollution not covered by the Phase I Rule. Section 402(p)(1) placed a temporary moratorium (expiring in 1994) on the permitting of other stormwater discharges pending the results of studies mandated in § 402(p)(5) to identify the sources and pollutant content of such discharges and to establish procedures and methods to control them as "necessary to mitigate impacts on water quality." 33 U.S.C. § 1342(p)(5). Section 402(p)(6) required that EPA establish "a comprehensive program to regulate" these stormwater discharges "to protect water quality," following the studies mandated in § 402(p)(5) and consultation with state and local officials. *Id.* at § 1342(p)(6).

EPA proposed the Phase II Rule in January of 1998.[FN10] In October, 1999, Congress passed legislation precluding EPA from promulgating the new Rule until EPA submitted an additional report to Congress supporting certain anticipated aspects of the Rule.[FN11] EPA was also required to publish its report in the Federal Register for public comment. Pub. L. No. 106-74, § 431(c), 113 Stat. at 1097. Later that month, EPA submitted the required ("Appropriations Act") study and promulgated the Rule.[FN12]

FN10. Proposed Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 63 Fed. Reg. 1536 (proposed Jan. 9, 1998).

FN11. Pub. L. No. 106-74, § 431(a), 113 Stat. 1047, 1096 (1999) ("Appropriations, 2000-Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies").

FN12. Regulations for Revision of the Wa-

ter Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122, 123, and 124).

Under the Phase II Rule, NPDES permits are required for discharges from small municipal separate storm sewer systems ("small MS4s") and stormwater discharges from construction activity disturbing between one and five acres ("small construction sites"). 40 C.F.R. §§ 122.26(a)(9)(i)(A)-(B). Small MS4s may seek permission to discharge by submitting an individualized set of best-management plans in six specified categories, *id.* at § 122.34, either in the form of an individual permit application, or in the form of a notice of intent to comply with a general permit. *Id.* at § 122.33(b). Small MS4s may also seek permission to discharge through an alternative process, under which a permit may be sought without requiring the operator to regulate third parties, *id.* at §§ 122.33(b)(2)(ii), 122.26(d).[FN13] Small construction sites may ***843** apply for individual NPDES permits or seek coverage under a promulgated general permit. *Id.* at § 122.26(c). EPA also preserved authority to regulate other categories of harmful stormwater discharges on a regional, as-needed basis. *Id.* at § 122.26(a)(9)(i)(C)-(D).

FN13. The Rule also allows a small MS4 to be regulated under an individual NPDES permit covering a nearby large or medium MS4, with provisions adapted to address the small MS4. 40 C.F.R. § 122.33(b)(3).

D. Facial Challenges to the Phase II Rule

The Rule was challenged in the Fifth, Ninth, and D.C. Circuits in three separate actions ultimately consolidated before the Ninth Circuit.

The Texas Cities Coalition on Stormwater and the Texas Counties Stormwater Coalition (collectively, "the Municipal Petitioners") assert that EPA lacked authority to require permitting, that its promulgation of the Rule was procedurally defective, that the Rule establishes categories that are arbitrary and capricious, and that the Rule impermissibly requires municipalities to regulate their own citizens in contravention of the Tenth Amendment and to communicate a federally mandated message in contravention of the First Amendment. The Natural Resources Defense Council ("NRDC") intervened on behalf of EPA.

Environmental Defense Center, joined by petitioner-intervenor NRDC ("the Environmental Petitioners"), asserts that the regulations fail to meet minimum Clean Water Act statutory requirements because they constitute a program of impermissible self-regulation, fail to provide required avenues of public participation, and neglect to address stormwater runoff associated with forest roads and other significant sources of runoff pollution.

The American Forest & Paper Association ("AF&PA") and the National Association of Home Builders ("the Industrial Petitioners") assert that promulgation of the Rule was procedurally defective and violated the Regulatory Flexibility Act, that EPA's retention of authority to regulate future sources of runoff pollution is *ultra vires,* and that the decision to regulate discharge from construction sites one to five acres in size is arbitrary and capricious. NRDC again intervened on behalf of EPA.

We have jurisdiction pursuant to section 509(b)(1) of the Clean Water Act, 33 U.S.C. § 1369(b)(1) (assigning review of EPA effluent and permitting regulations to the Federal Courts of Appeals).

II.
DISCUSSION

A. The Permit Requirements

[3] The Municipal Petitioners' primary contention is that the Phase II Rule compels small MS4s to regulate citizens as a condition of receiving a permit to operate, and that EPA lacks both statutory and constitutional authority to impose such a requirement. Because we avoid considering constitutionality if an issue may be resolved on narrower grounds, *Greater New Orleans Broadcasting Ass'n*

v. United States, 527 U.S. 173, 184, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999), we first ask whether the Phase II Rule is supported by statutory authority.

1. Statutory Authority

[4] The Municipal Petitioners assert that the statutory command in Clean Water Act § 402(p)(6) that EPA develop a "comprehensive program to regulate" small MS4s did not authorize a program based on NPDES permits. Petitioners argue that because § 402(p)(6) explicitly indicates elements that the program may ***844** contain (performance standards, guidelines, etc.) without mentioning "permits," Congress must have intended that the program exclude permitting.[FN14]

> FN14. The text of that section reads: "Not later than October 1, 1993, [EPA], in consultation with state and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate." 33 U.S.C. § 1342(p)(6).

The fact that "permitting" is not included on a statutory list of elements that the program "may" include is not determinative, because the list is manifestly nonexclusive. The only constraints are that the § 402(p)(6) regulations be based on the § 402(p)(5) studies, that they be issued in consultation with state and local officials, and that-"at a minimum"-they establish priorities, requirements for state stormwater management programs, and expeditious deadlines, and constitute a comprehensive program "to protect water quality." 33 U.S.C. § 1342(p)(6). EPA was free to adopt any regulatory program, including a permitting program, that included these elements. *See Chevron, U.S.A. v. Natural Res. Def. Council,* 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (deference to an agency's reasonable interpretation is required unless Congress expressed its intent unambiguously). It is more reasonable to interpret congressional silence about permits as an indication of EPA's flexibility not to use them than as an outright prohibition.[FN15]

> FN15. The lesser category of "permits" may also be implied by the inclusion of "performance standards" in the list of possible program features.

The Municipal Petitioners further contend that their interpretation is supported by the structure of § 402(p), which expressly requires permits for large and medium sized MS4s in a separate section, § 402(p)(3)(B).[FN16] However, as EPA counters, the language in § 402(p)(3) requiring permits for municipal storm sewers may be interpreted to apply both to Phase I *and* Phase II MS4s. Moreover, as respondent-intervenor NRDC notes, the mere existence of the § 402(p)(1) permitting moratorium, designed to apply only to Phase II dischargers, necessarily implies that EPA has the authority to require permits from these sources after the 1994 expiration of the moratorium.

> FN16. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States,* 522 U.S. 23, 29-30, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997).

Since there would have been no need to establish a permitting moratorium for these sources if the sources could *never* be subject to permitting requirements, petitioners' interpretation violates the

bedrock principle that statutes not be interpreted to render any provision superfluous. *See Burrey v. Pacific Gas & Elec. Co.*, 159 F.3d 388, 394 (9th Cir.1998). EPA's interpretation of its mandate under § 402(p)(6) was reasonable and EPA acted within its statutory authority in formulating the Phase II Rule as a permitting program.

2. The Tenth Amendment

The Municipal Petitioners contend that the Phase II Rule on its face compels ***845** operators of small MS4s to regulate third parties in contravention of the Tenth Amendment. We conclude that the Rule does not violate the Tenth Amendment, because it directs no unconstitutional coercion.

The Phase II Rule contemplates several avenues through which a small MS4 may obtain permission to discharge. First, if the NPDES Permitting Authority overseeing the small MS4 has issued an applicable general permit, the small MS4 may submit a notice of intent wherein the small MS4 agrees to comply with the terms of the general permit and specifies plans for implementing six "Minimum Measures" designed to protect water quality. 40 C.F.R. §§ 122.33(b)(1), 122.34(d)(1)(i), 122.34(b). Second, the small MS4 may apply for an individual permit under 40 C.F.R. § 122.34, which would again require compliance with the six Minimum Measures. *Id.* at §§ 122.33(b)(2)(i), 122.34(a), 122.34(b). Third, under an "Alternative Permit" option, the small MS4 may apply for an individualized permit under 40 C.F.R. § 122.26(d), the permitting program established by the Phase I Rule for large and medium-sized MS4s. *Id.* at §§ 122.33(b)(2)(ii), 122.26(d).[FN17]

> FN17. The Phase II Rule also allows a small MS4 to be regulated under an NPDES permit covering a nearby large or medium-sized MS4, with provisions adapted to address the small MS4. 40 C.F.R. § 122.33(b)(3).

[5] The Minimum Measures mentioned above require small MS4s to implement programs for: (1) conducting public education and outreach on stormwater impacts, *id.* at § 122.34(b)(1); (2) engaging public participation in the development of stormwater management programs, *id.* at § 122.34(b)(2); (3) detecting and eliminating illicit discharges to the MS4, *id.* at § 122.34(b)(3); (4) reducing pollution to the MS4 from construction activities disturbing one acre or more, *id.* at § 122.34(b)(4); (5) minimizing water quality impacts from development and redevelopment activities that disturb one acre or more, *id.* at § 122.34(b)(5); and (6) preventing or reducing pollutant runoff from municipal activities, *id.* at § 122.34(b)(6).[FN18]

> FN18. The Municipal Petitioners argue that the Minimum Measures exceed EPA's statutory authority under § 402(p) of the Clean Water Act. We disagree. The list of elements for a regulatory program that appears in § 402(p)(6) is nonexclusive, and EPA's adoption of the Minimum Measures represents a permissible interpretation of its authority under § 402(p)(6). *See Chevron*, 467 U.S. at 843-44, 104 S.Ct. 2778.
>
> The Municipal Petitioners argue that EPA is not entitled to *Chevron* deference, and that the Minimum Measures must be rejected absent a clear statement of congressional intent that EPA enact the Minimum Measures. The Municipal Petitioners argue that this clear statement requirement arises because there are "significant constitutional questions" about the permissibility of the Minimum Measures under the Tenth Amendment, and because the Minimum Measures alter "the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs*, 531 U.S. 159, 173, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001).
>
> As we explain, because the Phase II Rule includes at least one alternative to the

> Minimum Measures, *i.e.*, the option of seeking a permit under 40 C.F.R. § 122.26(d), the Minimum Measures do not present significant Tenth Amendment problems demanding a clear statement of congressional intent. Nor does the Phase II Rule alter the federal-state balance. To the contrary, the option of seeking a permit under 40 C.F.R. § 122.26(d) maintains precisely the same federal-state balance as existed prior to the Phase II Rule. *See, e.g., Natural Res. Def. Council v. EPA,* 966 F.2d 1292 (9th Cir.1992) (reviewing Phase I Rule); *Natural Res. Def. Council v. Costle,* 568 F.2d 1369, 1379 (D.C.Cir.1977) (denying EPA authority to exempt MS4s from regulation under the Clean Water Act). Furthermore, even if a clear statement of congressional intent were necessary, § 402(p) of the Clean Water Act is replete with clear statements that Congress intended EPA to require MS4s either to obtain NPDES permits or to stop discharging stormwater.

***846** The Municipal Petitioners contend that the measures regulating illicit discharges, small construction sites, and development activities unconstitutionally compel small MS4 operators to regulate third parties, *i.e.*, upstream dischargers. The Illicit Discharge Detection and Elimination measure requires that a permit seeker prohibit non-stormwater discharges to the MS4 and implement appropriate enforcement procedures. 40 C.F.R. § 122.34(b)(3)(ii)(B).[FN19] The Construction Site Stormwater Runoff Control measure requires a permit seeker to implement and enforce a program to reduce stormwater pollutants from small construction sites. *Id.* at §§ 122.34(b)(4)(i)-(ii).[FN20] It mandates erosion and sedimentation controls, site plan reviews that take account of water quality impacts, site inspections, and the consideration of public comment, and requires that construction site operators implement erosion, sedimentation, and waste management best management practices. *Id.* The Post-Construction/New Development measure requires permit seekers to address post-construction runoff from new development and redevelopment projects disturbing one acre or more. *Id.* at § 122.34(b)(5)(ii)(B).[FN21]

> FN19. This subsection provides that permit seekers must, "[t]o the extent allowable under State, Tribal, or local law, effectively prohibit, through ordinance or other regulatory mechanism, non-stormwater discharges into your storm sewer systems and implement appropriate enforcement procedures and actions...." 40 C.F.R. § 122.34(b)(3)(ii)(B).
>
> FN20. This subsection provides that permit seekers "must develop, implement, and enforce a program to reduce pollutants in any storm water runoff to your small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre.... [The] program must include the development and implementation of, at a minimum: (A) An ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State, Tribal, or local law; (B) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices; (C) Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality; (D) Procedures for site plan review which incorporate consideration of potential water quality impacts; (E) Procedures for receipt and consideration of information submitted by the public, and (F) Procedures for site inspection and enforcement control measures."

40 C.F.R. §§ 122.34(b)(4)(i)-(ii).

FN21. This subsection provides that permit seekers must "[u]se an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects [disturbing one acre or more] to the extent allowable under State, Tribal or local law." 40 C.F.R. §§ 122.34(b)(5)(ii)(B).

Noting that most MS4s are operated by municipal governments, and that "[t]he drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised," *New Orleans Gaslight Co. v. Drainage Comm'n,* 197 U.S. 453, 460, 25 S.Ct. 471, 49 L.Ed. 831 (1905), the Municipal Petitioners argue that requiring operators of small MS4s to implement "through ordinance or other regulatory mechanism" the regulations required by the Minimum Measures contravenes the Tenth Amendment. *See, e.g., New York v. United States,* 505 U.S. 144, 188, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

EPA counters that the Phase II Rule does not violate the Tenth Amendment because operators of small MS4s may opt to avoid the Minimum Measures by seeking a permit under the Alternative Permit ***847** option, 40 C.F.R. § 122.33(b)(2)(ii).[FN22]

FN22. EPA and NRDC also argue that the Minimum Measures are facially constitutional, and that the Phase II Rule presents no Tenth Amendment difficulties because operators of small MS4s may avoid stormwater regulation entirely by electing not to discharge stormwater into federal waters in the first place. In light of our holding with regard to the Alternative Permit option, we do not consider these arguments.

[6][7][8] Under the Tenth Amendment, "the Federal Government may not compel States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States,* 521 U.S. 898, 925, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997); *see also New York,* 505 U.S. at 188, 112 S.Ct. 2408. Similarly, the federal government may not force the States to regulate third parties in furtherance of a federal program. *See Reno v. Condon,* 528 U.S. 141, 151, 120 S.Ct. 666, 145 L.Ed.2d 587 (2000) (upholding a federal statutory scheme because it "does not require the States in their sovereign capacity to regulate their own citizens"). These protections extend to municipalities. *See, e.g., Printz* 521 U.S. at 931 n. 15, 117 S.Ct. 2365.

[9][10] However, while the federal government may not *compel* them to do so, it may *encourage* States and municipalities to implement federal regulatory programs. *See New York,* 505 U.S. at 166-68, 112 S.Ct. 2408. For example, the federal government may make certain federal funds available only to those States or municipalities that enact a given regulatory regime. *See, e.g., South Dakota v. Dole,* 483 U.S. 203, 205-08, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) (upholding federal statute conditioning state receipt of federal highway funds on state adoption of minimum drinking age of twenty-one). The crucial proscribed element is coercion; the residents of the State or municipality must retain "the ultimate decision" as to whether or not the State or municipality will comply with the federal regulatory program. *New York,* 505 U.S. at 168, 112 S.Ct. 2408. However, as long as "the alternative to implementing a federal regulatory program does not offend the Constitution's guarantees of federalism, the fact that the alternative is difficult, expensive or otherwise unappealing is insufficient to establish a Tenth Amendment violation." *City of Abilene v. EPA,* 325 F.3d 657, 662 (5th Cir.2003).

[11] With the Phase II Rule, EPA gave the operators of small MS4s a choice: either implement the regulatory program spelled out by the Minimum Measures described at 40 C.F.R. § 122.34(b), or pursue the Alternative Permit option and seek a permit under the Phase I Rule as described at 40 C.F.R. § 122.26(d). Thus, unless § 122.26(d) itself

offends the Constitution's guarantees of federalism, the Phase II Rule does not violate the Tenth Amendment.

Pursuing a permit under the Alternative Permit option does require permit seekers, in their application for a permit to discharge, to propose management programs that address substantive concerns similar to those addressed by the Minimum Measures. *See* 40 C.F.R. § 122.26(d). However, § 122.26(d) lists the requirements for an *application* for a permit to discharge, not the requirements of the permit itself. Therefore, nothing in § 122.26(d) requires the operator of an MS4 to implement a federal regulatory program in order to receive a permit to discharge, because nothing in § 122.26(d) specifies the contents of the permit that will result from the application process.

City of Abilene, 325 F.3d 657, provides a helpful illustration. The cities of Abilene and Irving, Texas, have populations between 100,000 and 250,000, and so were ***848** required to apply for permits under the Phase I Rule, 40 C.F.R. § 122.26(d). *City of Abilene,* 325 F.3d at 659-60. Under § 122.26(d) the cities were required to submit proposed stormwater management programs. *Id.* at 660. They negotiated the terms of those programs with EPA, and EPA eventually presented the cities with proposed management permits that contained conditions requiring the implementation of stormwater regulatory programs, and potentially requiring the regulation of third parties. *Id.* But, as the Fifth Circuit noted, this did not mean that the cities had no choice but to implement a federal regulatory program. Instead:

> The Cities filed comments objecting to those conditions, and negotiations continued until the EPA offered the Cities the option of pursuing numeric end-of-pipe permits, which would have required the Cities to satisfy specific effluent limitations rather than implement management programs. The Cities declined this offer, electing to continue negotiations on the management permits.

Id. The Fifth Circuit rejected the cities' contention that the resulting permits violated the Tenth Amendment by requiring the cities to regulate third parties according to federal standards. *Id.* at 661-63. Because the cities chose to pursue the management permits despite the fact that EPA provided them with an option for obtaining permits that would not have involved implementing a management program or regulating third parties, no unconstitutional coercion occurred. *Id.* at 663. The ultimate decision to implement the federal program remained with the cities.

Any operator of a small MS4 that wishes to avoid the Minimum Measures may seek a permit under § 122.26(d), and, as *City of Abilene* demonstrates, nothing in § 122.26(d) will compel the operator of a small MS4 to implement a federal regulatory program or regulate third parties, because § 122.26(d) specifies application requirements, not permit requirements. Therefore, by presenting the option of seeking a permit under § 122.26(d), the Phase II Rule avoids any unconstitutional coercion. The Municipal Petitioners' claim that the Phase II Rule violates the Tenth Amendment therefore fails.

3. The First Amendment and the Minimum Measures

The Municipal Petitioners contend that the Public Education and Illicit Discharge Minimum Measures compel municipalities to deliver EPA's political message in violation of the First Amendment. The Phase II Rule's "Public Education and Outreach" Minimum Measure directs regulated small MS4s to "distribute educational materials to the community ... about the impacts of stormwater discharges on water bodies and the steps the public can take to reduce pollutants in stormwater runoff." 40 C.F.R. § 122.34(b)(1)(i). The "Illicit Discharge Detection and Elimination" measure requires regulated small MS4s to "[i]nform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste." 40 C.F.R. § 122.34(b)(3)(ii)(D).

[12] The Municipal Petitioners argue that the

344 F.3d 832, 57 ERC 1039, 33 Envtl. L. Rep. 20,269, 03 Cal. Daily Op. Serv. 8398, 2003 Daily Journal D.A.R. 10,479
(Cite as: 344 F.3d 832)

First Amendment prohibits EPA from compelling small MS4s to communicate messages that they might not otherwise wish to deliver. They further contend that EPA's interpretation of § 402(p) as authorizing these Measures does not warrant *Chevron* deference because it raises serious constitutional issues, but that even if deference were given, the resulting rule is unconstitutional because neither Congress nor EPA may dictate the speech of MS4s. They contend that municipalities are protected by the First Amendment, ***849** *Pacific Gas & Elec. v. Public Utilities Comm'n,* 475 U.S. 1, 8, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) ("Corporations and other associations, like individuals, contribute to the [discourse] that the First Amendment seeks to foster...."), which applies as much to compelled statements of "fact" as to those of "opinion." *Riley v. Nat'l Fed. of the Blind,* 487 U.S. 781, 797-98, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988).

We conclude that the purpose of the challenged provisions is legitimate and consistent with the regulatory goals of the overall scheme of the Clean Water Act, *cf. Glickman v. Wileman Bros. & Elliott, Inc.,* 521 U.S. 457, 476, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997), and does not offend the First Amendment. [FN23] The State may not constitutionally require an individual to disseminate an ideological message, *Wooley v. Maynard,* 430 U.S. 705, 713, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), but requiring a provider of storm sewers that discharge into national waters to educate the public about the impacts of stormwater discharge on water bodies and to inform affected parties, including the public, about the hazards of improper waste disposal falls short of compelling such speech.[FN24] These broad requirements do not dictate a specific message. They require appropriate educational and public information activities that need not include any specific speech at all. A regulation is facially unconstitutional only when every possible reading compels it, *Meinhold v. U.S. Dep't of Def.,* 34 F.3d 1469, 1476 (9th Cir.1994),[FN25] but this is clearly not the case here.

FN23. We decline to address two further arguments raised by EPA: first, that municipalities do not receive full First Amendment protections, under *Muir v. Alabama Educational Television Commission,* 688 F.2d 1033, 1038 n. 12 (5th Cir.1982) (*en banc*) ("Government expression, being unprotected by the First Amendment, may be subject to legislative limitation which would be impermissible if sought to be applied to private expression ...."), and *Aldrich v. Knab,* 858 F.Supp. 1480, 1491 (W.D.Wash.1994) (holding that "unlike private broadcasters, the state itself does not enjoy First Amendment rights"), and second, that even if the First Amendment were fully applicable, the Phase II regulations would satisfy them because MS4s may avoid the compulsion to speak by seeking a permit under the Alternative option, 40 C.F.R. § 122.26(d)(2)(iv), rather than under the Minimum Measures.

FN24. As a subsidiary matter, we note that it also falls short of compelling the MS4 to "regulate" third parties in contravention of the Tenth Amendment. Dispensing information to facilitate public awareness about safe disposal of toxic materials constitutes "encouragement," not regulation.

FN25. "When the constitutional validity of a statute or regulation is called into question, it is a cardinal rule that courts must first determine whether a construction is possible by which the constitutional problem may be avoided." *Meinhold,* 34 F.3d at 1476.

As in *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio,* 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), where the Supreme Court upheld certain disclosure requirements in attorney advertising, "[t]he interests at stake in this case are not of the same order as those discussed in *Wooley* [invalidating a law requiring that drivers

display the motto 'Live Free or Die' on New Hampshire license plates] ... and *Barnette* [forbidding the requirement that public school students salute the flag because the State may not impose on the individual 'a ceremony so touching matters of opinion and political attitude']." *Id.* at 651. EPA has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

***850** Informing the public about safe toxin disposal is non-ideological; it involves no "compelled recitation of a message" and no "affirmation of belief." *PruneYard Shopping Ctr. v. Robins,* 447 U.S. 74, 88, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) (upholding state law protecting petitioning in malls and noting that "*Barnette* is inapposite because it involved the compelled recitation of a message containing an affirmation of belief"). It does not prohibit the MS4 from stating its own views about the proper means of managing toxic materials, or even about the Phase II Rule itself. Nor is the MS4 prevented from identifying its dissemination of public information as required by federal law, or from making available federally produced informational materials on the subject and identifying them as such.

Even if such a loosely defined public information requirement could be read as compelling speech, the regulation resembles another regulation that the Supreme Court has held permissible. In *Glickman,* 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585, the Court upheld a generic advertising assessment promulgated by the Department of Agriculture on behalf of California tree fruit growers because the order was consistent with an overall regulatory program that did not abridge protected speech:

> Three characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge the freedom of speech protected by the First Amendment. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views. Indeed, since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program.

Id. at 469-70, 117 S.Ct. 2130 (footnotes omitted). Here, as in *Glickman,* the Phase II regulations impose no restraint on the freedom of any MS4 to communicate any message to any audience. They do not compel any specific speech, nor do they compel endorsement of political or ideological views. And since all permittees are engaged in the handling of stormwater runoff that must be conveyed in reasonably unpolluted form to national waters, it is similarly fair to presume that they will agree with the central message of a public safety alert encouraging proper disposal of toxic materials. FN26 The Phase II regulation departs only from the second element in the *Glickman* analysis, because the public information requirement may compel a ***851** regulated party to engage in some speech at some time; but unlike the offensive messages in *Maynard* and *Barnette* (and even the inoffensive advertising messages at issue in *Glickman*) that speech is not specified by the regulation. FN27

> FN26. In its most recent treatment of compelled speech, the Supreme Court held that a generic advertising campaign violated free speech where the message was specific and antagonistic to the preferred advertising message of the plaintiff, and the regulation compelling participation was not part of a broader regulatory apparatus already constraining the plaintiff's autonomy in the relevant arena. *United States Dep't. of Agriculture v. United*

Foods, 533 U.S. 405, 410-17, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001). The court distinguished this advertising program from the one in *Glickman* on the latter point: "[t]he program sustained in *Glickman* differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting market autonomy." *Id.* at 411, 121 S.Ct. 2334. Although the Phase II Rule is not an advertising or marketing regulation, it constitutes a "comprehensive program" restricting the autonomy of MS4s in the relevant arena of controlling toxic discharges to storm sewers that drain to U.S. waters.

FN27. In deciding the similar question of whether a regulation impermissibly compelled speech by requiring manufacturers of mercury-containing products to inform consumers how to dispose safely of the toxic material, the Second Circuit held that "mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests." *Nat'l Elec. Mfrs. Ass'n v. Sorrell,* 272 F.3d 104, 114 (2d Cir.2001). What speech may follow from the Phase II directive will not be "commercial" in the same sense that manufacturer labeling is, but it will be similar in substance to *Sorrell* to the extent that it informs the public how to dispose safely of toxins. We think the policy considerations underlying the commercial speech treatment of labeling requirements, *see, e.g.,* the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1333-39 , apply similarly in the context of the market-participant municipal storm sewer provider.

The public information requirement does not impermissibly compel speech, and nothing else in the Phase II Rule offends the First Amendment. FN28 The Rule does not compel a recitation of a specific message, let alone an affirmation of belief. To the extent MS4s are regulated by the public information requirement, the regulation is consistent with the overall regulatory program of the Clean Water Act and the responsibilities of point source dischargers.

FN28. The Alternative option contains a public education requirement that is similar but even less specific, and therefore even less burdensome, than the requirements in the Minimum Measures. *See* § 122.26(d)(2)(iv)(B)(6) (requiring permit seekers to propose programs to counter illicit discharges, including a "description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials").

4. Notice and Comment on the Alternative Permit Option

The Municipal Petitioners contend that, in adopting the Alternative Permit option, EPA did not comply with the minimum notice and comment procedures required in informal rulemaking by the Administrative Procedures Act ("APA"), 5 U.S.C. § 553. The APA requires an agency to publish notice of a proposed rulemaking that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* at § 553(b)(3).

[13] We have held that a "final regulation that varies from the proposal, even substantially, will be valid as long as it is 'in character with the original proposal and a logical outgrowth of the notice and comments.' " *Hodge v. Dalton,* 107 F.3d 705, 712 (9th Cir.1997). In determining whether notice was adequate, we consider whether the complaining party should have anticipated that a particular requirement might be imposed. The test is whether a

new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule. *Am. Water Works Ass'n v. EPA,* 40 F.3d 1266, 1274 (D.C.Cir.1994).

The Municipal Petitioners argue that the Alternative Permit option is not a logical outgrowth of EPA's proposed rule because, although numerous alternatives were discussed in the Preamble to the proposed rule, 63 Fed. Reg. at 1554-1557, the Alternative Permit option eventually adopted was not. EPA counters that the proposed rule included a supplementary alternative permitting system based on concepts similar to those in the Minimum ***852** Measures, including "simplified individual permit application requirements."[FN29] EPA contends that the Alternative Permit option was a logical outgrowth of the comments it received on the proposal expressing concern that the Minimum Measures might violate the Tenth Amendment. 64 Fed. Reg. at 68,765.

> FN29. Municipal Petitioners concede that "simplified individual permit application requirements" were discussed, but they contend that the permit requirements discussed are not sufficiently similar to those promulgated to establish a logical outgrowth.

[14] The Alternative Permit option passes the *Hodge* test. The proposed rule suggested an individualized permitting option to be developed in response to comments during the notice and comment period. The Alternative option contains no elements that were not part of the original rule, even if they are configured differently in the final rule. Petitioners had, and took, their opportunity to object to the aspects of the Rule that they did not support in their comments on the Minimum Measures.

B. The General Permit Option and Notices of Intent

The Environmental Petitioners contend that the general permitting scheme of the Phase II Rule allows regulated small MS4s to design stormwater pollution control programs without adequate regulatory and public oversight, and that it contravenes the Clean Water Act because it does not require EPA to review the content of dischargers' notices of intent and does not contain express requirements for public participation in the NPDES permitting process.

In reviewing a federal administrative agency's interpretation of a statute it administers, we first determine whether Congress has expressed its intent unambiguously on the question before the court. *See Chevron,* 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). "If, instead, Congress has left a gap for the administrative agency to fill, we proceed to step two. At step two, we must uphold the administrative regulation unless it is arbitrary, capricious, or manifestly contrary to the statute." *Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1162, *amended by* 197 F.3d 1035 (9th Cir.1999) (citations and internal quotations omitted).

[15] We conclude that the Phase II General Permit option violates the Clean Water Act's requirement that permits for discharges "require controls to reduce the discharge of pollutants to the maximum extent practicable," 33 U.S.C. § 1342(p)(3)(B)(iii). We also conclude that the Phase II General Permit option violates the Clean Water Act because it does not contain express requirements for public participation in the NPDES permitting process. We remand these aspects of the Phase II Rule.[FN30]

> FN30. EPA argues that the Environmental Petitioner's challenge is not ripe for review because "the question of whether some general permit somewhere might fail to assure that pollutants are reduced to the maximum extent practicable is not ripe for review." But we are not addressing the mer-

its of any specific permit. Rather, the question before us "is purely one of statutory interpretation that would not benefit from further factual development of the issues presented." *Whitman v. American Trucking,* 531 U.S. 457, 479, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). Specifically, we are addressing whether EPA, in promulgating the Phase II Rule, has accomplished the substantive controls for municipal stormwater that Congress mandated in § 402(p) of the Clean Water Act. As we held in *Natural Resources Defense Council v. EPA,* 966 F.2d at 1296-97, 1308, this question is ripe for review.

853** ***1. Phase II General Permits and Notices of Intent

Primary responsibility for enforcement of the requirements of the Clean Water Act is vested in the Administrator of the EPA. 33 U.S.C. § 1251(d); *see also* 33 U.S.C. § 1361(a) ("The Administrator [of EPA] is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter."). The Clean Water Act renders illegal any discharge of pollutants not specifically authorized by a permit. 33 U.S.C. § 1311(a) ("Except in compliance with this section and [other sections detailing permitting requirements] of this title, the discharge of any pollutant by any person shall be unlawful."). Under the Phase II Rule, dischargers may apply for an individualized permit with the relevant permitting authority, or may file a "Notice of Intent" ("NOI") to seek coverage under a "general permit." 40 C.F.R. § 122.33(b).

A general permit is a tool by which EPA regulates a large number of similar dischargers. Under the traditional general permitting model, each general permit identifies the output limitations and technology-based requirements necessary to adequately protect water quality from a class of dischargers. Those dischargers may then acquire permission to discharge under the Clean Water Act by filing NOIs, which embody each discharger's agreement to abide by the terms of the general permit. Because the NOI represents no more than a formal acceptance of terms elaborated elsewhere, EPA's approach does not require that permitting authorities review an NOI before the party who submitted the NOI is allowed to discharge. General permitting has long been recognized as a lawful means of authorizing discharges. *Natural Res. Def. Council v. Costle,* 568 F.2d 1369 (D.C.Cir.1977).

The Phase II general permitting scheme differs from the traditional general permitting model. The Clean Water Act requires EPA to ensure that operators of small MS4s "reduce the discharge of pollutants to the maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B). To ensure that operators of small MS4s achieve this "maximum extent practicable" standard, the Phase II Rule requires that each NOI contain information on an individualized pollution control program that addresses each of the six general criteria specified in the Minimum Measures; thus, according to the Phase II Rule, submitting an NOI and implementing the Minimum Measures it contains "constitutes compliance with the standard of reducing pollutants to the 'maximum extent practicable.' " 40 C.F.R. § 122.34(a).

Because a Phase II NOI establishes what the discharger will do to reduce discharges to the "maximum extent practicable," the Phase II NOI crosses the threshold from being an item of procedural correspondence to being a substantive component of a regulatory regime. The text of the Rule itself acknowledges that a Phase II NOI is a permit application that is, at least in some regards, functionally equivalent to a detailed application for an individualized permit. *See, e.g.,* 40 C.F.R. § 122.34(d)(1) ("In your permit application (either a notice of intent for coverage under a general permit or an individual permit application), you must identify and submit to your NPDES permitting authority the following information...."). For this reason, EPA rejected the possibility of providing a "form NOI" to Phase II permittees, explaining that "[w]hat will be required on an MS4's NOI ... is

more extensive than what is usually required on ***854** an NOI, so a 'form' NOI for MS4s may be impractical." 64 Fed. Reg. at 68,764.

2. Failure to Regulate

The Environmental Petitioners argue that, by allowing NPDES authorities to grant dischargers permits based on unreviewed NOIs, the Rule creates an impermissible self-regulatory system.[FN31] Petitioners contend the Rule impermissibly fails to require that the permitting authority review an NOI to assure compliance with Clean Water Act standards, including the standard that municipal storm-water pollution be reduced to "the maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B)(iii). *See* 40 C.F.R. § 123.35 (setting out requirements for permitting authorities, but not requiring review of NOI); 64 Fed. Reg. at 68,764 ("EPA disagrees that formal approval or disapproval by the permitting authority is needed").

> FN31. Petitioners suggest that EPA should be held to the standard it espoused to procure judicial approval for the Phase I program. In 1991, responding to NRDC's assertion that the Phase I Rule failed to set "hard criteria" for review of MS4 storm-water programs, EPA responded that "inadequate proposals will result in the denial of permit applications." Respondent's Brief at 67, *Natural Res. Def. Council v. EPA,* 966 F.2d 1292 (9th Cir.1992) (Nos. 91-70200, 91-70176, & 90-70671). Petitioners contend that this court relied on that representation in ruling for EPA on that issue. *Natural Res. Def. Council v. EPA,* 966 F.2d at 1308 n. 17 ("Individual NPDES permit writers ... will decide whether application proposals are adequate....").

EPA maintains that the Phase II permit system is fully consistent with the authorizing statute. It contends that § 402(p)(6) granted EPA flexibility in designing the Phase II "comprehensive program," and notes that while the statute does not require general permits, neither does it preclude them. EPA contends that Congress delegated the task of designing the program to EPA, and that EPA reasonably adopted a "flexible version" of the NPDES permit program to suit the unique needs of the Phase II program. It disputes that the general permit program creates "paper tigers," especially since EPA, States, and citizens may initiate enforcement actions. Finally, EPA argues that the Rule does not create a self-regulatory program, but that even if it did, nothing in § 402(p)(6) precludes such a program.

Reviewing the Phase II Rule under the first step of *Chevron,* we note that the plain language of § 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p), expresses unambiguously Congress's intent that EPA issue no permits to discharge from municipal storm sewers unless those permits "require controls to reduce the discharge of pollutants to the maximum extent practicable."

Phase II general permits will likely impose requirements that ensure that operators of small MS4s comply with many of the standards of the Clean Water Act. Thus, general permits issued under Phase II will ordinarily contain numerous substantive requirements, just as did the permits issued under Phase I. *See* 40 C.F.R. §§ 123.35 & 123.35(a) ("§ 123.35 As the NPDES Permitting Authority for regulated small MS4s, what is my role? (a) You must comply with the requirements for all NPDES permitting authorities under Parts 122, 123, 124 and 125 of this chapter."); *see also* 40 C.F.R. § 122.28 (outlining requirements for NPDES authorities issuing general permits). And every operator of a small MS4 who files an NOI under Phase II "must comply with other applicable NPDES permit requirements, standards, and conditions established in ***855** the ... general permit." *See* 40 C.F.R. §§ 122.34 & 122.34(f).

[16] However, while each Phase II general permit will likely ensure that operators of small MS4s comply with certain standards of the Clean Water Act, they will not "require controls to reduce the

discharge of pollutants to the maximum extent practicable." According to the Phase II Rule, the operator of a small MS4 has complied with the requirement of reducing discharges to the "maximum extent practicable" when it implements its stormwater management program, *i.e.*, when it implements its Minimum Measures. 40 C.F.R. § 122.34(a); *see also* 64 Fed. Reg. at 68753 (stating EPA's anticipation that limitations more stringent that the minimum control measures "will be unnecessary"). Nothing in the Phase II regulations requires that NPDES permitting authorities review these Minimum Measures to ensure that the measures that any given operator of a small MS4 has decided to undertake will *in fact* reduce discharges to the maximum extent practicable.[FN32]

FN32. That the Rule allows a permitting authority to review an NOI is not enough; every permit must comply with the standards articulated by the Clean Water Act, and unless every NOI issued under a general permit is reviewed, there is no way to ensure that such compliance has been achieved.

The regulations do require NPDES permitting authorities to provide operators of small MS4s with "menus" of management practices to assist in implementing their Minimum Measures, *see* 40 C.F.R. § 123.35(g), but again, nothing requires that the combination of items that the operator of a small MS4 selects from this "menu" will have the combined effect of reducing discharges to the maximum extent practicable.

Nor is the availability of citizen enforcement actions a substitute for EPA's enforcement responsibility, especially because, as discussed below, the Rule does not require that NOIs be publicly available. Absent review on the front end of permitting, the general permitting regulatory program loses meaning even as a procedural exercise.

See 40 C.F.R. § 123.35 ("As the NPDES Permitting Authority for regulated small MS4s, what is my role?"). Therefore, under the Phase II Rule, nothing prevents the operator of a small MS4 from misunderstanding or misrepresenting its own stormwater situation and proposing a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable.

In fact, under the Phase II Rule, in order to receive the protection of a general permit, the operator of a small MS4 needs to do nothing more than decide for itself what reduction in discharges would be the maximum practical reduction. No one will review that operator's decision to make sure that it was reasonable, or even good faith.[FN33] Therefore, as the Phase II Rule stands, EPA would allow permits to issue that would do less than *require* controls to reduce the discharge of pollutants to the maximum extent practicable.[FN34] *See* ***856** 64 Fed. Reg. at 68753 (explaining that the minimum control measures will protect water quality if they are "properly implemented"). We therefore must reject this aspect of the Phase II Rule as contrary to the clear intent of Congress. *Cf. Natural Res. Def. Council,* 966 F.2d at 1305 (rejecting as arbitrary and capricious a permitting system that allowed regulated industrial stormwater dischargers to "self-report" whether they needed permit coverage).

FN33. EPA identifies no other general permitting program that leaves the choice of substantive pollution control requirements to the regulated entity, and we are not persuaded by the analogy it urges to the traditional model of general permitting (where NOIs routinely are not reviewed), because, as we have noted, the Phase II general permit model is substantially dissimilar.

FN34. In its petition for rehearing, EPA argues for the first time that because the regulations require NPDES Permitting Au-

> thorities to include in general permits "any additional measures necessary" to ensure that the maximum extent practicable standard is met, 40 C.F.R. §§ 123.35(h)(1), 123.35(f) (incorporating by reference the "maximum extent practicable" requirement of 40 C.F.R. §§ 122.34(a)), 122.34(f) (requiring small MS4s to comply with additional measures), the Phase II Rule ensures that discharges will be reduced to the maximum extent practicable.
>
> The trouble with EPA's reasoning is that the Phase II Rule defines the "maximum extent practicable" standard in such a way that no "additional measures" will ever be necessary under § 123.35(h)(1). While a Permitting Authority may impose additional measures, nothing compels it to do so because, merely by implementing the best management practices that the operator of a small MS4 has chosen for itself, that small MS4 will already have met the "maximum extent practicable" standard. *See* 40 C.F.R. § 122.34(a).

Involving regulated parties in the development of individualized stormwater pollution control programs is a laudable step consistent with the directive to consult with state and local authorities in the development of the § 402(p)(6) comprehensive program. But EPA is still required to ensure that the individual programs adopted are consistent with the law. Our holding should not prevent the Phase II general permitting program from proceeding mostly as planned. Our holding does not preclude regulated parties from designing aspects of their own stormwater management programs, as contemplated under the Phase II Rule. However, stormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable. We therefore remand this aspect of the Rule.

3. Public Participation

The Environmental Petitioners contend that the Phase II Rule fails to provide for public participation as required by the Clean Water Act, because the public receives neither notice nor opportunity for hearing regarding an NOI. The EPA replies on the one hand by arguing that NOIs are not "permits" and therefore are not subject to the public availability and public hearing requirements of the Clean Water Act, and on the other hand by arguing that the combination of the public involvement minimum measure, 40 C.F.R. § 122.34(b)(2), the Federal Freedom of Information Act, 5 U.S.C. § 552, and state freedom of information acts would fulfill any such requirements if NOIs were permits.

Reviewing the Phase II Rule under *Chevron* step one, we conclude that clear Congressional intent requires that NOIs be subject to the Clean Water Act's public availability and public hearings requirements. The Clean Water Act requires that "[a] copy of each permit application and each permit issued under [the NPDES permitting program] shall be available to the public," 33 U.S.C. § 1342(j), and that the public shall have an opportunity for a hearing before an permit application is approved, 33 U.S.C. § 1342(a)(1). Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act's approach and philosophy. *See* 33 U.S.C. § 1251(e); *see also Costle v. Pacific Legal Found.*, 445 U.S. 198, 216, 100 S.Ct. 1095, 63 L.Ed.2d 329 (1980) (noting the "general policy of encouraging public participation is applicable to the administration of the NPDES permit program"). EPA has acknowledged that technical issues relating to the issuance of NPDES permits should be decided in "the most open, accessible forum possible, ***857** and at a stage where the [permitting authority] has the greatest flexibility to make appropriate modifications to the permit." 44 Fed. Reg. 32,854, 32,885 (June 7, 1979).

As we noted above, under the Phase II Rule it

is the NOIs, and not the general permits, that contain the substantive information about how the operator of a small MS4 will reduce discharges to the maximum extent practicable. Under the Phase II Rule, NOIs are functionally equivalent to the permit applications Congress envisioned when it created the Clean Water Act's public availability and public hearing requirements. Thus, if the Phase II Rule does not make NOIs "available to the public," and does not provide for public hearings on NOIs, the Phase II Rule violates the clear intent of Congress. EPA's first argument-that NOIs are not subject to the public availability and public hearings requirements of the Clean Water Act-therefore fails.

We therefore reject the Phase II Rule as contrary to the clear intent of Congress insofar as it does not provide for public hearings on NOIs as required by 33 U.S.C. § 1342(a)(1). However, Congress has not directly addressed the question of what would constitute an NOI being "available to the public" as required by 33 U.S.C. § 1342(j). Under *Chevron* step two, we must defer to EPA's interpretation of "available to the public" unless it is arbitrary, capricious, or manifestly contrary to the statute.

[17] EPA argues that the NOIs are "available to the public" as a result of the combined effects of the public participation minimum measures, and of federal and state freedom of information acts. This argument is unconvincing. First, the public participation Minimum Measure only requires dischargers to design a program minimally consistent with State, Tribal, and local requirements. 40 C.F.R. § 122.34(b)(2). Second, the federal Freedom of Information Act only applies to documents that are actually in EPA's possession, not to documents that are in the possession of state or tribal NPDES authorities, *see* 40 C.F.R. § 2 (providing EPA's policy for releasing documents under the federal Freedom of Information Act), and nothing in the Phase II Rule provides that EPA obtain possession of every NOI that is submitted to a NPDES permitting authority. *See* 40 C.F.R. § 123.41(a) (making information provided to state NPDES authorities available to EPA only *upon request*). Thus, under the Phase II Rule, NOIs will only "be available to the public" subject to the vagaries of state and local freedom of information acts. We conclude that EPA's interpretation of 33 U.S.C. § 1342(j), as embodied in the provisions of the Phase II Rule providing for the public availability of NOIs, is manifestly contrary to the Clean Water Act, which contemplates greater scope, greater certainty, and greater uniformity of public availability than the Phase II Rule provides. We therefore reject this aspect of the Phase II Rule. FN35

FN35. EPA argues for the first time in its petition for rehearing that NOIs will be publicly available under 40 C.F.R. § 122.34(g)(2). Addressing operators of regulated small MS4s, this section provides: "You must make your records, including a description of your storm water management program, available to the public at reasonable times during regular business hours." While this section does seem to provide for the public availability of a small MS4's records, we are troubled that nothing in EPA's initial briefs indicated that EPA considered NOIs to be subject to this section. We normally defer to an agency's interpretations of its own regulations, but we may decline to defer to the *post hoc* rationalizations of appellate counsel. *See, e.g., Martin v. Occupational Safety and Health Review Commission,* 499 U.S. 144, 150, 156, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991). If EPA intends this section to provide for the public availability of NOIs-for example because it intends NOIs to be among the records subject to this section-it may clarify on remand.

***858** In sum, we conclude that EPA's failure to require review of NOIs, which are the functional

equivalents of permits under the Phase II General Permit option, and EPA's failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the Clean Water Act. We therefore vacate those portions of the Phase II Rule that address these procedural issues relating to the issuance of NOIs under the Small MS4 General Permit option, and remand so that EPA may take appropriate action to comply with the Clean Water Act.

C. Failure to Designate

We reject the Environmental Petitioners' contention that EPA's failure to designate for Phase II regulation serious sources of stormwater pollution, including certain industrial ("Group A") sources and forest roads, was arbitrary and capricious. *See Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989).[FN36]

FN36. Agency determinations based on the record are reviewed under the "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). The standard is narrow and the reviewing court may not substitute its judgment for that of the agency. *Marsh,* 490 U.S. at 378, 109 S.Ct. 1851. However, the agency must articulate a rational connection between the facts found and the conclusions made. *Washington v. Daley,* 173 F.3d 1158, 1169 (9th Cir.1999). The reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Marsh,* 490 U.S. at 378, 109 S.Ct. 1851. The court may reverse under the "arbitrary and capricious" standard only if the agency:

> has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.
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> *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43, 103 S.Ct. 2856.

1. "Group A" Facilities

In addition to the small MS4s and construction sites ultimately designated for regulation under the Phase II Rule, EPA evaluated a variety of other point-source discharge categories for potential Phase II regulation. One group of dischargers (referred to as the "Group A" facilities) included sources that "are very similar, or identical" to regulated stormwater discharges associated with industrial activity that were not designated for Phase I regulation for administrative reasons unrelated to their environmental impacts.[FN37] 64 Fed. Reg. at 68,779. EPA estimates that Group A includes approximately 100,000 facilities, including auxiliary facilities and secondary activities ("*e.g.,* maintenance of construction equipment and vehicles, local trucking for an unregulated facility such as a grocery store," *id.*) and facilities intentionally omitted from Phase I designation ("*e.g.,* publicly owned treatment works with a design flow of less than 1 million gallons per day, landfills that have not received industrial waste," *id.*).

FN37. EPA explains that the Group A facilities were not regulated with the other Phase I sources because EPA used Standard Industrial Classification Index (SIC) codes in defining the universe of regulated industrial activities: "By relying on SIC codes, a classification system created to identify industries rather than environmental impacts from these industries [sic] discharges, some types of storm water discharges that might otherwise be considered 'industrial' were not included in the existing NPDES storm water program." 64 Fed. Reg. at 68,779.

***859** The Environmental Petitioners contend

that EPA should have designated the Group A facilities for categorical Phase II regulation after finding (1) that stormwater discharges from these facilities are the same as those from the industrial sources regulated under Phase I, and (2) that such discharges may cause "adverse water quality impacts." *Id.* Petitioners argue that these findings, and EPA's failure to provide individualized analysis regarding whether any specific source category within Group A requires regulation, render EPA's decision not to regulate any of these sources under the Rule arbitrary and capricious. They maintain that EPA's "line-drawing," which regulates some pollution sources but leaves nearly identical sources unregulated without any persuasive rationale, is necessarily arbitrary and capricious. *See Natural Res. Def. Council,* 966 F.2d at 1306 (EPA's decision not to regulate construction sites smaller than five acres was arbitrary when EPA provided no data to justify the five-acre threshold and admitted that unregulated sites could have significant water quality impacts).

Petitioners argue that § 402(p)(6) at least required EPA to make findings with respect to individual Group A categories, and that data collected from Phase I permit applications could be used to evaluate the pollutant potential of the identical Group A sources. They contend that these findings should have sufficed as a basis for designating at least some Group A sources, and that EPA's conclusion that it lacked adequate nationwide data upon which to designate any of these sources is not supported by the record evidence. Comparing EPA's identification of the serious polluting potential of some of these sources with its statutory mandate under § 402(p)(6) "to protect water quality," they argue that EPA fails even the forgiving standard of arbitrary and capricious review in that it has "offered an explanation for its decision that runs counter to the evidence before [it]" and "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *See Motor Vehicle Mfrs.,* 463 U.S. at 43, 103 S.Ct. 2856.

EPA maintains that it considered Group A facilities' similarity to already regulated sources as only one of several criteria that it used in designating sources for regulation under Phase II, 64 Fed. Reg. at 68,780, and that sources that appear "similarly situated" under one criterion are not necessarily similarly situated under all. EPA asserts that nothing in § 402(p)(6) implied a responsibility to make individualized findings regarding each Group A subcategory, and it maintains that it simply lacked sufficient data to support nationwide designation of the Group A facilities. EPA notes that, after failing to receive requested comment providing such data, it proposed instead "to protect water quality" by allowing regional regulation of problem Group A facilities under the residual designation authority. EPA contends that agencies must be afforded deference in determining the data necessary to support regulatory decisionmaking and that it reasonably determined the quantum of data it would need to support the designation of additional sources on a nationwide basis. *See Sierra Club v. EPA,* 167 F.3d 658, 662 (D.C.Cir.1999).

[18] We conclude that sufficient evidence supports EPA's decision not to designate Group A sources on a nationwide basis, and instead to establish local and regional designation authority to account for these sources and protect water quality. Although we are troubled by the purely administrative basis for the distinction between facilities regulated under the Phase I Rule and the Group A facilities ***860** that remain unregulated under Phase II, FN38 EPA's choice of the Phase I standard for designation is not the issue before us. Before us is whether EPA acted arbitrarily in declining to designate the Group A sources on a nationwide basis under the Phase II Rule, and we cannot say that it did.

> FN38. As discussed in footnote 37, Group A facilities were not regulated with other Phase I industrial sources based on a government coding system used to distinguish different types of industry (without reference to their similar environmental im-

pacts). *See* 64 Fed. Reg. at 68,779.

EPA has articulated a rational connection between record facts indicating insufficient data to categorically regulate Group A facilities and its corresponding conclusion not to do so, and we defer to that decision. *See Washington v. Daley,* 173 F.3d 1158, 1169 (9th Cir.1999). In the text of the Rule, EPA explains that the process behind its decision not to nationally designate Group A sources for Phase II regulation focused not only on the likelihood of contamination from a source category, but also on the sufficiency of national data about each category and whether pollution concerns were adequately addressed by existing environmental regulations.[FN39] We cannot say that EPA relied on factors Congress had not intended it to consider, that it failed to consider an important aspect of the problem, or that its rationale is implausible. *See Motor Vehicle Mfrs.,* 463 U.S. at 43, 103 S.Ct. 2856. Nor did EPA's decision run counter to the evidence before it. *Id.* The Environmental Petitioners allege that its decision not to regulate Group A facilities runs counter to evidence that similar sources are highly polluting, but as EPA considered evidence beyond those similarities that persuaded it not to regulate, we cannot say that EPA's decision is unsupported by the record. Nothing in § 402(p)(6) unambiguously requires EPA to evaluate the Group A source categories individually, and we defer to EPA's interpretation of the statute it is charged with administering. *See Royal Foods Co. v. RJR Holdings,* 252 F.3d 1102, 1106 (9th Cir.2001).

> FN39. "In identifying potential categories of sources for designation in today's notice, EPA considered designation of discharges from Group A and Group B facilities. EPA applied three criteria to each potential category in both groups to determine the need for designation: (1) The likelihood for exposure of pollutant sources included in that category, (2) whether such sources were adequately addressed by other environmental programs, and (3) whether sufficient data were available at this time on which to make a determination of potential adverse water quality impacts for the category of sources. As discussed previously, EPA searched for applicable nationwide data on the water quality impacts of such categories of facilities...."
>
> "EPA's application of the first criterion showed that a number of Group A and B sources have a high likelihood of exposure of pollutants.... Application of the second criterion showed that some categories were likely to be adequately addressed by other programs."
>
> "After application of the third criterion, availability of nationwide data on the various storm water discharge categories, EPA concluded that available data would not support any such nationwide designations. While such data could exist on a regional or local basis, EPA believes that permitting authorities should have flexibility to regulate only those categories of sources contributing to localized water quality impairments.... If sufficient regional or nationwide data become available in the future, the permitting authority could at that time designate a category of sources or individual sources on a case-by-case basis." 64 Fed. Reg. at 68,780.

2. Forest Roads

The Environmental Petitioners also contend that EPA arbitrarily failed to regulate forest roads under the Rule despite clear evidence in the record documenting the need for stormwater pollution control ***861** of drainage from these roads. Petitioners again contend that this agency action is arbitrary, because EPA has offered an explanation for its decision that runs counter to the evidence before it.

Petitioners point to EPA's own conclusion that forest roads "are considered to be the major source

of erosion from forested lands, contributing up to 90 percent of the total sediment production from forestry operations."[FN40] They note that both unimproved forest roads and construction sites create large expanses of non-vegetated soil subject to stormwater erosion, and argue that construction site data thus also support regulation of forest roads. Petitioners observe that EPA has cited no contrary evidence indicating that forest roads are not sources of stormwater pollutant discharges to U.S. waters, and they argue that Phase II regulation is necessary "to protect water quality," because proper planning and road design can minimize erosion and prevent stream sedimentation. Petitioners note that this court has previously held that, in the absence of such "supportable facts," EPA is not entitled to the usual assumption that it has "rationally exercised the duties delegated to it by Congress." *Natural Res. Def. Council,* 966 F.2d at 1305.

FN40. *Guidance Specifying Management Measures For Sources of Nonpoint Pollution in Coastal Waters,* EPA guidance paper 840-B-93-001c (Jan. 1993), *available at* http://www.epa.gov/owow/nps/mmgi/index.html (last visited Sept. 18, 2002) ("Coastal Waters").

[19] EPA's response is that we have no jurisdiction to hear this challenge, chiefly because, it believes, the challenge is time-barred by Clean Water Act § 509(b)(1), 33 U.S.C. § 1369(b)(1) (providing that "application for review shall be made within 120 days from the date of [agency action]"). EPA promulgated silviculture regulations in 1976 that exclude from NPDES permit requirements certain silvicultural activities that EPA determined constitute non-point source activities, including "surface drainage, or road construction and maintenance from which there is natural runoff." 40 C.F.R. § 122.27(b)(1).[FN41] EPA asserts that the exclusion applies to forest roads in general, not only to "construction" and "maintenance"-an assertion disputed by Petitioners-and that any challenge to the decision not to regulate forest roads should have been brought within 120 days of the promulgation of that rule. *See* 33 U.S.C. § 1369(b)(1).

FN41. The provision provides in full as follows:

> Silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and part 233).

40 C.F.R. § 122.27(b)(1).

EPA's argument might be more persuasive if Petitioners' contention could be understood essentially as a direct challenge to the 1976 silviculture regulations, but this is not the case. Even were we to assume that EPA exempted forest roads from NPDES permit requirements in 1976 under 40 C.F.R. § 122.27(b)(1), that would not resolve the question whether EPA should have addressed forest roads in its "comprehensive program ... to protect ***862** water quality" under § 402(p)(6), because § 402(p)(6) was not enacted until 1987. Petitioners challenge EPA's decision not to regulate under the new portion of the statute, not the decision not to regulate under other provisions that were in effect

earlier.

EPA argues in the alternative that Petitioners should have sought judicial review when EPA considered amending § 122.27(b)(1)-to delete the language that it asserts renders forest roads non-point sources-but then determined not to make the amendment. However, we are aware of no statute or legal doctrine providing that a party's failure to challenge an agency's decision *not* to amend its rules in one proceeding deprives the party of the right to challenge, in a contemporaneous proceeding, the promulgation of an entire new rule which could have, but did not, provide the full relief the party seeks. Assuming that EPA is correct that § 122.27(b)(1) defines forest roads as non-point sources, both the Phase II Rule proceedings and the proceedings in which the proposed amendment to § 122.27(b)(1) was considered and rejected were proper proceedings in which to raise the issue whether discharges from forest roads should be regulated. Petitioners chose to raise the issue in their comments to the proposed Phase II Rule, because they believed that Clean Water Act § 402(p)(6) mandates the regulation of forest roads. They did not lose their right to challenge the final Phase II Rule's failure to regulate forest roads simply because they did not also raise a challenge to EPA's failure to adopt an amendment to § 122.27(b)(1) that the agency initially proposed. (We note, incidentally, that it appears that even a successful challenge to § 122.27(b)(1) would likely not have achieved the objective the Environmental Petitioners sought: it would only have allowed case-by-case coverage for forest roads, and not for overall coverage.)

[20] Finally, EPA suggests that Petitioners' comments during the Phase II rulemaking process were too short to create jurisdiction in this court to hear this challenge. However, EPA exaggerates the slightness of those comments, which comprised two paragraphs, with footnotes, stating objections and providing support. We also agree with Petitioners that EPA was aware of the forest road sedimentation problem at the time of the rulemaking.[FN42] Indeed, EPA responded to the comments without disputing that the problem is serious. 3 EPA, *Response to Public Comments* 8 (Oct. 29, 1999). Rather, the agency relied on 40 C.F.R. § 122.27(b)(1), indicating that it was barred from acting under the Phase II Rule by § 122.27(b)(1).

> FN42. Nonpoint Source Pollution: The Nation's Largest Water Quality Problem, EPA841-F-96-004A ("Pointer # 1") ("The latest *National Water Quality Inventory* indicates that agriculture is the leading contributor to water quality impairments, degrading 60 percent of the impaired river miles and half of the impaired lake acreage surveyed by states, territories, and tribes.").

EPA does not seriously address the merits of Petitioners' objections to the Rule in its brief to this court. Instead, EPA relies almost entirely on its assertion that we lack jurisdiction to decide this question. It does, however, strongly imply that its failure to adopt its own proposed amendment in the proceeding pertaining to § 122.27(b)(1) relieves it of its obligation to consider including forest roads in the Phase II Rule proceedings. We reject any such contention. Petitioners' assertion that § 402(p)(6) requires that the Phase II Rule contain provisions regulating forest roads necessitates a response from EPA on the merits.

***863** Having concluded that the objections of the Environmental Petitioners are not time-barred, and that we have jurisdiction to hear them, but that EPA failed to consider those objections on the merits, we remand this issue to the EPA, so that it may consider in an appropriate proceeding Petitioners' contention that § 402(p)(6) requires EPA to regulate forest roads. EPA may then either accept Petitioners' arguments in whole or in part, or reject them on the basis of valid reasons that are adequately set forth to permit judicial review.

D. AF&PA's Standing

The American Forestry & Paper Association (AF&PA), a national trade association representing the forest, pulp, paperboard, and wood products industry, is one of the two Industry Petitioners asserting the remaining claims.[FN43] Before considering these challenges, however, we consider whether AF&PA has standing to raise them.

> FN43. The Municipal Petitioners join in asserting the "regulatory basis" claim at Part II(F)(1).

EPA argues that AF&PA lacks standing because it cannot show that it represents entities that suffer a cognizable injury under the Phase II Rule as promulgated. EPA argues that the interests of AF&PA entities might have supported standing had EPA decided to regulate forest roads as Phase II stormwater dischargers, but since EPA declined to do so, none of AF&PA's members are currently subject to the Rule. AF&PA contends that its members have a cognizable legal interest in the Rule because they risk becoming subject to regulation at any future time under the continuing designation authority.

[21] We agree that AF&PA lacks standing. A claimant meeting Article III standing requirements must show that "(1) it has suffered an 'injury in fact' ...; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC),* 528 U.S. 167, 180-81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). Standing requires an injury that is "actual or imminent, not 'conjectural or hypothetical.' " *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). AF&PA's interest in avoiding future regulation of forest roads is not actually or imminently threatened by any potential result in this case. No ripe claim about misuse of the residual authority to regulate forest road discharge, or any other kind of discharge, is before the court. Should members of AF&PA become subject to Phase II regulation through subsequent administrative action, it will have standing to challenge those actions at that time. In the meanwhile, we proceed to the merits of the remaining claims on behalf of AF&PA's co-petitioner, the National Association of Home Builders, which has established its standing to raise them.

E. Consultation with State and Local Officials

The Industry Petitioners contend that EPA failed to consult with the States on the Phase II Rule as required by § 402(p)(5), which instructs EPA to conduct studies "in consultation with the States," and § 402(p)(6), which instructs the Administrator to issue regulations based on these studies "in consultation with State and local officials." 33 U.S.C. §§ 1342(p)(5)-(6). We conclude that EPA satisfied its statutory duty of consultation. *See Marsh,* 490 U.S. at 378, 109 S.Ct. 1851.

***864** Petitioners concede several instances in which EPA circulated drafts of the Phase II Rule to state and local authorities, but argue that these consultations were meaningless because (1) the reports were circulated too far in advance of the actual rulemaking, (2) the rulemaking wrongfully proceeded based on other sources of input, (3) standard APA notice and comment procedures could not suffice because Congress must have intended something more when it added the consultation requirements to the language of § 402, and (4) consultation at the final stage of rulemaking was inadequate because comment was sought on the final report only after it had been submitted to Congress and the Phase II Rule had been promulgated. Petitioners provide examples of state feedback that allegedly went unheeded by EPA in its promulgation of the final Rule.

EPA maintains that it consulted extensively with States and localities in developing the Phase II Rule, discharging its obligations under §§ 402(p)(5) & (6). EPA contends that the comments Petitioners cite as unheeded by EPA demonstrate that EPA *did* consult with States concerning the Rule, even if some States did not concur in EPA's ultimate conclusion, and that the final rule adopted a good

measure of the flexibility sought by state representatives. EPA argues that Industry Petitioners cannot complain that consultation was inadequate simply because it did not result in the adoption of Petitioners' preferred views.

EPA also disputes Petitioners' allegation that while EPA did comply with the terms of the 1999 Appropriations Act (requiring EPA to defend the proposed Phase II Rule before Congress and then publish the final report for public comment), it demonstrated its failure to adequately consult by publishing the report for public comment *after* the Phase II Rule had been formally promulgated, rendering any subsequent public comment meaningless. EPA counters that these actions do not indicate that it failed to satisfy Congress's directive that it consult with state and local officials, because EPA had engaged in extensive consultation before Congress requested the Appropriations Act report, and Congress did not require further consultation when it conditioned promulgation of the Rule only on the submission of this final report. EPA claims that while Congress required it to publish the report after its submission, public comment on the report was not required before promulgation, and that the statutory deadline structure rendered any other interpretation impossible.

[22] We conclude that the overall record indicates EPA met its statutory duty of consultation. A draft of the first report was circulated to States, EPA regional offices, the Association of State and Interstate Water Pollution Control Administrators ("ASIWPCA"), and other stakeholders in November, 1993, and was revised based on comments received. EPA established the Urban Wet Weather Flows Federal Advisory Committee ("FACA Committee"), balancing membership between EPA's various outside stakeholder interests, including representatives from States, municipalities, Tribes, commercial and industrial sectors, agriculture, and environmental and public interest groups. 64 Fed. Reg. 68,724. The 32 members of the Phase II FACA Subcommittee, reflecting the same balance of interests, met fourteen times over three years and state and municipal representatives provided substantial input regarding the draft reports, the ultimate Phase II Rule, and the supporting data.[FN44] *Id.* EPA ***865** instituted the Phase II Subcommittee meetings in addition to the standard APA notice and comment procedures, which EPA also followed.

> FN44. NRDC argues that this claim is not only meritless for the reasons stated by EPA, but also frivolous, since industry petitioner National Association of Home Builders, as a member of the FACA Phase II Subcommittee, participated in and affirmed that such consultation took place.

The fact that the Rule did not conform to Petitioners' hopes and expectations does not bear on whether EPA adequately consulted state and local officials. Although required to consult with States and localities, EPA was free to chart the substantive course it saw fit. EPA was not required to consult with States on the Appropriations Act report. Even if EPA should have sought further comment at that late stage, failure to do so does not outweigh the evidence demonstrating extensive consultation and cooperation with local authorities on development of the Rule.

F. Designation of Certain Small MS4s and Construction Sites

The Industry Petitioners contend that, in designating certain small MS4s and construction sites for regulation under the Phase II Rule, EPA failed to adhere to the statutorily required regulatory basis and misinterpreted record evidence. We disagree.

1. Regulatory Basis

The Industry Petitioners and the Municipal Petitioners contend that EPA violated the statutory command to base the Phase II regulations on § 402(p)(5) studies. We review EPA's interpretation of its statutory authority under the *Chevron* standard, 467 U.S. at 842-44, 104 S.Ct. 2778, and affirm.

Petitioners argue that the studies mandated by § 402(p)(5) were intended to provide the sole substantive basis for the "comprehensive program" envisioned in § 402(p)(6), but that EPA also (and thus improperly) based its designation of small MS4s and construction sites on (1) public comment received in the aftermath of judicial invalidation of the scope of construction sites regulated by the Phase I Rule,[FN45] and (2) additional research discussed in the Preamble to the Phase II Rule.[FN46]

> FN45. *See Natural Res. Def. Council,* 966 F.2d at 1306 (remanding EPA's decision to regulate only construction sites disturbing more than five acres, after EPA had initially proposed to regulate all sites disturbing more than one acre).
>
> FN46. The Industry Petitioners contend that EPA lacked authority to issue the Phase II regulation of construction sites based on a process EPA itself characterized as "separate and distinct" from the development of the Report to Congress. 64 Fed. Reg. at 68,732. They add that the Phase II Rule was not "based on" the 1999 Report ultimately requested by Congress in the Appropriations Act, since EPA's report in response was released on the very day that the final Phase II Rule was published.

EPA contends that the statute did not require it to base its designations exclusively on the § 402(p)(5) studies, and that it was in fact required to take account of information from other sources in promulgating the regulations. It argues that it based the Phase II Rule on conclusions reported in the § 402(p)(5) studies, but then appropriately supported these results with data described in the additional study requested by Congress in the Appropriations Act, comments submitted during the statutorily required notice-and-comment process, and other available information. To read the authorizing statute as limiting reliance to the § 402(p)(5) studies, EPA claims, would preclude it from relying on recommendations received through the separate, post-study requirement to "consult with State and local officials" under ***866** § 402(p)(6), and through the notice and comment process mandated by the APA, 5 U.S.C. § 553(b).

Respondent-intervenor NRDC adds that the Phase II Rule is consistent with the § 402(p)(5) studies reported in 1995, and moreover, that the Industry Petitioners lack standing to raise the "regulatory basis" claim because they cannot show the requisite injury. *See Friends of the Earth,* 528 U.S. at 180-81, 120 S.Ct. 693.

a. Standing. Industry Petitioners[FN47] contend that they have suffered injury in fact, because their members are now either automatically regulated by the permitting requirements or subject to future regulation (under the residual authority, discussed below) that otherwise would not have been authorized, and that this is a direct result of EPA's failure to adhere to the framework of the 1995 Report, which allegedly would have precluded these aspects of the Rule. NRDC contends that the Industry Petitioners lack standing because they cannot show that being subject to NPDES permitting is the causal result of the procedural injury they urge, and because they cannot base standing on hypothetical injury that may arise in the future.

> FN47. Since we have already determined that AF & PA lacks standing to raise any of its claims, *see* Section D above, this discussion pertains to the remaining Industry Petitioner, National Association of Home Builders.

NRDC argues that the injuries Petitioners allege are not consistent with the guidelines laid out in *Friends of the Earth,* 528 U.S. at 180-81, 120 S.Ct. 693. It insists that Petitioners' only possible claims of injury from the alleged "regulatory basis" violation are purported harm to members caused by the final Phase II Rule itself or harm to members caused by EPA's alleged failure to provide adequate notice of future regulatory requirements in the 1995 Report. However, NRDC contends that Petitioners

have not suffered the requisite injury, because they had actual notice that EPA might regulate small construction sites, 63 Fed. Reg. at 1583, and they can show no chain of causation linking their alleged injury from the Rule itself to the actions challenged here.

NRDC's causation argument is complex. Although the Petitioners purport to challenge EPA's failure to follow all of the 1995 Report's recommendations in the final Phase II Rule, NRDC contends, they are really challenging the subsequent proceedings through which EPA developed the final Rule. Even if there were some unlawful variance between the 1995 report and final rule, NRDC continues, the cause of that variance would have been some failure to abide by rulemaking standards during administrative proceedings that produced the text of the final Rule-not EPA's attention to sources of input other than the 1995 Report. NRDC maintains that these intervening acts of rulemaking (e.g., Phase II Subcommittee activities and the notice-and-comment process) break the requisite chain of causation between EPA's alleged failure to adhere to recommendations in the 1995 report and the flaws Petitioners allege in the Phase II Rule, which NRDC claims would have been due to "purportedly unlawful EPA decisions on the merits during the subsequent administrative proceedings." *See Northside Sanitary Landfill v. Thomas,* 804 F.2d 371, 381-84 (7th Cir.1986) (finding no standing to challenge EPA statements concerning the fate of a hazardous waste facility when subsequent state administrative acts, not EPA comments, would determine the facility's actual fate).

[23] We note that NRDC's standing arguments apply equally to the Municipal Petitioners, who can also assert only the ***867** harms resulting to members from the Rule itself or from a lack of notice, and that we are thus not only considering the standing of the Industry Petitioners but also that of the Municipal Petitioners to raise the "regulatory basis" claim.[FN48] That established, we find standing for both.

FN48. Although the issue of Municipal Petitioners' standing has not been raised by the parties, we are obliged to consider it to determine whether the case-or-controversy requirement of Article III is satisfied. *See, e.g., Boeing Co. v. Van Gemert,* 444 U.S. 472, 488 n. 4, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980); *Juidice v. Vail,* 430 U.S. 327, 331, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977).

NRDC essentially argues that petitioners lack standing because (1) they cannot show that being subject to NPDES permitting is the causal result of the procedural injury they urge, (2) they cannot claim any actual notice injury from the alleged procedural wrong because notice was actually given, and (3) they cannot claim standing based on hypothetical injury that may (or may not) arise from future regulation under the residual authority. We can readily agree with the latter two contentions. As discussed above, the "actual injury" requirement of Article III standing precludes judicial consideration of exactly the kind of hypothetical harm the Industry Petitioners allege may follow from use of Phase II authority for future designations of regional sources. *Friends of the Earth,* 528 U.S. at 180-81, 120 S.Ct. 693. If future Phase II designations cause identifiable injury to Petitioners, they will then be free to pursue that ripe claim. And because EPA clearly issued notice to all regulated parties that they may be subject to regulation under the proposed rule, 63 Fed. Reg. at 1568 (MS4s) and 1582 (construction), petitioners cannot show injury from lack of actual notice.

However, NRDC's causation argument is less persuasive. NRDC correctly argues that the petitioners cannot establish a definite chain of causation between the EPA's alleged failure to limit their regulatory basis to the § 402(p)(5) studies and the fact that they now must obtain permits. But this will almost always be true of petitions challenging an agency's failure to abide by statutory procedural requirements. Because all administrative decision-making following an alleged procedural irregularity

could always be considered an intervening factor breaking the chain of causation, NRDC's interpretation of the requisite chain of causation would dubiously shield administrative decisions from procedural review.

For this reason, we have held that the failure of an administrative agency to comply with procedural requirements in itself establishes sufficient injury to confer standing, even though the administrative result might have been the same had proper procedure been followed. *City of Davis v. Coleman,* 521 F.2d 661, 671 (9th Cir.1975) (agency's failure to comply with National Environmental Policy Act's procedural requirements constituted injury sufficient to support standing of a geographically related plaintiff regardless of potentially similar regulatory outcome). In *City of Davis,* we noted that the standing inquiry represents "a broad test, but because the nature and scope of environmental consequences are often highly uncertain before study we think it an appropriate test." *Id.* A plaintiff who shows that a causal relation is "probable" has standing, even if the chain cannot be definitively established. *Johnson v. Stuart,* 702 F.2d 193, 195-96 (9th Cir.1983) (school students and their parents had standing to challenge a statute that limited the texts that might be selected for teaching, even ***868** though it could not be shown whether any specific book had been rejected under this statute or for other reasons).

The Supreme Court has also acknowledged that standing may be established by harm resulting indirectly from the challenged acts, *Warth v. Seldin,* 422 U.S. 490, 504-05, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), and that causation may be established if the plaintiff shows a good probability that, absent the challenged action, the alleged harm would not have occurred, *Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 262-64, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

Thus, although the petitioners cannot show with certainty that the alleged "regulatory basis" violation caused them to be wrongfully subjected to Phase II permitting requirements, we hold that they have alleged a procedural injury sufficient to support their standing to bring the claim.

b. Merits. Although we resolve the standing issue in favor of the petitioners, we nevertheless affirm the Rule against their claim that EPA violated procedural constraints implied by the authorizing statute, § 402(p)(6).

Congress intended EPA to use all sources of information in developing a comprehensive program to protect water quality to the maximum extent practicable. The statute unambiguously required EPA to base its regulations both on the § 402(p)(5) studies and on consultation with state and local officials. Congress enacted § 402 with full knowledge that EPA would also be required to take account of public comments during the notice and comment phase of administrative rulemaking prescribed by the APA.[FN49]

FN49. Even if the statute *were* ambiguous, we would defer to EPA's reasonable interpretation. *Chevron,* 467 U.S. at 843-44, 104 S.Ct. 2778.

2. MS4s in Urbanized Areas

The Municipal Petitioners contend that the designation of small MS4s for Phase II regulation according to Census Bureau defined areas of population density ("urbanized areas") is arbitrary and capricious. They argue that EPA has not established that the Census Bureau's designation of urbanized areas is correlated with actual levels of pollution runoff in stormwater, and that EPA adopted the designations simply for administrative convenience. We affirm, because the record reflects a reasoned basis for EPA's decision. *See Marsh,* 490 U.S. at 378, 109 S.Ct. 1851.

Conceding that the Preamble cites studies purporting to establish "a high correlation between the degree of development/urbanization and adverse impacts on receiving waters due to stormwater," 64 Fed. Reg. at 68,751, the Municipal Petitioners nevertheless contend that the record contains no

"demonstrably correlated, *quantified* basis on which EPA may reasonably have concluded that any particular population, or any population density, *per se* establishes that all urban areas having that same characteristic in gross are necessarily appropriate for inclusion as Phase II sources." Pointing to *Leather Industries of America v. EPA,* 40 F.3d 392, 401 (D.C.Cir.1994) (rejecting as arbitrary EPA's regulation of pollutant levels in the absence of data supporting a relationship between the caps and level of risk), Petitioners argue that EPA simply assumed the relationship Congress contemplated it would establish by the § 402(p)(5) studies.

EPA responds that it extensively documented the relationship between urbanization and harmful water quality impacts from stormwater runoff, pointing to its findings that the degree of surface imperviousness in an area directly corresponds ***869** to the degree of harmful downstream pollution from stormwater runoff, 64 Fed. Reg. at 68,724-27, and that it articulated a rational connection between these record facts and its decision to designate small MS4s serving areas of high population density ("urbanized areas") to protect water quality.

[24] We treat EPA's decision with great deference because we are reviewing the agency's technical analysis and judgments, based on an evaluation of complex scientific data within the agency's technical expertise. *See Baltimore Gas & Elec. Co. v. NRDC,* 462 U.S. 87, 103, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983); *see also Chem. Mfrs. Ass'n v. EPA,* 919 F.2d 158, 167 (D.C.Cir.1990) ("It is not the role of courts to 'second-guess the scientific judgments of the EPA....' "). We conclude that the record supports EPA's choice.

The statute simply called upon EPA to "designate stormwater discharges," other than those designated in Phase I, "to be regulated to protect water quality." 33 U.S.C. § 1342(p)(6). EPA did so, based on record evidence showing a compelling and widespread correlation between urban stormwater runoff and deleterious impacts on water quality. Petitioners' assertion that EPA failed to establish a "quantified" basis for its designation is inapposite. The statute did not require EPA to establish with pinpoint precision a numeric population threshold within urbanized areas that would justify regulation under Phase II. In areas implicating technical expertise and judgment, courts do not require "perfect stud[ies]" or data. *Sierra Club,* 167 F.3d at 662. EPA satisfied the *Leather Industries* standard by adopting a threshold consistent with the criterion of "protecting water quality," and did not assume, but instead sufficiently documented, the relationship between urbanization and harmful stormwater discharge.

3. Small Construction Sites

Industry and Municipal Petitioners also argue that EPA's decision to regulate under Phase II all construction sites disturbing between one and five acres of land ("small construction sites") is arbitrary and unsupported by the record. We do not agree. *See Marsh,* 490 U.S. at 378, 109 S.Ct. 1851.

a. Record Evidence. Municipal Petitioners claim that EPA arrived at the one-acre standard based not on factual findings in the record but instead as a reaction to the earlier Ninth Circuit remand of the Phase I five-acre designation. They allege that the one-acre standard is no more based on supporting data than the rejected five-acre standard, and is thus quantitatively arbitrary.

Industry Petitioners argue that EPA's findings do not support regulation of *all* small construction sites, but indicate only that small construction sites, taken cumulatively, may cause effects similar to large sites in a given area. They contend that EPA's conclusion that adverse effects are possible under certain circumstances cannot support categorical designation of all small construction sites nationwide, and that the Rule is arbitrary because (1) it is based on an analysis that fails to take account of the frequency of negative impacts, (2) it fails to take account of acknowledged factors that determine whether small construction activities cumulatively cause harm (such as the degree of development in a

watershed at any given time), and (3) EPA has acknowledged that the actual water quality impact of construction sites of all sizes varies widely from area to area depending on climatological, geological, geographical,*870 and hydrological influences. FN50

FN50. The Industrial Petitioners argue that although the Phase I authorizing statute required EPA to regulate all sources associated with "industrial activity," Congress expressly directed that the Phase II regulatory program be focused on sources that require regulation "to protect water quality." They assert that because EPA's rule ignores the variability of water quality impacts nationwide, the Rule is not appropriately targeted on the protection of water quality.

Industry Petitioners further contend that the record does not support the designation of small sites, because almost all of the technical papers EPA relied on focused on larger sites or failed to take account of size, FN51 and because the lack of an adequate factual basis for nationwide regulation of small sites makes the Phase II Rule arbitrary and capricious. *Am. Petroleum Inst. v. EPA,* 216 F.3d 50, 58 (D.C.Cir.2000) (invalidating a solid waste rule because EPA "failed to provide a rational explanation for its decision" declining to exclude oil-bearing waste waters from the statutory definition of solid waste).

FN51. Petitioners heavily critique two studies relied on by EPA that dealt specifically with the water quality impacts of small construction sites, noting that one concludes it is impossible to generalize about the impacts of small sites, Lee H. MacDonald, *Technical Justification for Regulating Construction Sites 1-5 Acres in Size,* July 22, 1997, and that the other merely concludes that small sites "can have" significant effects if erosion controls are not implemented, David W. Owens, et al., *Soil Erosion from Small Construction Sites.* Petitioners contend that the latter study was managed with no erosion controls, intentionally producing worst-case sediment runoff and unreasonable estimates of actual sediment yields for small sites nationwide. EPA vigorously defends the studies.

EPA maintains that construction sites regulated under the Phase II Rule degrade water quality across the United States and that the administrative record unambiguously documents that harm. EPA disputes Petitioners' assertion that it failed to establish the need to regulate small sites nationwide, but also contends that it is not required to base every administrative decision on a precise quantitative analysis. *See Sierra Club,* 167 F.3d at 662 ("EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem.").

EPA also disputes petitioners' assertions that data from studies involving larger construction sites are irrelevant to the Phase II Rule. EPA explains that discharges of sediment due to erosion are the result of the interaction of several factors including soils, slope, precipitation, and vegetation:

> For construction sites that are one acre or more, none of the environmental factors contributing to sediment discharges is dependent on the size of the site disturbed. A one-acre site can have the same combination of soils, slope, degree of disturbance and precipitation as a 100-acre site, and consequently can lose soil at the same rate ... and discharge sediments in the same concentrations ... as a 100-acre site.

EPA contends that it is thus reasonable to extrapolate data about small sites from studies of larger ones-and that such an extrapolation may even be forgiving, since small sites are currently less likely to have effective erosion and sedimentation control plans. FN52

FN52. NRDC adds that notwithstanding

> the clear interest of the National Association of Home Builders ("NAHB," one of the Industry Petitioners), NAHB's multi-year participation in the FACA Phase II Subcommittee Small Construction and No-Exposure Sites Work Group, and NAHB's own submission of detailed comments on the proposed Rule, NAHB failed to enter into the administrative record any study contradicting the proposition that small construction sites cause water quality problems. NRDC points to the record's showing that NAHB had itself proposed that regulation of construction sites of two acres or greater was appropriate, and contends that this is thus not a dispute over whether small construction sites should be regulated on a nationwide basis, but instead a technical disagreement over whether EPA should establish a one-acre threshold or a different threshold on a similar small scale.

***871** Indeed, EPA argues that although adverse water quality impacts of small construction sites have been widely recognized, effective local erosion and sedimentation control programs have not been adopted in many areas.[FN53] Though not all watersheds are currently adversely effected by small construction sites,[FN54] EPA notes that the Phase II Rule acts "to protect water quality" both remedially and preventively, and argues that it need not quantify the cumulative effects of discharges from these sites or identify all watersheds that are currently harmed before acting to limit pollution from small sites.[FN55]

> FN53. Whitney Brown and Deborah Caraco, *Controlling Stormwater Runoff Discharges from Small Construction Sites: A National Review,* Task 5 Final Report submitted by the Center for Watershed Protection to the EPA Office of Wastewater Management, March 1997, IP E.R. 633, 643.
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> FN54. EPA adds that operators of small sites in areas unlikely to suffer adverse impacts may apply for a permit waiver if little or no rainfall is expected during the period of construction (the "rainfall erosivity waiver") or if regulation is unnecessary based on a location-specific evaluation of water quality (the "water quality waiver"). 64 Fed. Reg. at 68,776.
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> FN55. EPA also implies permission to regulate for potential cumulative impacts of small sites from the past directive of this court. When the Phase I industrial discharge regulations were challenged, we found no record data to support that rule's exemption of construction activities on less than five acres and held that small sites did not categorically qualify for a *de minimis* exemption because "even small construction sites can have a significant impact on local water quality." *Natural Res. Def. Council,* 966 F.2d at 1306.

[25] We reverse under the arbitrary and capricious standard only if the agency has relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision contrary to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43, 103 S.Ct. 2856. Petitioners' contention that EPA relied on factors Congress did not intend it to consider was rejected in our earlier discussion of the regulatory basis challenge. They submit no evidence that EPA failed to consider an important aspect of the problem. We cannot say that EPA's designation of small construction sites is implausible (especially given the support of twenty-some-odd studies of sedimentation from construction sites that EPA reviewed in promulgating the challenged regulations, 64 Fed. Reg. 68,728-31). We could remand this aspect of the Rule only if, as the petitioners urge, EPA's explanation for its decision to regulate small

construction sites were contrary to the record evidence, and it is not.

Petitioners' primary contention is that evidence in the record suggests it is not possible to provide an explicit, quantitative link between small construction sites and an adverse effect on water quality. But even if this were so, EPA's decision to regulate preventively small construction sites "to protect water quality" is not inconsistent with the record. Petitioners contend that EPA's reliance on data from studies of large construction sites is insufficient to support EPA's designation of small sites, but EPA has adequately supported its contention that experts can reasonably*872 extrapolate projected water quality impacts from large to small sites. We apply the substantial evidence standard when reviewing the factual findings of an agency, *Dickinson v. Zurko,* 527 U.S. 150, 156-58, 119 S.Ct. 1816, 144 L.Ed.2d 143 (1999),[FN56] and find it satisfied here.

FN56. The "substantial evidence" standard requires a showing of such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Edlund v. Massanari,* 253 F.3d 1152, 1156 (9th Cir.2001).

Moreover, EPA is not required to conduct the "perfect study." *Sierra Club,* 167 F.3d at 662. We defer to an agency decision not to invest the resources necessary to conduct the perfect study, and we defer to a decision to use available data unless there is no rational relationship between the means EPA uses to account for any imperfections in its data and the situation to which those means are applied. *Id.; Am. Iron & Steel Inst. v. EPA,* 115 F.3d 979, 1004 (D.C.Cir.1997). The record indicates a reasoned basis for EPA's decision that regulating small construction sites was necessary "to protect water quality" as required by § 402(p)(6).

[26] ***b. Waivers.*** Industry Petitioners further contend that EPA's allowance of regulatory waivers for small construction sites not likely to cause adverse water quality impacts inappropriately supplements the permitting regulations.

Petitioners argue that EPA has the burden of establishing a comprehensive program to control sources as necessary to protect water quality, and that shifting the burden to individual contractors, businesses, and homeowners to prove they do not harm water quality falls short of meeting this statutory obligation. Citing *National Mining Association v. Babbitt,* 172 F.3d 906, 910 (D.C.Cir.1999), they argue that EPA's rebuttable regulatory presumption of water quality impact from small construction activity is unreasonable because the agency has established no scientific likelihood that any given small site will affect water quality. EPA defends the waiver approach as fair and efficient, and argues that the Industrial Petitioners are confusing arguments about the limits of presumptions in evidentiary hearings conducted under the APA.[FN57]

FN57. EPA further argues that even if the waiver provision were properly characterized as an evidentiary presumption, it should be sustained because the record demonstrates that the presumed fact of the water quality impact of small sites is more likely true than not.

EPA is correct; the Phase II Rule creates no presumption applicable to an evidentiary hearing, and a regulation creating exemptions by waiver is reviewed under the familiar arbitrary and capricious standard. The use of waivers to allow permit exemptions for small sites unlikely to cause adverse impacts is reasonable under that standard.

[27] ***c. Consistency.*** Industry Petitioners also argue that EPA's decision to regulate all small construction sites under the Phase II Rule is arbitrary and capricious because EPA applied a different standard in regulating small construction projects than it applied to other potential sources of stormwater runoff subject to Phase II regulation.

344 F.3d 832, 57 ERC 1039, 33 Envtl. L. Rep. 20,269, 03 Cal. Daily Op. Serv. 8398, 2003 Daily Journal D.A.R. 10,479
(Cite as: 344 F.3d 832)

Petitioners contend that EPA decided not to designate other potential sources identified in the § 402(p)(5) studies because it determined that there are not "sufficient data ... available at this time on which to make a determination of potential adverse water quality impacts for the category of sources." 64 Fed. Reg. at 68,780. Petitioners contend this standard should have been applied to small construction sites as well, but EPA opted to ***873** regulate these sources despite an alleged lack of coherent data on small site impacts as a general category.

EPA counters, once again, that it did have adequate data to regulate small construction sites. It contends that construction sites of all sizes have greater erosion rates than almost any other land use, and thus are not similarly situated to the potential polluters that EPA chose not to regulate at this time.[FN58] These sources include secondary industrial activities (for example, maintenance of construction equipment or local trucking for an unregulated facility such as a grocery store) and other unregulated commercial activities (for example, car and truck rental facilities). 64 Fed. Reg. at 68,779. EPA reports that it decided not to categorically regulate these potential sources based both on available data about water quality impacts and on the extent to which potentially adverse water quality impacts are mitigated by existing regulations to which these sources are already subject. *Id.* at 68,780.

> FN58. EPA notes that the Phase II Rule empowers regional permitting authorities to regulate local sources of these types known to be responsible for harmful water quality impacts via the continuing "residual designation" authority (an aspect of the Rule that Petitioners also challenge).

We find no error. *See Marsh,* 490 U.S. at 378, 109 S.Ct. 1851. EPA acted reasonably in designating all small construction sites for Phase II regulation, and Industry Petitioners point to no record evidence that the nature of pollutant contributions from small construction site discharge is sufficiently similar to pollutants from the non-regulated sources to support the analogy they seek to draw. *New Orleans Channel 20 v. FCC,* 830 F.2d 361, 366 (D.C.Cir.1987) (an agency does not act irrationally when it treats parties differently, unless the parties are similarly situated). Sufficient evidence supports EPA's conclusion that small construction sites are not similar enough to these "other sources" to support petitioner's challenge.

G. Continuing ("Residual") Designation Authority

The Industry Petitioners argue that EPA acted improperly in retaining authority to designate future sources of stormwater pollution for Phase II regulation as needed to protect federal waters. We disagree.

The Phase II Rule preserves authority for EPA and authorized States to designate currently unregulated stormwater dischargers as requiring permits under the Rule if future circumstances indicate that they warrant regulation "to protect water quality" under the terms of § 402(p)(6). 40 C.F.R. § 122.26(a)(9). In the Phase II Preamble, EPA explains this aspect of the Rule:

> Under today's rule, EPA and authorized States continue to exercise the authority to designate remaining unregulated discharges composed entirely of stormwater for regulation on a case-by-case basis.... Individual sources are subject to regulation if EPA or the State, as the case may be, determines that the stormwater discharge from the source contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. This standard is based on the text of section CWA 402(p). In today's rule, EPA believes, as Congress did in drafting section CWA 402(p)(2)(E), that individual instances of stormwater discharge might warrant special regulatory attention, but do not fall neatly into a discrete, predetermined category. Today's rule preserves the regulatory authority***874** to subsequently address a source (or category of sources) of stormwater discharges of concern on a localized or re-

gional basis.

64 Fed. Reg. 68,781. The text of the Rule requires a discharger to obtain a permit if the NPDES permit authority determines that "stormwater controls are needed for the discharge based on wasteload allocations that are part of 'total maximum daily loads' (TMDLs[FN59]) that address the pollutant(s) of concern" or that "the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 40 C.F.R. §§ 122.26(a)(9)(i)(C)-(D).

FN59. TMDLs are pollutant loading limits established by NPDES permitting authorities under the Clean Water Act for waters that do not meet a water quality standard due to the presence of a pollutant. *See* 33 U.S.C. § 1313(d).

1. Statutory Authority

The Industry Petitioners contend that this "residual" designation authority, which would allow a NPDES permitting authority to require at any future time a permit from any stormwater discharge not already regulated, is *ultra vires.* Although they concede that Congress authorized case-by-case designation in § 402(p)(2)(E),[FN60] they argue that this authority attached only during the permitting moratorium that ended in 1994, prior to the Phase II rulemaking. They object that EPA has impermissibly designated a category of "not yet identified" sources and preserved authority to regulate them on a case-by-case basis indefinitely into the future.[FN61]

FN60. This section enables a NPDES permitting authority to designate for regulation: "[a] discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2)(E).

FN61. Notably, Industry Petitioner NAHB itself took the position during Phase II Subcommittee proceedings that the power to designate additional sources survived the promulgation of the Phase II Rule. In a 1996 comment letter to EPA, NAHB asserted its understanding that "[t]he permitting authority still reserves the right to designate additional sources if they are shown to be a contributor of water quality impairment." NRDC Supplemental Excerpts of Record at 58.

[28] Petitioners contend that § 402(p)(6)[FN62] cannot rescue the residual authority because it does not authorize case-by-case identification of discharges to be regulated, and that Congress, had it intended otherwise, would have included language in § 402(p)(6) similar to the case-by-case authority explicitly granted in § 402(p)(2)(E).[FN63] They also contend that ***875** continuing authority to designate sources based on waste load allocations that are part of TMDLs exceeds the scope of authority in § 402(p)(2), which nowhere mentions TMDLs. Finally, they argue that the categorical designation authorized by § 402(p)(6) is only permissible when based on the § 402(p)(5) studies and carried out in consultation with state and local authorities, but that the Rule allows future designations based on agency discretion unaccompanied by adequate demonstration that the source itself is a significant threat to water quality.

FN62. The full text of § 402(p)(6), which specifically authorizes the Phase II program, reads: "Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a compre-

> hensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate." 33 U.S.C. § 1342(p)(6).
>
> FN63. Petitioners further argue that even if EPA could preserve the case-by-case authority conferred in § 402(p)(2)(E), that section confers authority only to regulate "a discharge" determined to threaten water quality, not a category of discharges. However, we agree with respondent-intervenor NRDC's argument that § 402(p)(2)(E) does not preclude EPA from designating entire categories of sources. Petitioners' argument follows from its reliance on the fact that § 402(p)(2)(E) refers to "discharge" in the singular rather than the plural to conclude that EPA may only designate sources meeting the § 402(p)(2)(E) description on a case-by-case basis. But all five of the § 402(p)(2)(5) categories refer to "discharge" in the singular, even in reference to discharges clearly intended for categorical regulation, like "a discharge from a municipal separate storm sewer system serving a population of 250,000 or more." 33 U.S.C. § 1342(p)(2)(C). The error in petitioners' interpretation is exposed by 1 U.S.C. § 1, which provides that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise-words importing the singular include and apply to several persons, parties, or things."

EPA counters that § 402(p)(6) authorized the designation, made on the basis of statutorily required sources of input and in consultation with the States, of a third class of discharges to be identified on location-specific bases by the NPDES permitting authority. EPA contends that Petitioners mistake the source of its authority for continuing designations as arising only from § 402(p)(2), discounting the full scope of its authority under § 402(p)(6). EPA argues that it permissibly interpreted § 402(p)(6) as allowing the residual designation authority because its language does not expressly preclude it, and because such authority is consistent with (and arguably required by) that section's mandate to establish a "comprehensive program" to protect water quality from adverse stormwater discharges. EPA maintains that the structure of § 402(p) reflects "Congress' intent to assure regulation of all problematic stormwater discharges as expeditiously as reasonably possible-not to limit EPA to a one-time-only opportunity to designate discharges for regulation."

[29] We review EPA's interpretation of the statute it administers with deference, *Royal Foods Co.*, 252 F.3d at 1106, and affirm this aspect of the Phase II Rule as a legitimate exercise of regulatory authority conferred by § 402(p). The residual designation authority is grounded both on § 402(p)(6), which broadly authorizes a comprehensive program to protect water quality, and on § 402(p)(2)(5), which authorizes case-by-case designation of certain polluters and categories of polluters.

While not a blank check, § 402(p)(6) authorizes a comprehensive program that allows regional designation of polluting discharges that compromise water quality locally, even if they have not been established as compromising water quality nationally at the time Phase II was promulgated. In allowing continuing designation authority, EPA permissibly designated a third category of dischargers subject to Phase II regulation-those established locally as polluting U.S. waters-following all required studies and consultation with state and local officials. EPA reasonably determined that discharges other than those from small MS4s and construction sites were likely to require regulation "to protect

water quality" in satisfaction of the § 402(p)(6) mandate. EPA reasonably determined that, although it lacked sufficient data to support nationwide, categorical*876 designation of these sources, particularized data might support their designations on a more localized basis. EPA reasonably interpreted § 402(p)(6) as authorizing regional designation of sources and regional source categories, based on water quality standards including TMDLs.

Petitioners' § 402(p)(2)(5) argument (that EPA could not draw support for the residual designation authority from § 402(p)(2)(5) because such authority expired in 1994) is contradicted by the plain language of the statute. Respondent-intervenor NRDC correctly notes that § 402(p)(1) sets forth a permitting moratorium for stormwater discharges prior to 1994, and that § 402(p)(2) exempts certain categories of sources from that permitting moratorium, including those to be regulated on a case-by-case basis under § 402(p)(2)(5). Specifically, the statute provides that the 1994 date "shall not apply" to the five categories of discharges listed in § 402(p)(2). The termination of a moratorium that "shall not apply" to the continuing designation authority under § 402(p)(2)(5) cannot rescind EPA's authority to regulate sources in that category. Nothing in § 402(p) suggests that authority to designate these sources ends at any time, and EPA remains free to designate § 402(p)(2)(E) dischargers.

Finally, although Petitioners may be legitimately concerned that a permitting authority may designate a source without adequately establishing its eligibility, this issue must be addressed in the context of an actual case or controversy. Whether a NPDES authority may impose permitting requirements on a discharger without an adequate finding of polluting activity is not yet ripe for judicial review. *Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1141 (9th Cir.2000) ("A concrete factual situation is necessary to delineate the boundaries of what conduct the government may or may not regulate.").

2. Nondelegation Doctrine

[30] Industry Petitioners contend that EPA's interpretation of § 402(p) to allow the residual designation authority must be rejected because it would render the statute unconstitutional under the nondelegation doctrine. We deny petitioners' claim, both because it is not properly raised and because it rests on an interpretation explicitly overturned by the United States Supreme Court.

Petitioners base their contention on *American Trucking Ass'ns v. EPA,* 175 F.3d 1027, 1034 (D.C.Cir.1999),[FN64] in which the D.C. Circuit remanded a regulation under the nondelegation doctrine because, although EPA had applied reasonable factors in establishing the air quality standards in question, the agency had articulated no "intelligible principle" to channel its application of these factors. *Id.* Petitioners argue that if § 402(p) authorizes a NPDES permitting authority to require Phase II permitting of any stormwater source deemed to be a "significant contributor" of pollutants to U.S. waters, then that grant of authority likewise constitutes an unconstitutional delegation of legislative authority because-as did the *American Trucking* delegation-it "leaves [EPA] free to pick any point" at which a regulatory burden will attach. *Id.* at 1037.

> FN64. This case was reversed in relevant part by the Supreme Court in *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 476, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001).

However, in reversing *American Trucking,* the Supreme Court rejected the notion that an agency has the power to interpret a statute so as to either save it from being, or transform it into, an unconstitutional delegation. *877*Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 473, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). Whether a statute delegates legislative power "is a question for the courts, and an agency's [interpretation] has no bearing upon the answer." *Id.* Petitioner's argument to the contrary rests on the very reasoning in *American Trucking* that was overturned in *Whitman.* The relevant question is not whether EPA's interpretation is unconsti-

tutional, but whether the statute itself is unconstitutional-a challenge Industry Petitioners do not raise.

But even if the challenge were properly raised, § 402(p) would, like the Clean Air Act standard-setting provision at issue in *Whitman,* survive constitutional review. The Supreme Court has upheld against nondelegation attacks many similar statutes establishing nonquantitative standards. *Am. Power & Light Co. v. SEC,* 329 U.S. 90, 104, 67 S.Ct. 133, 91 L.Ed. 103 (1946) (upholding statute giving SEC authority to modify corporate structures so that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders"); *Yakus v. United States,* 321 U.S. 414, 419-20, 423-27, 64 S.Ct. 660, 88 L.Ed. 834 (1944) (upholding statute giving agency power to set prices that "will be generally fair and equitable"). In *Yakus,* the Court held that a statutory command to "effectuate the purposes" of the overall statutory scheme withstood scrutiny. *Id.* Section 402(p)(6)'s directive "to protect water quality" summarizes the central purpose of the Clean Water Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a). It establishes a determinate criterion of the kind the Supreme Court upheld in *Yakus* and *American Power & Light.*

3. Notice and Comment

[31] Industry Petitioners also contend that, to the extent it allows the designation of entire categories of sources, rather than individual sources, the residual designation authority violates the APA, 5 U.S.C. § 553(b)(3), because EPA did not provide public notice that it was considering such a rule. *Ober v. EPA,* 84 F.3d 304, 315 (9th Cir.1996) (invalidating EPA rule where it deviated from proposal); *Shell Oil Co. v. EPA,* 950 F.2d 741, 746-47 (D.C.Cir.1991). Petitioners contend that while the proposed rule would have allowed case-by-case designation where an authority "determines that the discharge contributes to a violation," 63 Fed. Reg. at 1635 (proposing 40 C.F.R. § 122.26(a)(9)(i)(D)), the final rule authorizes case-by-case designation where "the discharge, or category of discharges within a geographic area, contributes to a violation," 40 C.F.R. § 122.26(a)(9)(i)(D).

EPA notes that it had proposed to promulgate continuing designation authority in some form, and points to elements in the proposed rule that explicitly envision the categorical designation of sources at the local/watershed level. FN65

> FN65. "[T]oday's proposal would encourage [voluntary] control of stormwater discharges ... unless the discharge (or category of discharges) is individually or locally designated as described in the following section. The necessary data to support designation could be available on a local, regional, or watershed basis and would allow the NPDES permitting authority to designate a category of sources or individual sources on a case-by-case basis. If sufficient nationwide data [becomes] available in the future, EPA could at that time designate additional categories of industrial or commercial sources on a national basis. EPA requests comment on the three-pronged analysis used to assess the need to designate additional industrial or commercial sources and invites suggestions regarding watershed-based designation." 63 Fed. Reg. at 1588.

***878** According to the "logical outgrowth" standard, a final regulation must be "in character with the original proposal and a logical outgrowth of the notice and comments." *Hodge,* 107 F.3d at 712. EPA emphasized that it was considering continuing designations based on watershed data rather than designating these sources on a national basis, and invited comment regarding this proposal. 63 Fed. Reg. at 1536. This supports the necessary relationship between the proposed and final rule.

H. Regulatory Flexibility Act

The Industry Petitioners contend that the Phase II Rule will impose substantial compliance costs on

their members and other small entities, but that EPA failed to conduct the analysis required by the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601-11. They argue that EPA seeks to excuse its noncompliance by falsely certifying that the Rule does not have a significant impact on a substantial number of small entities. 64 Fed. Reg. at 68,800. We are not persuaded.

[32] The RFA requires a federal agency to prepare a regulatory flexibility analysis and an assessment of the economic impact of a proposed rule on small business entities, 5 U.S.C. § 604, unless the agency certifies that the proposed rule will not have a "significant economic impact on a substantial number of small entities" and provides a factual basis for that certification, *id.* at § 605; *N. W. Mining Ass'n v. Babbitt,* 5 F.Supp.2d 9, 15-16 (D.D.C.1998).

EPA did certify that the Phase II Rule would not yield "significant impacts," 64 Fed. Reg. at 68,800, but Petitioners contend this certification is erroneous because (1) EPA treats as "not significant" costs that are in fact significant, and (2) EPA failed to account for the entire universe of small entities affected (including small home construction contractors) and all significant costs to those entities. They urge that the failure to consider a significant segment of the affected small entity community requires invalidation of the Rule, citing *North Carolina Fisheries Ass'n v. Daley,* 27 F.Supp.2d 650, 659 (E.D.Va.1998) (certification failed to comply with RFA where agency ignored several categories of affected small entities), and *Northwest Mining,* 5 F.Supp.2d at 15 (RFA was violated where improper definition of small entity excluded analysis of affected entities).

EPA maintains that its certification was appropriate, and, moreover, that it has already voluntarily followed the additional RFA procedures that the Industry Petitioners now request. EPA argues that Petitioners have incorrectly specified the costs that the small entities they represent will bear, referring erroneously to EPA's total annual compliance costs estimates for all entities, rather than to costs estimated for small entities as defined under the RFA. EPA maintains that it did consider economic impacts on small home construction contractors who might be denied discharge permits, and that it evaluated the annual costs of Phase II compliance associated with any land disturbance between one and five acres. 64 Fed. Reg. at 68,800-01.

Respondent-intervenor NRDC contends that Petitioners' reliance on measures of the aggregate impact of the Rule on small entities to determine compliance with the threshold test under the RFA fails as a matter of law because aggregate measures are not consistent with the statutory language setting out that test. NRDC notes that the plain language of § 605(b) sets out a three-component test indicating that EPA need not perform a regulatory flexibility analysis if it finds that the proposed ***879** rule will not have: (1) "a significant economic impact" on (2) "a substantial number" of (3) "small entities." 5 U.S.C. § 605(b). NRDC contends that EPA satisfied the statutory test, and that Petitioners' interpretation, which rewrites the test to omit the "substantial number" component, is erroneous.

[33] We believe NRDC correctly interprets the statute, *Marsh,* 490 U.S. at 378, 109 S.Ct. 1851, and that EPA reasonably certified that the Phase II Rule would not have a significant economic impact in compliance with the Regulatory Flexibility Act. We also conclude that, even if EPA had failed to properly comply with the procedural requirements of the RFA, its actual assessment of the Rule's economic impacts renders any defective compliance harmless error. In granting relief under RFA § 611, a court may order an agency "to take corrective action consistent with" the RFA and APA, including remand to the agency, 5 U.S.C. § 611(a)(4)(A), but EPA has already conducted the economic analyses Petitioners seek when it convened the "Small Business Advocacy Review Panel" before publishing notice of the proposed rule. 64 Fed. Reg. at 68,801. That Panel evaluated the Rule and considered the comments of small entities on a number of issues,

consistent with the procedures described in RFA § 603. *Id.* Appendix 5 of EPA's preamble to the proposed rule explained provisions that had been designed to minimize impacts on small entities, based on advice and recommendations from the Panel. 63 Fed. Reg. 1615, 64 Fed. Reg. 68,811. Modifications for small entities included alternative compliance and reporting mechanisms responsive to the resources of small entities, simplified procedures, performance rather than design standards, and waivers.

Any hypothetical noncompliance would thus have been harmless, since the available remedy would simply require performance of the economic assessments that EPA actually made. Like the Notice and Comment process required in administrative rulemaking by the APA, the analyses required by RFA are essentially procedural hurdles; after considering the relevant impacts and alternatives, an administrative agency remains free to regulate as it sees fit. We affirm the Rule against this challenge.[FN66]

FN66. Our consideration of the issue at all may be gratuitous, since petitioners failed to submit timely comment disputing the adequacy of EPA's consideration of economic impacts on small businesses proposed at 63 Fed. Reg. at 1605-07. *United States v. L.A. Tucker Truck Lines,* 344 U.S. 33, 37, 73 S.Ct. 67, 97 L.Ed. 54 (1952) ("[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

III.
CONCLUSION

We conclude that the EPA's failure to require review of NOIs, which are the functional equivalents of permits under the Phase II General Permit option, and its failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the Clean Water Act. We therefore remand these aspects of the Small MS4 General Permit option so that EPA may take appropriate action to comply with the Clean Water Act. We also remand so that EPA may consider in an appropriate proceeding the Environmental Petitioners' contention that § 402(p)(6) requires EPA to regulate forest roads. We affirm all other aspects of the Phase II Rule against the statutory, administrative, and constitutional challenges raised in this action.

***880** Petitions for Review GRANTED IN PART and DENIED IN PART.

TALLMAN, Circuit Judge, concurring in part and dissenting in part:

I concur in most of the majority's opinion, but I dissent from Section II.B, which remands the Phase II Rule because its system of general permits is "arbitrary and capricious." I believe EPA's design of a system of general permits supported by notices of intent was a reasonable exercise of EPA's administrative discretion. We must give deference to EPA's interpretation of the laws it is charged with enforcing, so long as EPA's reading of those laws is permissible. Because EPA acted reasonably in designing a National Pollutant Discharge Elimination System ("NPDES") based on general permits and supported by NOIs, I respectfully dissent from the court's decision to remand this portion of the Phase II Rule.

I

As the majority concedes, we evaluate EPA's interpretation of the Clean Water Act with deference. Majority Op. 13796. If Congress's intent is unclear as to whether a system of general permits supplemented by NOIs is allowed, we simply ask "whether EPA's interpretation is permissible." *Ober v. Whitman,* 243 F.3d 1190, 1193 (9th Cir.2001).

II

As an initial matter, then, we must ask if Congress was clear in its intent concerning the propriety of a system of general permits augmented by NOIs.

Five legislative commands guide this inquiry. First, 33 U.S.C. § 1342(p)(6) charges EPA with creating a system to regulate stormwater discharges. Plainly, nothing in this section speaks to whether EPA may utilize a general permit approach in regulating stormwater discharge.

Second, 33 U.S.C. § 1311(a) makes it illegal to discharge pollutants "except as in compliance" with several sections of the Clean Water Act. Again, nothing in this section addresses whether EPA may make use of general permits reinforced by NOIs.

Third, 33 U.S.C. § 1342 in general (as opposed to the limited charge in section 1342(p)(6) discussed above) authorizes EPA to issue NPDES permits, provided that the permits satisfy several conditions. But nothing in section 1342 prohibits the use of a system of general permits.

Fourth, the Clean Water Act mandates that "a copy of each permit application and each permit issued under" the NPDES permitting program be made available to the public for inspection and photocopying. 33 U.S.C. § 1342(j). The Act does not elaborate on this naked requirement. There is no explanation of the manner in which NPDES permits and applications are to be made publicly available. Nor does the Act define what constitutes a "permit" that would trigger these requirements.

And fifth, the Clean Water Act authorizes the issuance of an NPDES "permit" "after opportunity for public hearing." 33 U.S.C. § 1342(a)(1). The Act does not provide a definition of "permit," nor does it further detail what triggers the requirement of a public hearing.

In short, the Clean Water Act fails to address the propriety of a general permit system, or whether NOIs ought to be considered "permits." Therefore, we should uphold EPA's creation of a system of general permits buttressed by NOIs so long as it is "permissible." *See* ***881** *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Our duty to defer to EPA in such a situation is based on sound policy. Given the overwhelming challenge and complexity of the programs administered by federal agencies today, it is sensible to trust agencies with the design of those programs so long as the programs are reasonable interpretations of congressional mandates.

The central issues regarding EPA's general permit system are whether the Clean Water Act allows such a system and whether NOIs should be considered "permits." The resolution of these issues requires a complicated weighing of policies (e.g., administrative streamlining vs. robust inquiry) that is precisely what agencies are designed to do and courts are without the resources or expertise to do. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction." *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778.

III

The Phase II Rule promulgates a system of general permits. EPA contemplated that these general permits will be issued on a watershed basis, with individual stormwater dischargers then filing NOIs to operate under general permits. The federal regulations implementing this system repeatedly emphasize that "[t]he use of general permits, instead of individual permits, reduces the administrative burden of permitting authorities, while also limiting the paperwork burden on regulated parties." 64 Fed. Reg. 68,722, 68,737, 68,762 (Dec. 8, 1999)

The use of a general permit system for the administration of the NPDES system has been considered and approved before. In *NRDC v. Costle,* 568 F.2d 1369 (D.C.Cir.1977), the District of Columbia Circuit considered a challenge to EPA's regulations under the Federal Water Pollution Control Act, which was the precursor to the Clean Water Act. In *Costle,* EPA sought approval of its design for the NPDES system. EPA had issued regulations exempting broad categories of point

sources from the requirement that an NPDES permit be obtained before discharging into federal waters. Part of EPA's rationale in creating the exempted categories was that otherwise EPA would be overwhelmed by the administrative burden of issuing NPDES permits. *Id.* at 1377-79. The *Costle* court affirmed the lower court's rejection of these exemptions because the legislation in question plainly required that all point sources obtain some kind of NPDES permit. *Id.* But in rejecting EPA's regulations, the *Costle* court discussed the options available to EPA in promulgating an NPDES system that was considerate of the enormous burden such a system could impose on EPA. *Id.* at 1380-81. In particular, the court recommended "the use of area or general permits. *The Act allows such techniques.* Area-wide regulation is one well-established means of coping with administrative exigency." *Id.* at 1381 (emphasis added).

Against this backdrop, EPA's creation of a general permit system was entirely permissible. And if the creation of a general permit system is permissible, then it does not matter whether NOIs are given a public airing.

The majority contends that the general permit system prevents EPA from fulfilling its duty to make sure that municipalities do not discharge pollutants in violation of the Clean Water Act. The majority reasons that by failing to require EPA review of NOIs, the Rule fails to ensure that a regulated MS4's stormwater pollution control program will satisfy the Clean Water Act requirement that the MS4 "reduce***882** discharges to the maximum extent practicable." Majority Op. 855. But the majority's analysis ignores the effects of the general permit. By filing an NOI, a discharger obligates itself to comply with the limitations and controls imposed by the general permit under which it intends to operate. EPA mandates that all permits (including general permits) condition their issuance on satisfaction of pollution limitations imposed by the Clean Water Act. 40 C.F.R. § 122.44. In particular, EPA requires permits to satisfy the restrictions imposed by Clean Water Act section 307(a). *Id.* at § 122.44(b)(1). Therefore, the *general permit* imposes the obligations with which the discharger must comply (including applicable Clean Water Act standards), and EPA's decision not to review every NOI is not a failure to insure compliance with the Clean Water Act.

The majority also objects to EPA's general permit system because it fails to allow for sufficient public participation in the NOIs. Majority Op. 856-858. The majority's position fails to give deference to EPA and imposes the majority's own wishes instead. EPA would have been justified in creating a system entirely reliant on general or area permits. Its imposition of NOIs is an indulgence to certain policy prerogatives, namely public involvement and the collection of additional information. But the power to create a general permit system necessarily implies the power to require subordinate steps for NOIs that do not quite reach the level of inquiry associated with actual permits.

IV

We function as an adjudicator of disputes, not as a policy-making body. Where an agency promulgates rules after a deliberative process, it is incumbent upon us to respect the agency's decisions or else risk trivializing the function of that agency. In this case, EPA made a permissible decision to create a general permit program supported by NOIs. Therefore, I respectfully dissent from Section II.B of the majority's opinion.

C.A.9,2003.
Environmental Defense Center, Inc. v. U.S. E.P.A.
344 F.3d 832, 57 ERC 1039, 33 Envtl. L. Rep. 20,269, 03 Cal. Daily Op. Serv. 8398, 2003 Daily Journal D.A.R. 10,479

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Commission on
State Mandates

TAB NO. 4

191 F.3d 1159, 30 Envtl. L. Rep. 20,116, 99 Cal. Daily Op. Serv. 7618, 1999 Daily Journal D.A.R. 9661, 1999 Daily Journal D.A.R. 12,369
(Cite as: 191 F.3d 1159)

▷

United States Court of Appeals,
Ninth Circuit.
DEFENDERS OF WILDLIFE and The Sierra Club, Petitioners,
v.
Carol M. BROWNER, in her official capacity as Administrator of the United States Environmental Protection Agency, Respondent.
City of Tempe, Arizona; City of Tucson, Arizona; City of Mesa, Arizona; Pima County, Arizona; and City of Phoenix, Arizona, Intervenors-Respondents.

No. 98-71080.
Argued and Submitted Aug. 11, 1999.
Decided Sept. 15, 1999.

Environmental organizations sought review of Environmental Protection Agency (EPA) decision to issue National Pollution Discharge Elimination System (NPDES) permits to five municipalities, for their separate storm sewers, without requiring numeric limitations to ensure compliance with state water-quality standards. The Court of Appeals, Graber, Circuit Judge, held that: (1) organizations had standing; (2) municipal storm-sewer discharges did not have to strictly comply with state water-quality standards; but (3) EPA had discretion to require that municipal discharges comply with such standards.

Petition denied.

West Headnotes

[1] Environmental Law 149E ⟹651

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek649 Persons Entitled to Sue or Seek Review; Standing
149Ek651 k. Cognizable Interests and Injuries, in General. Most Cited Cases
(Formerly 199k25.15(4.1) Health and Environment)

For purpose of statute authorizing any interested person to seek judicial review of Environmental Protection Agency (EPA) decision issuing or denying any National Pollution Discharge Elimination System (NPDES) permit, "any interested person" means any person that satisfies the injury-in-fact requirement for Article III standing. U.S.C.A. Const. Art. 3, § 2, cl. 1; Federal Water Pollution Control Act Amendments of 1972, § 509(b)(1)(F), 33 U.S.C.A. § 1369(b)(1)(F).

[2] Environmental Law 149E ⟹652

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek649 Persons Entitled to Sue or Seek Review; Standing
149Ek652 k. Organizations, Associations, and Other Groups. Most Cited Cases
(Formerly 199k25.15(4.1) Health and Environment)

Environmental organizations had standing to seek judicial review of Environmental Protection Agency (EPA) decision to issue National Pollution Discharge Elimination System (NPDES) permits for municipalities' storm sewers based on allegation that organizations' members used and enjoyed ecosystems affected by storm water discharges and sources thereof governed by the permits. U.S.C.A. Const. Art. 3, § 2, cl. 1; Federal Water Pollution Control Act Amendments of 1972, § 509(b)(1)(F), 33 U.S.C.A. § 1369(b)(1)(F).

[3] Environmental Law 149E ⟹220

149E Environmental Law
149EV Water Pollution
149Ek215 Administrative Agencies and Proceedings
149Ek220 k. Permit and Certification Proceedings. Most Cited Cases
(Formerly 199k25.7(13.1), 199k25.7(11) Health and Environment)

191 F.3d 1159, 30 Envtl. L. Rep. 20,116, 99 Cal. Daily Op. Serv. 7618, 1999 Daily Journal D.A.R. 9661, 1999 Daily Journal D.A.R. 12,369
(Cite as: 191 F.3d 1159)

Although best practicable control technology (BPT) requirement for National Pollution Discharge Elimination System (NPDES) permits takes into account issues of practicability, the Environmental Protection Agency (EPA) also is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability. Federal Water Pollution Control Act Amendments of 1972, §§ 301(b)(1)(A, C), 402(a)(1), 33 U.S.C.A. §§ 1311(b)(1)(A, C), 1342(a)(1).

[4] Environmental Law 149E ⚿196

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek196 k. Discharge of Pollutants. Most Cited Cases
(Formerly 199k25.7(13.1) Health and Environment)

Water Quality Act amendments to the Clean Water Act do not require municipal storm-sewer discharges to strictly comply with state water-quality standards, in order to obtain National Pollution Discharge Elimination System (NPDES) permit, but instead prescribe separate standard requiring reduction of discharge of pollutants to maximum extent practicable, in view of Act's distinction between municipal and industrial discharges. Federal Water Pollution Control Act Amendments of 1972, §§ 301(b)(1)(C), 402(p)(3)(B)(iii), 33 U.S.C.A. §§ 1311(b)(1)(C), 1342(p)(3)(B)(iii).

[5] Statutes 361 ⚿219(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(1) k. In General. Most Cited Cases

Questions of congressional intent that can be answered with traditional tools of statutory construction are still firmly within the province of the courts under *Chevron*, which governs review of an agency's interpretation of a statute.

[6] Statutes 361 ⚿188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

Statutes 361 ⚿205

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In General. Most Cited Cases

Using traditional tools of statutory construction when interpreting a statute, courts look first to the words that Congress used, and, rather than focusing just on the word or phrase at issue, courts look to the entire statute to determine Congressional intent.

[7] Statutes 361 ⚿195

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k195 k. Express Mention and Implied Exclusion. Most Cited Cases

Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

[8] Environmental Law 149E ⚿197

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications

191 F.3d 1159, 30 Envtl. L. Rep. 20,116, 99 Cal. Daily Op. Serv. 7618, 1999 Daily Journal D.A.R. 9661, 1999 Daily Journal D.A.R. 12,369
(Cite as: 191 F.3d 1159)

149Ek197 k. Conditions and Limitations. Most Cited Cases

(Formerly 199k25.7(10.1) Health and Environment)

Environmental Protection Agency (EPA) is not prohibited from requiring, under Clean Water Act, that municipal storm-sewer discharges strictly comply with state water-quality standards, but has discretion to determine appropriate pollution controls. Federal Water Pollution Control Act Amendments of 1972, § 402(p)(3)(B)(iii), 33 U.S.C.A. § 1342(p)(3)(B)(iii).

***1160** Jennifer Anderson and David Baron, Arizona Center for Law in the Public Interest, Phoenix, Arizona, for the petitioners.

Alan Greenberg, Attorney, U.S. Department of Justice, Environment & Natural Resources Division, Denver, Colorado, for the respondent.

Craig Reece, Phoenix City Attorney's Office, Phoenix, Arizona; Stephen J. Burg, Mesa City Attorney's Office, Mesa, Arizona; Timothy Harrison, Tucson City Attorney's Office, Tucson, Arizona; Harlan C. Agnew, Deputy County Attorney, Tucson, Arizona; and Charlotte Benson, Tempe City Attorney's Office, Tempe, Arizona, for the intervenors-respondents.

***1161** David Burchmore,Squire, Sanders & Dempsey, Cleveland, Ohio, for amici curiae.

Petition to Review a Decision of the Environmental Protection Agency. EPA No. 97-3.

Before: NOONAN, THOMPSON, and GRABER, Circuit Judges.

GRABER, Circuit Judge:

Petitioners challenge the Environmental Protection Agency's (EPA) decision to issue National Pollution Discharge Elimination System (NPDES) permits to five municipalities, for their separate storm sewers, without requiring numeric limitations to ensure compliance with state water-quality standards. Petitioners sought administrative review of the decision within the EPA, which the Environmental Appeals Board (EAB) denied. This timely petition for review ensued. For the reasons that follow, we deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Title 26 U.S.C. § 1342(a)(1) authorizes the EPA to issue NPDES permits, thereby allowing entities to discharge some pollutants. In 1992 and 1993, the cities of Tempe, Tucson, Mesa, and Phoenix, Arizona, and Pima County, Arizona (Intervenors), submitted applications for NPDES permits. The EPA prepared draft permits for public comment; those draft permits did not attempt to ensure compliance with Arizona's water-quality standards.

Petitioner Defenders of Wildlife objected to the permits, arguing that they must contain numeric limitations to ensure strict compliance with state water-quality standards. The State of Arizona also objected.

Thereafter, the EPA added new requirements:

> To ensure that the permittee's activities achieve timely compliance with applicable water quality standards (Arizona Administrative Code, Title 18, Chapter 11, Article 1), the permittee shall implement the [Storm Water Management Program], monitoring, reporting and other requirements of this permit in accordance with the time frames established in the [Storm Water Management Program] referenced in Part I.A.2, and elsewhere in the permit. This timely implementation of the requirements of this permit shall constitute a schedule of compliance authorized by Arizona Administrative Code, section R18-11-121(C).

The Storm Water Management Program included a number of structural environmental controls, such as storm-water detention basins, retention basins, and infiltration ponds. It also included

191 F.3d 1159, 30 Envtl. L. Rep. 20,116, 99 Cal. Daily Op. Serv. 7618, 1999 Daily Journal D.A.R. 9661, 1999 Daily Journal D.A.R. 12,369
(Cite as: 191 F.3d 1159)

programs to remove illegal discharges.

With the inclusion of those "best management practices," the EPA determined that the permits ensured compliance with state water-quality standards. The Arizona Department of Environmental Quality agreed:

> The Department has reviewed the referenced municipal NPDES storm-water permit pursuant to Section 401 of the Federal Clean Water Act to ensure compliance with State water quality standards. We have determined that, based on the information provided in the permit, and the fact sheet, adherence to provisions and requirements set forth in the final municipal permit, will protect the water quality of the receiving water.

On February 14, 1997, the EPA issued final NPDES permits to Intervenors. Within 30 days of that decision, Petitioners requested an evidentiary hearing with the regional administrator. *See* 40 C.F.R. § 124.74. Although Petitioners requested a hearing, they conceded that they raised only a legal issue and that a hearing was, in fact, unnecessary. Specifically, Petitioners raised only the legal question whether the Clean Water Act (CWA) requires numeric limitations to ensure strict compliance with state water-quality standards; they did not raise the factual question whether the management practices that the EPA chose would be effective.

***1162** On June 16, 1997, the regional administrator summarily denied Petitioners' request. Petitioners then filed a petition for review with the EAB. *See* 40 C.F.R. § 124.91(a). On May 21, 1998, the EAB denied the petition, holding that the permits need not contain numeric limitations to ensure strict compliance with state water-quality standards. Petitioners then moved for reconsideration, *see* 40 C.F.R. § 124.91(i), which the EAB denied.

JURISDICTION

[1][2] Title 33 U.S.C. § 1369(b)(1)(F) authorizes "any interested person" to seek review in this court of an EPA decision "issuing or denying any permit under section 1342 of this title." "Any interested person" means any person that satisfies the injury-in-fact requirement for Article III standing. *See Natural Resources Defense Council, Inc. v. EPA,* 966 F.2d 1292, 1297 (9th Cir.1992) [*NRDC II*]. It is undisputed that Petitioners satisfy that requirement. Petitioners allege that "[m]embers of Defenders and the Club use and enjoy ecosystems affected by storm water discharges and sources thereof governed by the above-referenced permits," and no other party disputes those facts. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 565-66, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) ("[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity."); *see also NRDC II,* 966 F.2d at 1297 ("NRDC claims, inter alia, that [the] EPA has delayed unlawfully promulgation of storm water regulations and that its regulations, as published, inadequately control storm water contaminants. NRDC's allegations ... satisfy the broad standing requirement applicable here.").

Intervenors argue, however, that they were not parties when this action was filed and that this court cannot redress Petitioners' injury without them. Their real contention appears to be that they are indispensable parties under Federal Rule of Civil Procedure 19. We need not consider that contention, however, because in fact Intervenors have been permitted to intervene in this action and to present their position fully. In the circumstances, Intervenors have suffered no injury.

DISCUSSION

A. *Standard of Review*

The Administrative Procedures Act (APA), 5 U.S.C. §§ 701-06, provides our standard of review for the EPA's decision to issue a permit. *See American Mining Congress v. EPA,* 965 F.2d 759, 763 (9th Cir.1992). Under the APA, we generally review such a decision to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

191 F.3d 1159, 30 Envtl. L. Rep. 20,116, 99 Cal. Daily Op. Serv. 7618, 1999 Daily Journal D.A.R. 9661, 1999 Daily Journal D.A.R. 12,369
(Cite as: 191 F.3d 1159)

On questions of statutory interpretation, we follow the approach from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See NRDC II*, 966 F.2d at 1297 (so holding). In *Chevron*, 467 U.S. at 842-44, 104 S.Ct. 2778, the Supreme Court devised a two-step process for reviewing an administrative agency's interpretation of a statute that it administers. *See also Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1452 (9th Cir.1996) ("The Supreme Court has established a two-step process for reviewing an agency's construction of a statute it administers."). Under the first step, we employ "traditional tools of statutory construction" to determine whether Congress has expressed its intent unambiguously on the question before the court. *Chevron*, 467 U.S. at 843 n. 9, 104 S.Ct. 2778. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S.Ct. 2778 (footnote omitted). If, instead, Congress has left a gap for the administrative agency to fill, we proceed to step two. *See id.* at 843, 104 S.Ct. 2778. At step two, we must uphold the administrative regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S.Ct. 2778.

***1163** B. *Background*

The CWA generally prohibits the "discharge of any pollutant," 33 U.S.C. § 1311(a), from a "point source" into the navigable waters of the United States. *See* 33 U.S.C. § 1362(12)(A). An entity can, however, obtain an NPDES permit that allows for the discharge of some pollutants. *See* 33 U.S.C. § 1342(a)(1).

[3] Ordinarily, an NPDES permit imposes effluent limitations on such discharges. *See* 33 U.S.C. § 1342(a)(1) (incorporating effluent limitations found in 33 U.S.C. § 1311). First, a permit-holder "shall ... achiev [e] ... effluent limitations ... which shall require the application of the best practicable control technology [BPT] currently available." 33 U.S.C. § 1311(b)(1)(A). Second, a permit-holder " *shall ... achiev[e] ... any more stringent limitation,* including those *necessary to meet water quality standards,* treatment standards or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title)." 33 U.S.C. § 1311(b)(1)(C) (emphasis added). Thus, although the BPT requirement takes into account issues of practicability, *see Rybachek v. EPA*, 904 F.2d 1276, 1289 (9th Cir.1990), the EPA also "is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability," *Oklahoma v. EPA*, 908 F.2d 595, 613 (10th Cir.1990) (internal quotation marks omitted), *rev'd on other grounds sub nom. Arkansas v. Oklahoma*, 503 U.S. 91, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992). *See also Ackels v. EPA*, 7 F.3d 862, 865-66 (9th Cir.1993) (similar).

The EPA's treatment of storm-water discharges has been the subject of much debate. Initially, the EPA determined that such discharges generally were exempt from the requirements of the CWA (at least when they were uncontaminated by any industrial or commercial activity). *See* 40 C.F.R. § 125.4 (1975).

The Court of Appeals for the District of Columbia, however, invalidated that regulation, holding that "the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402 [33 U.S.C. § 1342]." *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C.Cir.1977). "Following this decision, [the] EPA issued proposed and final rules covering storm water discharges in 1980, 1982, 1984, 1985 and 1988. These rules were challenged at the administrative level and in the courts." *American Mining Congress*, 965 F.2d at 763.

Ultimately, in 1987, Congress enacted the Water Quality Act amendments to the CWA. *See NRDC II*, 966 F.2d at 1296 ("Recognizing both the

environmental threat posed by storm water runoff and [the] EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987 containing amendments to the CWA.") (footnotes omitted). Under the Water Quality Act, from 1987 until 1994,[FN1] most entities discharging storm water did not need to obtain a permit. *See* 33 U.S.C. § 1342(p).

> FN1. As enacted, the Water Quality Act extended the exemption to October 1, 1992. Congress later amended the Act to change that date to October 1, 1994. *See* Pub.L. No. 102-580.

Although the Water Quality Act generally did not require entities discharging storm water to obtain a permit, it did require such a permit for discharges "with respect to which a permit has been issued under this section before February 4, 1987," 33 U.S.C. § 1342(p)(2)(A); discharges "associated with industrial activity," 33 U.S.C. § 1342(p)(2)(B); discharges from a "municipal separate sewer system serving a population of [100,000] or more," 33 U.S.C. § 1342(p)(2)(C) & (D); and "[a] discharge for which the Administrator ... determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States," 33 U.S.C. § 1342(p)(2)(E).

***1164** When a permit is required for the discharge of storm water, the Water Quality Act sets two different standards:

> (A) Industrial discharges
>
> Permits for discharges associated with industrial activity shall meet all applicable provisions of this section *and section 1311* of this title.
>
> (B) Municipal discharge
>
> Permits for discharges from municipal storm sewers-
>
> (i) may be issued on a system or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) *shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator ... determines appropriate for the control of such pollutants.*
>
> 33 U.S.C. § 1342(p)(3) (emphasis added).

C. *Application of Chevron*

[4] The EPA and Petitioners argue that the Water Quality Act is ambiguous regarding whether Congress intended for municipalities to comply strictly with state water-quality standards, under 33 U.S.C. § 1311(b)(1)(C). Accordingly, they argue that we must proceed to step two of *Chevron* and defer to the EPA's interpretation that the statute does require strict compliance. *See Zimmerman v. Oregon Dep't of Justice,* 170 F.3d 1169, 1173 (9th Cir.1999) ("At step two, we must uphold the administrative regulation unless it is arbitrary, capricious, or manifestly contrary to the statute.") (citation and internal quotation marks omitted), *cert. denied,* 531 U.S. 1189, 121 S.Ct. 1186, 149 L.Ed.2d 103, 68 USLW 3129 (1999).

Intervenors and *amici,* on the other hand, argue that the Water Quality Act expresses Congress' intent unambiguously and, thus, that we must stop at step one of *Chevron. See, e.g., National Credit Union Admin. v. First Nat'l Bank & Trust Co.,* 522 U.S. 479, 118 S.Ct. 927, 938-39, 140 L.Ed.2d 1 (1998) ("Because we conclude that Congress has made it clear that the *same* common bond of occupation must unite each member of an occupationally defined federal credit union, we hold that the NCUA's contrary interpretation is impermissible under the first step of *Chevron.*") (emphasis in original); *Sierra Club v. EPA,* 118 F.3d 1324, 1327

191 F.3d 1159, 30 Envtl. L. Rep. 20,116, 99 Cal. Daily Op. Serv. 7618, 1999 Daily Journal D.A.R. 9661, 1999 Daily Journal D.A.R. 12,369
(Cite as: 191 F.3d 1159)

(9th Cir.1997) ("Congress has spoken clearly on the subject and the regulation violates the provisions of the statute. Our inquiry ends at the first prong of *Chevron.*"). We agree with Intervenors and *amici:* For the reasons discussed below, the Water Quality Act unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C). That being so, we end our inquiry at the first step of the *Chevron* analysis.

[5][6] "[Q]uestions of congressional intent that can be answered with 'traditional tools of statutory construction' are still firmly within the province of the courts" under *Chevron. NRDC II,* 966 F.2d at 1297 (citation omitted). "Using our 'traditional tools of statutory construction,' *Chevron,* 467 U.S. at 843 n. 9, 104 S.Ct. 2778, 81 L.Ed.2d 694, when interpreting a statute, we look first to the words that Congress used." *Zimmerman,* 170 F.3d at 1173 (alterations, citations, and internal quotation marks omitted). "Rather than focusing just on the word or phrase at issue, we look to the entire statute to determine Congressional intent." *Id.* (alterations, citations, and internal quotation marks omitted).

As is apparent, Congress expressly required *industrial* storm-water discharges to comply with the requirements of 33 U.S.C. § 1311. *See* 33 U.S.C. § 1342(p)(3)(A) ("Permits for discharges associated with industrial activity *shall meet all applicable provisions of* this section and *section 1311* of this title.") (emphasis added). By incorporation, then, industrial*1165 storm-water discharges " *shall ... achiev[e] ... any more stringent limitation,* including those necessary to meet water quality standards, treatment standards or schedules of compliance, established pursuant to any State law or regulation (under authority preserved by section 1370 of this title)." 33 U.S.C. § 1311(b)(1)(C) (emphasis added); *see also* Sally A. Longroy, *The Regulation of Storm Water Runoff and its Impact on Aviation,* 58 J. Air. L. & Com. 555, 565-66 (1993) ("Congress further *singled out* industrial storm water dischargers, all of which are on the high-priority schedule, and requires them to satisfy all provisions of section 301 of the CWA [33 U.S.C. § 1311].... Section 301 further mandates that NPDES permits include requirements that receiving waters meet water quality based standards.") (emphasis added). In other words, industrial discharges must comply strictly with state water-quality standards.

Congress chose not to include a similar provision for municipal storm-sewer discharges. Instead, Congress required municipal storm-sewer discharges "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 ... determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii).

[7] The EPA and Petitioners argue that the difference in wording between the two provisions demonstrates ambiguity. That argument ignores precedent respecting the reading of statutes. Ordinarily, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (citation and internal quotation marks omitted); *see also United States v. Hanousek,* 176 F.3d 1116, 1121 (9th Cir.1999) (stating the same principle), *petition for cert. filed,* 68 USLW 3138 (Aug. 23, 1999). Applying that familiar and logical principle, we conclude that Congress' choice to require industrial storm-water discharges to comply with 33 U.S.C. § 1311, but not to include the same requirement for municipal discharges, must be given effect. When we read the two related sections together, we conclude that 33 U.S.C. § 1342(p)(3)(B)(iii) does not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

Application of that principle is significantly strengthened here, because 33 U.S.C. §

191 F.3d 1159, 30 Envtl. L. Rep. 20,116, 99 Cal. Daily Op. Serv. 7618, 1999 Daily Journal D.A.R. 9661, 1999 Daily Journal D.A.R. 12,369
(Cite as: 191 F.3d 1159)

1342(p)(3)(B) *is not merely silent* regarding whether municipal discharges must comply with 33 U.S.C. § 1311. Instead, § 1342(p)(3)(B)(iii) *replaces* the requirements of § 1311 with the requirement that municipal storm-sewer dischargers "reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator ... determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii). In the circumstances, the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

Indeed, the EPA's and Petitioners' interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii) would render that provision superfluous, a result that we prefer to avoid so as to give effect to all provisions that Congress has enacted. *See Government of Guam ex rel. Guam Econ. Dev. Auth. v. United States,* 179 F.3d 630, 634 (9th Cir.1999) ("This court generally refuses to interpret a statute in a way that renders a provision superfluous."), *as amended,* 1999 WL 604218 (9th Cir. Aug.12, 1999). As all parties concede, § 1342(p)(3)(B)(iii) creates a lesser standard than § 1311. Thus, if § 1311 continues to apply to municipal storm-sewer discharges,***1166** the more stringent requirements of that section always would control.

Contextual clues support the plain meaning of § 1342(p)(3)(B)(iii), which we have described above. The Water Quality Act contains other provisions that undeniably exempt certain discharges from the permit requirement altogether (and therefore from § 1311). For example, "[t]he Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture." 33 U.S.C. § 1342(*l*)(1). Similarly, a permit is not required for certain storm-water runoff from oil, gas, and mining operations. *See* 33 U.S.C. § 1342(*l*)(2). Read in the light of those provisions, Congress' choice to exempt municipal storm-sewer discharges from strict compliance with § 1311 is not so unusual that we should hesitate to give effect to the statutory text, as written.

Finally, our interpretation of § 1342(p)(3)(B)(iii) is supported by this court's decision in *NRDC II.* There, the petitioner had argued that "the EPA has failed to establish substantive controls for municipal storm water discharges as required by the 1987 amendments." *NRDC II,* 966 F.2d at 1308. This court disagreed with the petitioner's interpretation of the amendments:

> Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water. In the 1987 amendments, *Congress retained the existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge.*

Id. (emphasis added). The court concluded that, under 33 U.S.C. § 1342(p)(3)(B)(iii), " *Congress did not mandate a minimum standards approach.* " *Id.* (emphasis added). The question in *NRDC II* was not whether § 1342(p)(3)(B)(iii) required strict compliance with state water-quality standards, *see* 33 U.S.C. § 1311(b)(1)(C). Nonetheless, the court's holding applies equally in this action and further supports our reading of 33 U.S.C. § 1342(p).

In conclusion, the text of 33 U.S.C. § 1342(p)(3)(B), the structure of the Water Quality Act as a whole, and this court's precedent all demonstrate that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

D. *Required Compliance with 33 U.S.C. § 1311(b)(1)(C)*

[8] We are left with Intervenors' contention that the EPA may not, under the CWA, require strict compliance with state water-quality standards, through numerical limits or otherwise. We disagree.

Although Congress did not require municipal

storm-sewer discharges to comply strictly with § 1311(b)(1)(C), § 1342(p)(3)(B)(iii) states that "[p]ermits for discharges from municipal storm sewers ... shall require ... *such other provisions as the Administrator ... determines appropriate for the control of such pollutants.*" (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate. As this court stated in *NRDC II,* "Congress gave the administrator discretion to determine what controls are necessary.... NRDC's argument that the EPA rule is inadequate cannot prevail in the face of the clear statutory language." 966 F.2d at 1308.

Under that discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. The EPA has adopted an interim approach, which "uses best management practices (BMPs) in first-round storm water permits ... to provide for the attainment of water quality standards." The EPA applied that approach to the permits at issue here. Under 33 U.S.C. § 1342(p)(3)(B)(iii), the EPA's choice to include ***1167** either management practices or numeric limitations in the permits was within its discretion. *See NRDC II,* 966 F.2d at 1308 ("Congress did not mandate a minimum standards approach or specify that [the] EPA develop minimal performance requirements."). In the circumstances, the EPA did not act arbitrarily or capriciously by issuing permits to Intervenors.

PETITION DENIED.

C.A.9,1999.
Defenders of Wildlife v. Browner
191 F.3d 1159, 30 Envtl. L. Rep. 20,116, 99 Cal. Daily Op. Serv. 7618, 1999 Daily Journal D.A.R. 9661, 1999 Daily Journal D.A.R. 12,369

END OF DOCUMENT

TAB NO. 5

813 F.2d 1480, 25 ERC 1801, 55 USLW 2598, 17 Envtl. L. Rep. 20,547
(Cite as: 813 F.2d 1480)

United States Court of Appeals,
Ninth Circuit.
SIERRA CLUB, a California non-profit corporation, Plaintiff-Appellant,
v.
UNION OIL COMPANY OF CALIFORNIA, a California corporation, et al., Defendants-Appellees.

No. 85–2868.
Argued and Submitted Dec. 10, 1986.
Decided April 3, 1987.

Citizen enforcement action was brought against National Pollutant Discharge Elimination System permittee alleging exceedances of permit limitations. The United States District Court for the Northern District of California, Samuel Conti, J., held for permittee, and citizen group appealed. The Court of Appeals, Pregerson, Circuit Judge, held that: (1) permittee was not entitled to assert upset defense, under either federal or state law, which was not otherwise included in its permit, and (2) when permittee's reports indicate that permittee has exceeded permit limitations, permittee may not impeach its own reports by showing sampling error.

Affirmed in part; reversed in part; and remanded.

West Headnotes

[1] Administrative Law and Procedure 15A 229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of Administrative Remedies. Most Cited Cases

Party must exhaust its administrative remedies before it can obtain judicial review of an agency decision.

[2] Environmental Law 149E 208

149E Environmental Law
149EV Water Pollution
149Ek204 Compliance and Enforcement
149Ek208 k. Defenses. Most Cited Cases
(Formerly 199k25.7(17.1), 199k25.7(17) Health and Environment)

National Pollutant Discharge Elimination System permittee was precluded from raising upset defense where such defense was not included in its state-issue permit and permittee failed to exhaust its administrative remedies in attempt to have permit modified; federal regulations requiring inclusion of upset defense in federally issued permits did not provide permittee with automatic upset defense because state was not required to include such defenses in its permits. Federal Water Pollution Control Act Amendments of 1972, §§ 101–517, 510, as amended, 33 U.S.C.A. §§ 1251–1376, 1370.

[3] Environmental Law 149E 208

149E Environmental Law
149EV Water Pollution
149Ek204 Compliance and Enforcement
149Ek208 k. Defenses. Most Cited Cases
(Formerly 199k25.7(17.1), 199k25.7(17) Health and Environment)

Under California law, National Pollutant Discharge Elimination System permittee was not entitled to inclusion of upset defense in its permit where permittee failed to exhaust administrative remedies in attempting to have state-issued permit modified; state agency's alleged failure to comply with statute precluding it from omitting upset defense from permit unless it made proper findings of necessity for doing so did not result in implicit insertion of upset defense into permit. West's Ann.Cal.Water Code § 13377.

[4] Environmental Law 149E 208

149E Environmental Law

149EV Water Pollution
149Ek204 Compliance and Enforcement
149Ek208 k. Defenses. Most Cited Cases
(Formerly 199k25.7(17.1), 199k25.7(17) Health and Environment)

Even if National Pollutant Discharge Elimination System permittee was entitled to upset defense, such defense was not applicable to exceedances of water quality-based permit limitations; defense was only applicable with respect to technology-based permit exceedances.

[5] Environmental Law 149E ⚿208

149E Environmental Law
149EV Water Pollution
149Ek204 Compliance and Enforcement
149Ek208 k. Defenses. Most Cited Cases
(Formerly 199k25.7(17.1), 199k25.7(17) Health and Environment)

Even if National Pollutant Discharge Elimination System permittee was entitled to assert upset defense, such defense was not applicable to noncompliance caused by operational error or by improperly designed or inadequate treatment facilities.

[6] Environmental Law 149E ⚿208

149E Environmental Law
149EV Water Pollution
149Ek204 Compliance and Enforcement
149Ek208 k. Defenses. Most Cited Cases
(Formerly 199k25.7(17.1), 199k25.7(17) Health and Environment)

In order for National Pollutant Discharge Elimination System permittee to assert upset defense, in response to claim that it violated terms of permit, permittee must show that upset occurred and that permittee can show cause, that facility was properly run at time of upset, that permittee provided proper notice of upset, and that permittee conformed with remedial requirements.

[7] Environmental Law 149E ⚿208

149E Environmental Law
149EV Water Pollution
149Ek204 Compliance and Enforcement
149Ek208 k. Defenses. Most Cited Cases
(Formerly 199k25.7(17.1), 199k25.7(17) Health and Environment)

Excusal of National Pollutant Discharge Elimination System permittee's permit exceedances on ground that they "were caused by very unusual human errors that are excusable in light of time span and number of acceptable readings," was improper; the Clean Water Act and regulations promulgated under it make no provision for "rare" violations. Federal Water Pollution Control Act Amendments of 1972, §§ 101–517, as amended, 33 U.S.C.A. §§ 1251–1376.

[8] Environmental Law 149E ⚿197

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek197 k. Conditions and Limitations. Most Cited Cases
(Formerly 199k25.7(17.1), 199k25.7(17) Health and Environment)

National Pollutant Discharge Elimination System permittee violated permit's prohibition against creating conditions of visible oil in receiving waters where visible oil was observed on water near one of permittee's monitoring stations, though there was no evidence of visible oil on surrounding bay; permittee's permit limitation applied to "waters of the state," and not merely to the bay.

[9] Environmental Law 149E ⚿221

149E Environmental Law
149EV Water Pollution
149Ek215 Administrative Agencies and Proceedings
149Ek221 k. Compliance and Enforcement Proceedings. Most Cited Cases
(Formerly 199k25.7(17.1), 199k25.7(17) Health and Environment)

When National Pollutant Discharge Elimination permittee's reports indicate that permittee has

exceeded permit limitations, permittee may not impeach its own reports by showing sampling error.

[10] Federal Civil Procedure 170A ⚿851

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(E) Amendments
170Ak851 k. Form and Sufficiency of Amendment. Most Cited Cases

Whether citizen group's claims of permit exceedances by National Pollutant Discharge Elimination System permittee were time barred presented factual question precluding summary denial of group's motion to add alleged exceedances to its complaint. Federal Water Pollution Control Act Amendments of 1972, § 505, as amended, 33 U.S.C.A. § 1365.

[11] Federal Civil Procedure 170A ⚿841

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(E) Amendments
170Ak839 Complaint
170Ak841 k. New Cause of Action in General. Most Cited Cases

Citizen group, in enforcement action against National Pollutant Discharge Elimination System permittee, was not entitled to amend complaint in order to add alleged violations where group knew or should have known of facts underlying amendment when original complaint was filed.

[12] Federal Civil Procedure 170A ⚿840

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(E) Amendments
170Ak839 Complaint
170Ak840 k. Time for Amendment. Most Cited Cases

Delay in offering amendment to complaint alleging new violations, in citizen enforcement action against National Pollutant Discharge Elimination System permittee, did not justify denying leave to amend where permittee was on notice of facts contained in amendment and thus was not prejudiced.

***1482** Roger Beers, Stephan Volker, San Francisco, Cal., for plaintiff-appellant.

Patrick J. Cafferty, Jr., San Francisco, Cal., for defendants-appellees.

Amelia S. Salzman, Washington, D.C., for amicus curiae.

Appeal from the United States District Court for the Northern District of California.

Before CHOY, GOODWIN and PREGERSON, Circuit Judges.

PREGERSON, Circuit Judge:

The Sierra Club brought a citizen enforcement action against Union Oil Company of California ("Union Oil") alleging that Union Oil violated the terms of its National Pollutant Discharge Elimination System ("NPDES") permit on seventy-six occasions. After a five-day trial, the district court found no violations of the permit. The court excused some of the reported exceedances of permit limitations by application of an upset defense (an excuse for permit violations when circumstances occur that are beyond the reasonable control of the permittee), some on the ground that reports of exceedances were mistakes caused by sampling error, and some by application of a purported de minimus exception to the Federal Water Pollution Control Act ("the Act"). Sierra Club appeals from these rulings and from the district court's denial of its motion for leave to file an amended complaint before trial. We reverse.

Sierra Club's original complaint alleged that Union Oil exceeded its permit limitations on seventy-six occasions during the period between 1979 and 1983. Union Oil's principal defense is that approximately fifty of the exceedances were due to circumstances beyond Union Oil's reasonable con-

trol: unusually high levels of rainfall during the winters of 1981–1982 and 1982–1983. Union Oil argues that because these exceedances were caused by exceptional circumstances, Union Oil is entitled to assert an upset defense. Although Union Oil's permit contained no upset defense, Union Oil argues that *Marathon Oil Co. v. Environmental Protection Agency,* 564 F.2d 1253 (9th Cir.1977), and 40 C.F.R. § 122.41 (1986), necessitate the inclusion of an upset defense in the permit. Sierra Club counters by asserting that because Union Oil did not contest the terms of its permit when issued and reissued, Union Oil is barred by the doctrine of exhaustion of administrative remedies from seeking to amend the permit during this enforcement proceeding.

Union Oil's second major defense is that several of the permit exceedances were caused by sampling error, meaning that although reported as exceedances, they were in fact not exceedances. Sierra Club and the Environmental Protection Agency ("EPA") as amicus curiae argue that because accurate self-monitoring is critical to the effectiveness of the Federal Water Pollution Control Act, sampling errors should not be recognized as valid excuses for asserted exceedances of NPDES permits.

This case raises significant questions about the operation of the Federal Water Pollution Control Act. In particular, we must consider the issue of the states' power under the Act to impose more stringent water regulations than those imposed by the Environmental Protection Agency. We must also consider the level to which the viability of a self-monitoring system such as the NPDES requires courts to hold permittees accountable for all errors in reporting.

*1483 BACKGROUND

I. *Statutory Scheme*

The objective of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1376 (1986), is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As amended in 1972, the Act declares that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 125(a)(1). In furtherance of these goals, the Act prohibits the discharge of all pollutants except as authorized by the Environmental Protection Agency. 33 U.S.C. § 1311(a).

The Act requires that the EPA promulgate "effluent limitation" standards [FN1] for numerous categories of industrial polluters. These standards are principally technology-based, limiting discharges to levels achievable by use of "the best practicable control technology currently available." 33 U.S.C. § 1311(b)(1)(A). Water quality standards are used as a supplementary basis for effluent limitations, so that numerous dischargers, despite their individual compliance with technology-based limitations, can be regulated to prevent water quality from falling below acceptable levels. *Environmental Protection Agency v. California ex rel. State Water Resources Control Board,* 426 U.S. 200, 205 n. 12, 96 S.Ct. 2022, 2025 n. 12, 48 L.Ed.2d 578 (1976).

> FN1. An "effluent limitation" is "any restriction established by a State or the [EPA] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources ... including schedules of compliance." 33 U.S.C. § 1362(11). A "point source" is "any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Under the National Pollutant Discharge Elimination System, 33 U.S.C. § 1342, the EPA issues permits to individual dischargers. Under the permit, the generally applicable effluent limitations and other standards become the obligation of the individual discharger. *Environmental Protection Agency v. California,* 426 U.S. at 205, 96 S.Ct. at 2025. The Act requires that each discharger holding a NPDES permit monitor and report on its compliance with its permit. Each discharger must install,

use, and maintain monitoring equipment and must sample its effluents. 33 U.S.C. § 1318(a)(4)(A). The discharger must report the results of its self-monitoring to the EPA and the state agency that issues the permit. These self-monitoring reports are to be submitted at intervals specified in the permit. 40 C.F.R. § 122.41(1)(4).

In accordance with the Act's policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," 33 U.S.C. § 1251(b), states that follow the procedures outlined in the Act are authorized to issue NPDES permits to discharging entities within the state. 33 U.S.C. §§ 1251(b), 1342(b). All states must comply with the Act and with the EPA's regulations, but a state may adopt its own effluent limitations and standards so long as they are not less stringent than the EPA's correlative limitations and standards. 33 U.S.C. § 1370. Before a state issues any NPDES permit, it must transmit a copy of the proposed permit to the federal EPA Administrator. The EPA Administrator may object within ninety days to the issuance of the proposed permit and subject it to a review process. 33 U.S.C. § 1342(d)(2).

Actions to enforce the permit terms against the permittee may be brought by the EPA, 33 U.S.C. § 1319, or by concerned citizens, 33 U.S.C. § 1365. The Act provides for criminal and civil penalties to be imposed, with civil fines ranging as high as $10,000 per day for each violation. 33 U.S.C. § 1319(d).

The original regulations promulgated under the Act did not provide for any exceptions to NPDES permit terms when permit exceedances occurred because of conditions outside of the reasonable control of the discharger. In 1977, however, this court determined that, under some circumstances, the Act requires that an upset defense be made available to permittees. In *Marathon Oil,* 564 F.2d at 1272–73, the EPA issued a permit to Marathon Oil for its ***1484** offshore oil platforms and onshore facilities, but, in accordance with normal policy, did not include any upset provision in the permit. Marathon requested review by the EPA Regional Administrator and then by the EPA Administrator, challenging the terms of the permit and complaining, inter alia, of the absence of an upset provision. When the EPA Administrators affirmed the permit containing no upset provision, Marathon appealed to this court, as allowed under 33 U.S.C. § 1369(b). We remanded the case with instruction to the EPA to insert an upset provision in Marathon's permit.[FN2] *Marathon Oil,* 564 F.2d at 1272–73.

FN2. In support of this holding we stated:

> The Federal Water Pollution Control Act requires point sources of pollution to utilize the "best practicable control technology currently available" prior to 1983. The EPA cannot impose a higher standard without violating the Control Act. And yet the permits as currently written do exactly that.
>
> ....
>
> ... The EPA is free in writing the formal upset provision to place the burden on the permit holder of producing relevant data and proving that the upset could not have been prevented.
>
> *Marathon Oil,* 564 F.2d at 1272–73.

After *Marathon Oil* was decided, the EPA amended 40 C.F.R. § 122.41 to include a formal upset provision. The section provides for incorporating the upset defense into all NPDES permits, either explicitly or by reference to the relevant regulations. It defines "upset" as "an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee." 40 C.F.R. § 122.41(n). The scope of the upset defense under the section does not include noncompliance caused by "operational error, improperly designed treatment

facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation." *Id.* The regulation also imposes stringent procedural requirements for asserting the upset defense and places the burden of proof upon the party claiming the defense. *Id.*

The states' role relative to the conditions (one of which is the upset defense) described in 40 C.F.R. § 122.41 is set out in 40 C.F.R. § 123.25. That section provides that states may omit or modify any of section 122.41's conditions to impose more stringent requirements. 40 C.F.R. § 123.25(a)(12). The section concludes by stating:

> NOTE: States need not implement provisions identical to the above listed provisions. Implemented provisions must, however, establish requirements at least as stringent as the corresponding listed provisions.
>
> ....
>
> For example, a State may impose more stringent requirements in an NPDES program by *omitting the upset provision* of § 122.41 or by requiring more prompt notice of an upset.
>
> 40 C.F.R. § 123.25(a) (emphasis added).

II. *Facts*

Union Oil operates an oil refinery that discharges treated wastewater into the San Pablo Bay (at the north end of San Francisco Bay) from two onshore monitoring stations, referred to as E–001 and E–004. Wastewater discharged through E–001 consists solely of non-contact cooling water, which is saltwater taken from the Bay used primarily to cool refinery equipment containing heated oil without coming into contact with the oil. Wastewater discharged through E–004 contains non-contact cooling water, process wastewater, and stormwater runoff. The process wastewater consists of water contaminated with refining wastes, primarily oil, and a small amount of wastewater from sinks and toilets at the refinery.

For treating the process wastewater and stormwater runoff, the refinery uses a sewer system that routes the water to the wastewater treatment plant (Unit 100). In 1977, Union Oil installed biological treatment equipment, which divides the combined process wastewater-stormwater stream into two separate waste streams and provides different treatment for each stream. The first waste stream, known as the "segregated" waste stream, contains high concentrations of pollutants and is ***1485** routed to the wastewater treatment plant via a separate pipe. The segregated stream receives special pretreatment, one or two types of biological treatment in Unit 100, and finally, treatment by the activated sludge-clarifier system, known as the "bioplant." The second waste stream, known as the "unsegregated" waste stream, contains all of the remaining process wastewater and stormwater. The unsegregated waste stream is routed to Unit 100 through a combined sewer system. At Unit 100 this stream is first treated in a system designed to remove both oils and solids from the wastewater. The system has storm basins to store excess flows from the combined sewer system during periods of heavy rainfall. After the unsegregated wastestream undergoes this preliminary treatment, it, along with the segregated waste stream, receives biological treatment in the bioplant.

The biological treatment system has a design capacity of 2500 gallons per minute and is designed to provide treatment at all times to the segregated stream and, under normal weather conditions, to most of the unsegregated waste stream. When the quantity of water to be treated exceeds this level of 2500 gallons per minute, the system automatically treats all of the segregated waste stream and as much of the unsegregated stream as possible. The rest of the unsegregated stream is routed around the bioplant and is later combined with the water that has been treated in the bioplant. As a result, during heavy storms, the water released from the plant may contain pollutants in quantities greater than those allowed under the permit.

813 F.2d 1480, 25 ERC 1801, 55 USLW 2598, 17 Envtl. L. Rep. 20,547
(Cite as: 813 F.2d 1480)

Union Oil possesses an NPDES permit issued by the California Regional Water Quality Control Board ("California Water Board"). The initial permit, issued in November 1974, did not contain an upset provision. Union Oil petitioned the State Water Resources Control Board for review of the permit, specifically complaining of the absence of an upset provision. The State Board upheld the permit, stating that providing an upset defense is discretionary with the Regional Board. Union Oil did not appeal from the State Board's ruling. The permit was amended in 1977 and 1979, and a new permit was issued in 1980. The California Water Board never inserted an upset provision in Union Oil's permit, either explicitly or by reference to the relevant C.F.R. provisions. Union Oil never again requested review of the permit.

Union Oil's permit for the period in question contains provisions to bring it into compliance with the Federal Water Pollution Control Act and with more stringent state pollution standards. Some of these restrictions are based on the best practicable technology currently achievable, and some are based on standards of water quality. The permit contains a specific provision for an upward adjustment of certain effluent limitations for periods of heavy rainfall, by which additional contaminants may be discharged in proportion to the stormwater involved.

On June 4, 1984, Sierra Club filed this citizen suit pursuant to 33 U.S.C. § 1365, seeking injunctive relief and the imposition of civil penalties because Union Oil violated its NPDES permit. Based upon Sierra Club's review of wastewater test results contained in Union Oil's Discharge Monitoring Reports (DMRs) and Non-Compliance Reports (NCRs), Sierra Club alleged seventy-six violations of the permit limitations during the five-year period from 1979 to 1983. Union Oil filed a motion for summary judgment on the ground that many of the permit violations occurred as a result of heavy rainfall during the winters of 1981–1982 and 1982–1983, thus qualifying as upsets under 40 C.F.R. § 122.41(n). The trial court denied the motion.

Trial was set for September 9, 1985. Pursuant to Sierra Club's request for a continuance, the court continued the trial to October 29, 1985. On August 27, 1985, Sierra Club filed a motion for leave to file an amended complaint. The amended complaint included allegations of violations occurring before March 30, 1979. Sierra Club argued that these claims were not barred by the five-year statute of limitations because Sierra Club had been unaware of the facts underlying the claims until December 14, 1979, and because Union*1486 Oil had committed fraud in concealing the violations.[FN3] Sierra Club also filed a motion for partial summary judgment on the ground that Union Oil could not, as a matter of law, file reports reflecting that it had exceeded its permit limitations and then later challenge its own reports with evidence of sampling errors. The court set hearing of the motions for October 11, 1985. After this date was set, Sierra Club filed a motion for reconsideration of a magistrate's order denying discovery as to events occurring before 1979, which is beyond the federal statute of limitations period. On October 17, 1985, the court denied Sierra Club's motion for partial summary judgment. It also denied Sierra Club's motions for leave to file its amended complaint and for reconsideration of the magistrate's order; the court denied the motions on the grounds of delay, prejudice to defendants, and the fact that some of the additional allegations were based on documents available to plaintiff when the original complaint was filed.

> FN3. Sierra Club argued during the hearing on its motion to amend that no statute of limitations applied to Federal Water Pollution Control Act causes of action. The district court rejected this notion, and Sierra Club has not renewed the argument on appeal.

After five days of trial, the district court found in favor of Union Oil on all points. The court found that thirteen of the exceedances were not even actu-

al exceedances "because the applicable permit limitation either was not exceeded, or because the result was caused by error in wastewater sampling or analysis." Findings of Fact and Conclusions of Law ("Memorandum") at 8. The court found that fifty of the exceedances were excusable under an upset defense. *Id.* at 8, 10. Finally, it found that "a few exceedances (minor in magnitude) [presumably the thirteen remaining exceedances] were caused by very unusual human errors that are excusable in light of time span and number of acceptable readings." *Id.* at 9–10. Sierra Club brought a timely appeal.

ANALYSIS

I. *Upset Defense*

We hold that the district court erred in allowing Union Oil to raise the upset defense in this enforcement proceeding. Moreover, the district court misapplied the upset defense as codified in 40 C.F.R. § 122.41(n).

A. *Union Oil's Qualifications to Assert the Defense*

1. *Federal Law*

The issue whether Union Oil was entitled under the Act to raise the upset defense involves interpretation of federal law. The district court's findings on this issue are therefore reviewable de novo. *See, e.g., Trustees of Amalgamated Insurance Fund v. Geltman Industries,* 784 F.2d 926, 929 (9th Cir.), *cert. denied,* 479 U.S. 822, 107 S.Ct. 90, 93 L.Ed.2d 42 (1986).

The district court found that Union Oil was entitled to assert the upset defense under *Marathon Oil,* 564 F.2d at 1253, 1272–73, and under 40 C.F.R. § 122.41. We disagree.

This is an enforcement action in which Sierra Club alleged that Union Oil failed to comply with the terms of a permit issued by the California Water Board. Union Oil was essentially asking the district court to modify its permit to include an upset provision. This the district court was not entitled to do. To obtain modification of its permit, Union Oil should have acted through the proper administrative channels. Because Union Oil failed to exhaust its administrative remedies, it is bound by the terms of the permit issued by the California Water Board.

[1] A party must exhaust its administrative remedies before it can obtain judicial review of an agency decision. *McKart v. United States,* 395 U.S. 185, 193, 89 S.Ct. 1657, 1662, 23 L.Ed.2d 194 (1969). The purpose of the exhaustion rule is "to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." ***1487** *Parisi v. Davidson,* 405 U.S. 34, 37, 92 S.Ct. 815, 817, 31 L.Ed.2d 17 (1972). At the time the permit was issued and reissued, Union Oil had several administrative routes that it could have taken to protest the permit's terms. The NPDES program authorizes permittees to seek modifications of their permits in response to current judicial decisions and new EPA regulations. 40 C.F.R. § 122.62. In addition, when a state permit issuer submits a proposed permit to the EPA Administrator for review, the Administrator is authorized to object to the permit's terms. 33 U.S.C. § 1342(d). Review of the Administrator's actions may be had in the appropriate circuit court of appeals. 33 U.S.C. § 1369(b)(1). The Act further provides that "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement." [FN4] 33 U.S.C. § 1369(b)(2).

> FN4. Marathon Oil Company in *Marathon Oil,* 564 F.2d at 1253, followed the administrative procedure as mandated. In that case, this court reviewed the Administrator's decision to exclude the upset defense from a permit. *Id.* at 1259.

[2] Union Oil failed to seek any type of administrative review of its permit's terms since its appeal of the original permit in 1974. If Union Oil desired modification of its permit in the wake of *Marathon*

813 F.2d 1480, 25 ERC 1801, 55 USLW 2598, 17 Envtl. L. Rep. 20,547
(Cite as: 813 F.2d 1480)

Oil or the adoption of 40 C.F.R. § 122.41, it should have petitioned the California Water Board for review of the permit. When the EPA Administrator failed to object to the permit's terms, Union Oil should have appealed from that decision. Union Oil failed to follow the administrative steps that would have allowed the issuing agency to address Union Oil's claims. Union Oil only initiated criticism of its permit in an enforcement action before the district court. Therefore, Union Oil failed to exhaust its administrative remedies and was precluded from raising the upset defense in the district court.

Union Oil argues that the doctrine of exhaustion of administrative remedies does not apply here because the upset defense was available to Union Oil under *Marathon Oil* and 40 C.F.R. § 122.41. The upset defense is not, however, an implicit element of Union Oil's permit under *Marathon Oil* or 40 C.F.R. § 122.41. *Marathon Oil* stated that the absence of an upset defense from a *federally* issued permit violated the Federal Water Pollution Control Act. *Marathon Oil,* 564 F.2d at 1272–73. Therefore, when the EPA itself issues a permit, it must, under *Marathon Oil,* include an upset defense.[FN5] In this case, however, a state agency, not the EPA, issued the permit. The Act explicitly allows states to substitute federal effluent limitations and standards with more stringent state limitations and standards. 33 U.S.C. § 1370. The state's denial of the upset defense is an example of a state imposing standards more stringent than the correlative federal standards. Therefore, the absence of the upset defense in Union Oil's permit does not violate the Federal Water Pollution Control Act, and *Marathon Oil* does not mandate its presence in the permit.[FN6]

FN5. We make no determination as to whether *Marathon Oil* applies only to technology-based permit exceedances or to both water quality-based and technology-based exceedances. In addition, we do not intend to imply that an enforcement action is ever the appropriate forum for challenging the terms of an NPDES permit.

FN6. *Marathon Oil* 's principal point on this subject is that once a discharger employs the best practicable technology, it is unreasonable to require 100% compliance with the effluent limitations described in the permit. However, the Act entitles the states to select the standards that dischargers must achieve, 33 U.S.C. § 1370. The language of the Act indicates that striving for the utter abolition of pollution is an acceptable approach for states to take. The Act states as one of its objectives the elimination of discharge of pollutants by 1985. 33 U.S.C. § 1251(a)(1). It also recognizes the primary rights and responsibilities of states "to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).

The EPA's regulations promulgated under the Act likewise do not provide Union Oil with an automatic upset defense. 40 C.F.R. § 122.41 states that the upset defense must be incorporated into the permit either expressly or by reference to the relevant C.F.R. sections. Because Union Oil's permit contains neither an express incorporation nor an incorporation by reference, ***1488** the defense is not a part of the permit. In addition, while the EPA under this section must include the upset defense in all permits it issues, the regulations explicitly provide that states may omit upset defenses from permits. 40 C.F.R. § 123.25(a).

2. *California law*

[3] Union Oil contends that even if federal law does not mandate the inclusion of an upset defense, California law does. Because this question involves the interpretation of state and federal law, we review the district court's determinations de novo. *In re McLinn,* 739 F.2d 1395, 1397 (9th Cir.1984) (en banc) (state law); *Trustees of Amalgamated Insurance Fund,* 784 F.2d at 929 (federal law).

Union Oil argues that the California Water Board was not permitted under California law to omit the upset defense from a permit unless it made proper findings of necessity for doing so. Again,

Union Oil is improperly making this argument during an enforcement proceeding. Union Oil should have pursued its administrative remedies before the state agency and the EPA. Union Oil's failure to exhaust its administrative remedies bars it from criticizing the permit's terms in this action. Union Oil argues, however, that under California law, the upset defense is an automatic element of Union Oil's permit.

California Water Code § 13377 (West Supp.1987) provides:

> [T]he state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements ... which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.

Union Oil argues: (1) that the California Water Board violated this law by issuing a permit without an upset defense when it failed to make findings of the necessity of this more stringent standard, (2) that when a state fails to pass a more stringent standard, the federal standard governs, and (3) that the governing federal standard is 40 C.F.R. § 122.41(n), which provides an upset defense. Thus, Union asserts that the federal upset defense regulation applies to Union Oil's permit.

Union Oil's argument is incorrect. California Water Code § 13377 governs the state agency's setting of standards,[FN7] but the fact that the agency may not have complied with the statute does not implicitly insert an upset provision into Union Oil's permit. The state's method of adopting a more stringent standard should be subject to scrutiny only at the permit issuance stage. Moreover, even if the federal upset regulation did apply, it would not require that an upset defense be inserted into Union Oil's permit because 40 C.F.R. § 122.41 requires that the defense be inserted either explicitly or by reference to the relevant regulations, neither of which occurred here.

> FN7. The statute as written does not, as Union Oil argues, necessarily require "findings" by the state showing its more stringent standards to be necessary.
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> *See* Appellee's Brief at 41. In the case cited by Union Oil, *Southern California Edison Co. v. State Water Resources Control Board,* 116 Cal.App.3d 751, 172 Cal.Rptr. 306 (1981), the California Water Board set limitations that were more restrictive than those contained in California's own Ocean Plan. *Id.* at 758–59, 172 Cal.Rptr. at 310. *Southern California Edison* does not address the situation in which a California permit applies standards more stringent than the federal Act but in keeping with California law, and thus does not govern this case.

We hold that Union Oil was not entitled to use the upset defense to excuse any of the exceedances of its NPDES permit limitations.

B. *District Court's Application of the Upset Defense*

The district court misapplied the upset defense to Union Oil's alleged permit violations. The upset defense, as codified at 40 C.F.R. § 122.41(n), protects a permittee from liability only when the permittee proves that highly unusual circumstances ***1489** made preventing pollution difficult. The regulation imposes numerous stringent requirements, both substantive and procedural, that must be satisfied before a court may allow use of the upset defense.

The district court found in the broadest terms that all of Union Oil's permit violations were excusable on upset defense and other grounds. The court applied the upset defense, as codified at 40 C.F.R. §

813 F.2d 1480, 25 ERC 1801, 55 USLW 2598, 17 Envtl. L. Rep. 20,547
(Cite as: 813 F.2d 1480)

122.41(n), only in adopting its definition of "upset" as "an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee." 40 C.F.R. § 122.41(n). The district court ignored both substantive and procedural requirements for application of the upset defense. The court's interpretations of the regulation are conclusions of law that are reviewable de novo. *Trustees of Amalgamated Insurance Fund,* 784 F.2d at 929. The district court's finding of fact are reviewable on a clearly erroneous basis. *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948).

1. *Substantive Deficiencies*

a. *Water Quality-Based Exceedances*

[4] The district court erred in applying the upset defense to exceedances of water quality-based permit limitations. The EPA regulation permits use of the upset defense only with respect to *technology-based* permit exceedances. 40 C.F.R. § 122.41(n)(1).

The federal Administrator and state boards may, under the Act, impose water quality-based standards or technology-based standards.[FN8] The federal government establishes technology-based effluent standards based on polluters' technological and economic ability to control effluent levels. Technology-based limitations require application of the best practicable control technology currently available, as defined by the Administrator. *See* 33 U.S.C. § 1311(b)(1)(A). These limitations require that each permittee within a given industrial subcategory restrict its effluent levels to certain numerical amounts.

> FN8. For an enlightening discussion of technology-based and water quality-based permit limitations, see Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act,* 36 Vand.L.Rev. 1167 (1983).

States establish water quality standards that specify the uses to be made of a body of water and the maximum levels of pollutants allowable in view of those uses. Water quality standards are designed to ensure the survival of wildlife in navigable waters and to protect recreational activities in and on the water. 33 U.S.C. § 1312(a). In contrast with technology-based standards, which are based on the feasibility of limiting effluent levels, water quality-based limitations relate to the environmental effects of different effluent levels.

While the EPA considered applying the upset defense to water quality-based exceedances, *see* 47 Fed.Reg. 52,079 (1982), it later rejected this application as impractical:

> [I]t is apparent that it is not practical to extend the upset defense to violations of water quality-based limitations. Failures of pollution control equipment can occur on water quality limited stream segments. However, water quality standards are established to protect uses of the water, and are legally required to be met at all times.... Any defense for upsets must ensure that water quality standards are achieved at all times throughout the upset.... [and] would require a showing that water quality standards continued to be achieved in all stream segments, and for all pollutants, potentially affected by the discharge.
>
> ....
>
> Since it would be almost impossible for a permittee to establish the upset defense, the proposed extension [to water quality-based limitations] would be illusory....
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> 49 Fed.Reg. 38,038 (1984).

The record indicates that at least twenty-two of the permit violations were water quality-based, involving visible oil on San Pablo Bay, settleable solids, and coliform violations. The district court erred in holding that the upset defense as provided in *1490 40 C.F.R. § 122.41 excused these viola-

tions of the permit's water quality-based limitations.

b. *Operator Error*

[5] The district court stated that "a few exceedances (minor in magnitude), during the five-year period at issue, were caused by very unusual human errors that are excusable in light of time span and number of acceptable readings." Memorandum at 9–10. The court does not make clear whether it makes this analysis under the upset defense provision. If the analysis was based upon the upset defense, it was clear error. The upset provision clearly states that noncompliance caused by operational error is not an upset. 40 C.F.R. § 122.41(n). We conclude below that these exceedances were not excusable on any other grounds.

c. *Inadequate Facilities*

The upset provision does not apply to noncompliance caused by improperly designed or inadequate treatment facilities. 40 C.F.R. § 122.41(n)(1) . The record indicates that Union Oil's facilities were not adequate to handle heavy rainfall. Union Oil's supervisor of environmental control engineering stated in his declaration in support of Union Oil's motion for summary judgment that the capacity of Union Oil's storm basins is "generally sufficient to contain the excess wastewater occurring during any storm of a magnitude which is expected to occur on the average of once every ten years." Declaration of Donald W. DeBuse in Support of Union Oil Company of California Motion For Summary Judgment at 8. If the plant was only designed to handle rains of a magnitude occurring every ten years, the statistical chance is very high that unusual rains will cause exceedances of permit limitations over the life of the plant.

The inadequacy of Union Oil's facilities in this case is underlined by the fact that Union Oil's permit also adjusts upwardly the limitations for periods of heavy rainfall. Union Oil's pollution during the winters of 1981 and 1982 exceeded even the limitations reflecting this upward adjustment. By providing this stormwater runoff adjustment, which varies according to amounts of rainfall, the California Water Board was indicating what levels of pollution should occur in a properly designed and adequate plant when heavy rains take place. A plant like Union Oil's that is incapable of adhering even to these adjusted limitations is inadequate. On the basis of inadequate equipment alone, all of the violations attributed by Union Oil to heavy rain should not have been excused on the upset defense ground.

2. *Procedural Deficiencies*

[6] The district court made no findings as to whether Union Oil complied with the procedural requirements for showing an upset. A permittee who wishes to raise the defense of upset must show:

> (1) that an upset occurred and that the permittee can show the cause;
>
> (2) that the facility was properly run at the time of the upset;
>
> (3) that the permittee provided the proper notice of the upset;
>
> (4) that the permittee conformed with remedial requirements.

40 C.F.R. § 122.41(n)(3). In addition, the burden of proof is on the permittee to show compliance with these requirements. 40 C.F.R. § 122.41(n)(4).

The district court applied none of these procedural rules. It did not place the burden of proof on Union Oil for use of the defense. While the record contains evidence that Union Oil failed to identify causes for several violations and provided insufficient notice in some cases, the district court held that the upset defense excused Union Oil in all cases. Failure to require that the permittee satisfy all of the procedural requirements specified in 40 C.F.R. § 122.41(n)(3) is improper.

The district court's failure properly to apply the upset defense regulation in itself justifies reversal of its finding of no liability as to the allegedly rainfall-related exceedances.

II. ***De Minimus Theory***

[7] The district court's application of a purported de minimus exception to the Clean Water Act raises an issue of statutory***1491** interpretation and is reviewable de novo. *See, e.g., Trustees of Amalgamated Insurance Fund,* 784 F.2d at 929.

As noted above, the district court excused "a few" of the exceedances on the ground that they "were caused by very unusual human errors that are excusable in light of time span and number of acceptable readings." It is unclear whether the court intended to excuse these violations under the upset defense or under a de minimus theory. In either event, the district court erred. The Clean Water Act and the regulations promulgated under it make no provision for "rare" violations. Our legal system would be quite different if one's behavior were evaluated using the aggregative method the district court applied.

III. ***Sampling Error Defense***

The district court's findings that reported violations were excusable as based on sampling errors is a question of statutory interpretation, reviewable de novo. *See, e.g., Trustees of Amalgamated Insurance Fund,* 784 F.2d at 929. The district court's finding that some of the alleged violations were not actual violations is a finding of fact, reviewable under the clearly erroneous standard. *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948).

The district court's opinion states:

> Of those alleged ... violations, Union Oil presented evidence that thirteen were not even actual exceedances of permit limitations, because the applicable permit limitation either was not exceeded, or because the result was caused by error in wastewater sampling or analysis.
>
> Memorandum at 8.

The court made no explicit finding on Union Oil's contention that thirteen of the alleged exceedances either were not exceedances or were caused by sampling error. We must surmise from the court's excusing Union Oil on all of the alleged violations that the court found that in the cases of these thirteen alleged violations either Union Oil had not violated the permit's terms or the exceedances were excusable due to sampling error.

Of the thirteen alleged violations in question, Union Oil presented some evidence that six were not in fact exceedances of the limitations set out in the permit. Two of the thirteen alleged violations are allegations of biochemical oxygen demand and oil and grease violations in February 1983 and December 1981, respectively. Because the district court made no finding as to whether these two alleged permit violations were in fact permit violations, we remand for the purpose of allowing the district court to make a finding of fact on this point.

[8] The district court also failed to make findings of fact as to Union Oil's denial that in four instances it violated the permit's prohibition against creating conditions of visible oil in the receiving waters. It is unnecessary to remand this question because the record shows as a matter of law that Union Oil did violate the visible oil limitation. Union Oil argued at trial that while visible oil had been observed on the water near one of Union Oil's monitoring stations, there was no evidence of visible oil on San Pablo Bay. But Union Oil's permit limitations applied to "the waters of the state," not merely to San Pablo Bay. Thus, the four alleged visible oil violations were in fact chargeable to Union Oil.

[9] Union Oil argued that seven of the alleged violations were excusable because, while the Discharge Monitoring Reports ostensibly indicated that Union Oil had exceeded limitations contained in the permit, these reports were invalid due to sampling error. We hold that the district court should not have excused these exceedances on the basis of sampling error.

The NPDES program fundamentally relies on self-monitoring. The Code of Federal Regulations

contains several provisions that are obviously designed to ensure utmost accuracy in the reports submitted by permittees. For instance, 40 C.F.R. § 122.22 requires that a person signing a self-monitoring report shall make the following certification:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly ***1492** gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

The regulations at 40 C.F.R. §§ 122.41(j) and (k) establish numerous requirements for self-monitoring and reporting. These sections provide for heavy criminal penalties for anyone who knowingly falsifies reports or knowingly makes any false statement.

These and other EPA regulations demonstrate the agency's concern that reports be accurate. The legislative history surrounding the 1972 amendments to the Act supports the conclusion that accurate reports are critical to effective operation of the Act:

> [T]he bill ... establishes and makes precise new requirements imposed on persons and subject to enforcement. One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay.

S.Rep. No. 414, 92nd Cong., 1st Sess. 64, *reprinted in* 1972 U.S.Code Cong. & Ad.News 3668, 3730.

Were we to accept Union Oil's argument regarding the use of sampling errors to excuse reported permit exceedances, we would be sanctioning countless additional hours of NPDES litigation and creating new, complicated factual questions for district courts to resolve. As indicated by the legislative history, Congress hoped to limit such situations. In addition, if each self-monitoring report is to be considered only prima facie rather than conclusive evidence of an exceedance of a permit limitation, citizen groups like the Sierra Club would be taking a considerable risk whenever they initiated a citizen enforcement action pursuant to 33 U.S.C. § 1365. While a permittee's publicly filed reports might clearly indicate that illegal pollution was taking place, the permittee might have additional information unavailable to citizen groups indicating that sampling error rendered the reports meaningless. Finally and most importantly, allowing permittees to excuse their reported exceedances by showing sampling error would create the perverse result of rewarding permittees for sloppy laboratory practices. Such an approach would surely undermine the efficacy of the self-monitoring program.

We conclude that when a permittee's reports indicate that the permittee has exceeded permit limitations, the permittee may not impeach its own reports by showing sampling error.

IV. *Amendment of Complaint*

This court applies an abuse of discretion standard of review to district court decisions to deny leave to amend a complaint after a pleading responsive to the original complaint has been served. *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *Klamath-Lake Pharmaceutical Association v. Klamath Medical Service Bureau,* 701 F.2d 1276, 1292 (9th Cir.), *cert. denied,* 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983).

813 F.2d 1480, 25 ERC 1801, 55 USLW 2598, 17 Envtl. L. Rep. 20,547
(Cite as: 813 F.2d 1480)

Sierra Club's proposed amended complaint alleged additional permit violations falling into three categories: (1) reported violations occurring after March 30, 1979, (2) reported violations occurring before March 30, 1979, and (3) unreported violations. The district court denied Sierra Club's motion for leave to file the amended complaint. Sierra Club now seeks reversal of the district court's denial of leave to amend, except with respect to those violations in category (2), reported violations occurring before March 30, 1979.

Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." This court in *Howey v. United States,* 481 F.2d 1187, 1190 (1973) stated:

> The purpose of pleading is "to facilitate a proper decision on the merits," ***1493***Conley v. Gibson,* 355 U.S. 41, 48 [78 S.Ct. 99, 103, 2 L.Ed.2d 80], ... (1957), and not to erect formal and burdensome impediments in the litigation process. Unless undue prejudice to the opposing party will result, a trial judge should ordinarily permit a party to amend its complaint.

[10] The district court held that Sierra Club was barred by the five-year statute of limitations, 28 U.S.C. § 2462, from prosecuting claims based on violations occurring before June 30, 1979, and that therefore amendments describing those violations, even the unreported ones, would be futile. *See* Order Denying Plaintiff's Motions For Summary Judgment, For Leave to File an Amended Complaint, and for Reconsideration of Magistrate's Order Denying Further Discovery at 8. As to the unreported violations occurring after March 30, 1979, there is no statute of limitations problem. As to the unreported violations occurring before March 30, 1979, Sierra Club contends that (a) as claimant in this case, it did not learn of these violations until after the original complaint was filed, and (b) Union Oil committed fraud in concealing the violations. Because Sierra Club has raised pertinent questions of fact for the district court on whether the statute of limitations has been tolled (issues that the district court did not address in its memorandum supporting denial of the amendments), the district court is incorrect in peremptorily deeming amendments pertaining to the unreported pre-March 1979 violations to be futile.

In addition to citing the statute of limitations bar as justification for denying leave to amend, the district court denied amendment of the entire complaint because Sierra Club had access to information concerning some of the newly alleged violations when it filed the original complaint and because of delay and prejudice.

[11] Because Sierra Club knew or should have known when it filed the original complaint of five of the new violations alleged in the amended complaint, it was properly denied amendment with respect to those violations. We have held that where the party seeking amendment knows or should know of the facts underlying the amendment when the original complaint is filed, the motion to amend may be denied. *Jordan v. County of Los Angeles,* 669 F.2d 1311, 1324 (9th Cir.), *vacated on other grounds,* 459 U.S. 810, 103 S.Ct. 35, 74 L.Ed.2d 48 (1982). As to the rest of the complaint here, however, the district court had no basis under the law of this circuit to deny the amendment.

[12] Mere delay in proffering an amendment does not justify denying leave to amend. *Howey,* 481 F.2d at 1190–91. This court has also held that where a defendant is on notice of the facts contained in an amendment to a complaint, there is no serious prejudice to defendant in allowing the amendment. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 668 F.2d 1014, 1053 n. 68 (9th Cir.1981), *cert. denied,* 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982); *see also Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 644 F.2d 690, 694 (8th Cir.1981). Here, where all of the amendments were based upon facts contained in Union Oil's own records, Union Oil had notice of the facts. Thus, there is no prejudice to Union Oil.

Howey also provides: "Where there is a lack of

prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny such a motion." *Howey,* 481 F.2d at 1190–91. Here, Union Oil has not asserted, nor has the district court found, that the amendment was frivolous or made in bad faith. General considerations of judicial economy also justify allowing the amendments. The violations included in the proposed amendment relate to the same subject matter as the original complaint. Allowing the amendment will further the federal policy of "wrapping in one bundle all matters concerning the same subject matter." *Rosenberg Bros. v. Arnold,* 283 F.2d 406 (9th Cir.1960) (per curiam). For all of these reasons, we reverse the district court's denial of Sierra Club's motion for leave to amend. Sierra Club should be allowed to amend to include all violations except for the five about which it knew or should have known when it filed the original complaint.

***1494 CONCLUSION**

We remand to the district court for the purpose of determining whether the alleged February 1983 biochemical oxygen demand violation and the alleged December 1981 oil and grease violation in fact occurred. The district court's finding of no liability for the other seventy-four exceedances alleged in the original complaint is reversed and the case is remanded for determination of penalty. The district court's denial of leave to amend the complaint is reversed, except as to violations about which Sierra Club knew or should have known when it filed the original complaint.

Affirmed in part; reversed in part; and remanded. Appellant is entitled to costs.

C.A.9 (Cal.),1987.
Sierra Club v. Union Oil Co. of California
813 F.2d 1480, 25 ERC 1801, 55 USLW 2598, 17 Envtl. L. Rep. 20,547

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TAB NO. 6

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

Court of Appeal, Fourth District, Division 1, California.
CITY OF ARCADIA et al., Plaintiffs and Appellants,
v.
STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants.

No. D043877.
Jan. 26, 2006.
Rehearing Denied Feb. 17, 2006.
Review Denied April 19, 2006.

Background: Cities filed petition for writ of mandate and complaint for declaratory and injunctive relief against state and regional water boards to challenge water boards' adoption and approval of a zero trash total maximum daily loads (TMDL) discharge from municipal storm drains into river. The Superior Court, San Diego County, No. GIC803631,Wayne L. Peterson and Linda B. Quinn , JJ., partially granted cities' petition and granted declaratory relief, but did not invalidate trash TMDL on specified grounds. Water boards and cities appealed.

Holdings: The Court of Appeal, McConnell, P.J., held that:
(1) water boards' decision not to conduct an assimilative capacity study before adopting zero trash TMDL was within their expertise rather than trial court's;
(2) water boards sufficiently complied with statute requiring consideration of economic factors before adopting and approving zero trash TMDL;
(3) regional water board's environmental checklist with regard to approving zero trash TMDL was deficient for purposes of California Environmental Quality Act (CEQA);
(4) water boards' adoption and approval of zero trash TMDL did not violate federal standards; and
(5) adoption and approval of zero trash TMDL did not fail to comply with requisite scientific standards.

Judgment affirmed in part, reversed in part; order affirmed.

West Headnotes

[1] Mandamus 250 ⇐69

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k69 k. Legislative powers. Most Cited Cases

Review of judgment partially granting cities' petition for writ of mandate to challenge adoption by state and regional water boards of planning document setting a target of zero trash discharge from municipal storm drains into river was limited to traditional mandamus, inasmuch as water boards' actions were quasi-legislative. West's Ann.Cal.C.C.P. § 1085.

[2] Mandamus 250 ⇐69

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k69 k. Legislative powers. Most Cited Cases

Acts of an administrative agency that are quasi-legislative in nature are not reviewable by administrative mandamus; rather, review of a quasi-legislative action is limited to traditional mandamus.

[3] Mandamus 250 ⇐168(2)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k168 Evidence
250k168(2) k. Presumptions and burden of proof. Most Cited Cases

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

Mandamus 250 ⚿172

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k172 k. Scope of inquiry and powers of court. Most Cited Cases

Under statute authorizing writs of mandate, review is limited to an inquiry into whether the action was arbitrary, capricious, or entirely lacking in evidentiary support, and the petitioner has the burden of proof to show that the decision is unreasonable or invalid as a matter of law. West's Ann.Cal.C.C.P. § 1085.

[4] Mandamus 250 ⚿187.9(1)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k187 Appeal and Error
250k187.9 Review
250k187.9(1) k. Scope and extent in general. Most Cited Cases

In mandamus proceedings, the appellate court reviews the record de novo except where the trial court made foundational factual findings, which are binding on appeal if supported by substantial evidence.

[5] Environmental Law 149E ⚿689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

Abuse of discretion applies to review of California Environmental Quality Act issues. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[6] Environmental Law 149E ⚿689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

On review of California Environmental Quality Act (CEQA) issues, the reviewing court's task on appeal is the same as the trial court's; the reviewing court therefore conduct its review independent of the trial court's findings. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[7] Environmental Law 149E ⚿192

149E Environmental Law
149EV Water Pollution
149Ek187 Water Quality Standards or Plans
149Ek192 k. Daily maximum load and limited segments. Most Cited Cases

State and regional water boards' decision not to conduct an assimilative capacity study before adopting a target of zero trash discharge from municipal storm drains into river was within their expertise rather than the trial court's; Clean Water Act did not require regional boards to conduct an assimilative capacity study before adopting the zero trash total maximum daily loads (TMDL), and the evidence adequately supported boards' decision. Clean Water Act, § 303, 33 U.S.C.A. § 1313.

[8] Environmental Law 149E ⚿192

149E Environmental Law
149EV Water Pollution
149Ek187 Water Quality Standards or Plans
149Ek192 k. Daily maximum load and limited segments. Most Cited Cases

State and regional water boards were not required to conduct a cost/benefit analysis before adopting and approving a zero trash total maximum daily loads (TMDL) discharge from municipal storm drains into river; by its plain terms, statute authorizing such analysis did not apply at the TMDL stage. West's Ann.Cal.Water Code § 13267.

[9] Statutes 361 ⚿181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

361k180 Intention of Legislature
361k181 In General
361k181(1) k. In general. Most Cited Cases

Statutes 361 ⇨188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In general. Most Cited Cases

The court's primary aim in construing any law is to determine the legislative intent, and in doing so, the court looks first to the words of the statute, giving them their usual and ordinary meaning.

[10] Environmental Law 149E ⇨192

149E Environmental Law
149EV Water Pollution
149Ek187 Water Quality Standards or Plans
149Ek192 k. Daily maximum load and limited segments. Most Cited Cases

Adoption of a trash total maximum daily loads (TMDL) under Clean Water Act does not, by itself, prohibit any conduct or require any actions; instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual National Pollution Discharge Elimination System (NPDES) permits or establishing nonpoint source controls. Clean Water Act, § 303, 33 U.S.C.A. § 1313.

[11] Environmental Law 149E ⇨192

149E Environmental Law
149EV Water Pollution
149Ek187 Water Quality Standards or Plans
149Ek192 k. Daily maximum load and limited segments. Most Cited Cases

State and regional water boards sufficiently complied with statute requiring consideration of economic factors before adopting and approving a zero trash total maximum daily loads (TMDL) discharge from municipal storm drains into river; boards' trash TMDL included the estimated costs of several types of compliance methods and a cost comparison of capital costs and costs of operation and maintenance, and consideration of economic factors under statute did not require analysis of every conceivable compliance method or combinations thereof, or the fiscal impacts on permittees. West's Ann.Cal.Water Code § 13241.

[12] Environmental Law 149E ⇨192

149E Environmental Law
149EV Water Pollution
149Ek187 Water Quality Standards or Plans
149Ek192 k. Daily maximum load and limited segments. Most Cited Cases

State and regional water boards could include estuary of river along with river when adopting and approving a zero trash total maximum daily loads (TMDL) discharge from municipal storm drains into river; plain language of Clean Water Act did not preclude boards from exercising their discretion to simultaneously submit to the Environmental Protection Agency (EPA) the identification of an impaired water body and a TMDL for it. Clean Water Act, § 303(d)(2), 33 U.S.C.A. § 1313(d)(2).

[13] Environmental Law 149E ⇨218

149E Environmental Law
149EV Water Pollution
149Ek215 Administrative Agencies and Proceedings
149Ek218 k. Notice and comment. Most Cited Cases

State and regional water boards sufficiently identified estuary of river along with river, so as to put all parties on notice when adopting and approving a zero trash total maximum daily loads (TMDL) discharge from municipal storm drains into river, pursuant to Clean Water Act; although trash TMDL list did not include estuary, trash TMDL listed and discussed the beneficial uses of the estuary, and administrative record contained several pictures of trash deposited in estuary during high flows. Clean

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

Water Act, § 303, 33 U.S.C.A. § 1313.

[14] Environmental Law 149E ⚖595(3)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek595 Particular Projects
149Ek595(3) k. Waters and water courses; dams and flood control. Most Cited Cases

Regional water board failed to comply with California Environmental Quality Act (CEQA) requirements when it prepared an environmental checklist with regard to approving a zero trash total maximum daily loads (TMDL) discharge from municipal storm drains into river, in lieu of an environmental impact report (EIR) or its functional equivalent; basin planning process of state and regional water boards was a certified regulatory program, neither checklist nor trash TMDL included an analysis of the reasonably foreseeable impacts of construction and maintenance of pollution control devices or mitigation measures. West's Ann.Cal.Pub.Res.Code § 21159.
See 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 831 et seq.; Cal. Jur. 3d, Pollution and Conservation Laws, § 118 et seq.

[15] Environmental Law 149E ⚖585

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek585 k. In general. Most Cited Cases

California Environmental Quality Act (CEQA) requires a governmental agency to prepare an environmental impact report (EIR) whenever it considers approval of a proposed project that may have a significant effect on the environment. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[16] Environmental Law 149E ⚖589

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek589 k. Significance in general. Most Cited Cases

Environmental Law 149E ⚖590

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek590 k. Mitigation measures. Most Cited Cases

Environmental Law 149E ⚖594

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek594 k. Negative declaration; statement of reasons. Most Cited Cases

Under the California Environmental Quality Act (CEQA), if there is no substantial evidence a project may have a significant effect on the environment, or the initial study identifies potential significant effects, but provides for mitigation revisions which make such effects insignificant, a public agency must adopt a negative declaration to such effect and, as a result, no environmental impact report (EIR) is required. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[17] Environmental Law 149E ⚖589

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek589 k. Significance in general.

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

Most Cited Cases

Environmental Law 149E ⚿615

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek612 Evidence
149Ek615 k. Weight and sufficiency. Most Cited Cases

The California Environmental Quality Act (CEQA) requires the preparation of an environmental impact report (EIR) whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact; thus, if substantial evidence in the record supports a fair argument that significant impacts or effects may occur, an EIR is required and a negative declaration cannot be certified. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[18] Environmental Law 149E ⚿592

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek592 k. Categorical exclusion; exemptions in general. Most Cited Cases

State regulatory programs that meet certain environmental standards and are certified by the Secretary of the California Resources Agency are exempt from the requirements of California Environmental Quality Act (CEQA) for preparation of environmental impact reports (EIRs), negative declarations, and initial studies; environmental review documents prepared by such programs may be used instead of environmental documents that CEQA would otherwise require. West's Ann.Cal.Pub.Res.Code § 21080.5.

[19] Environmental Law 149E ⚿592

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek592 k. Categorical exclusion; exemptions in general. Most Cited Cases

The guidelines for implementation of the California Environmental Quality Act (CEQA) do not directly apply to a certified regulatory program's environmental document; however, when conducting its environmental review and preparing its documentation, a certified regulatory program is subject to the broad policy goals and substantive standards of CEQA. 14 CCR § 15000 et seq.

[20] Declaratory Judgment 118A ⚿201

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(K) Public Officers and Agencies
118Ak201 k. Officers and official acts in general. Most Cited Cases

Declaratory Judgment 118A ⚿204

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(K) Public Officers and Agencies
118Ak204 k. State officers and boards. Most Cited Cases

In cities' challenge to state and regional water boards' adoption and approval of a zero trash total maximum daily loads (TMDL) discharge from municipal storm drains into river, judgment should not have included declaratory relief as to non-navigable waters, where water boards conceded that trash TMDL only applied to navigable waters, leaving no present controversy with regard to non-navigable waters.

[21] Declaratory Judgment 118A ⚿61

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(D) Actual or Justiciable Controversy
118Ak61 k. Necessity. Most Cited Cases

The fundamental basis of declaratory relief is the existence of an actual, present controversy.

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

[22] Environmental Law 149E ⚿192

149E Environmental Law
149EV Water Pollution
149Ek187 Water Quality Standards or Plans
149Ek192 k. Daily maximum load and limited segments. Most Cited Cases

State and regional water boards' adoption and approval of a zero trash total maximum daily loads (TMDL) discharge from municipal storm drains into river did not violate federal "maximum extent practicable" and "best management practices" standards under Clean Water Act; record failed to show that zero limit was unattainable, burden was on cities challenging the TMDL to establish impossibility, and, in any event, federal statute applicable to establishing a TMDL did not suggest that practicality was a consideration. Clean Water Act, § 303(d)(1)(C), 33 U.S.C.A. § 1313(d)(1)(C).

[23] Appeal and Error 30 ⚿756

30 Appeal and Error
30XII Briefs
30k756 k. Form and requisites in general. Most Cited Cases

Appeal and Error 30 ⚿761

30 Appeal and Error
30XII Briefs
30k761 k. Points and arguments. Most Cited Cases

Appeal and Error 30 ⚿1079

30 Appeal and Error
30XVI Review
30XVI(K) Error Waived in Appellate Court
30k1079 k. Insufficient discussion of objections. Most Cited Cases

Parties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows the appellate court to treat the appellant's issue as waived.

[24] Environmental Law 149E ⚿192

149E Environmental Law
149EV Water Pollution
149Ek187 Water Quality Standards or Plans
149Ek192 k. Daily maximum load and limited segments. Most Cited Cases

State and regional water boards' adoption and approval of a zero trash total maximum daily loads (TMDL) discharge from municipal storm drains into river did not require water boards to identify load allocations and implementation measures for nonpoint sources of trash discharge; Clean Water Act did not require that states adopt a regulatory system for nonpoint sources. Clean Water Act, § 303, 33 U.S.C.A. § 1313.

[25] Environmental Law 149E ⚿192

149E Environmental Law
149EV Water Pollution
149Ek187 Water Quality Standards or Plans
149Ek192 k. Daily maximum load and limited segments. Most Cited Cases

State and regional water boards' adoption and approval of a zero trash total maximum daily loads (TMDL) discharge from municipal storm drains into river was not improper under Clean Water Act, notwithstanding stated beneficial uses of river that included allegedly illegal use of river for recreation and bathing by homeless people seeing shelter there; swimming and bathing by homeless were only two among numerous other beneficial uses that were not challenged. Clean Water Act, § 303(d)(1)(A), 33 U.S.C.A. § 1313(d)(1)(A).

[26] Environmental Law 149E ⚿192

149E Environmental Law
149EV Water Pollution
149Ek187 Water Quality Standards or Plans
149Ek192 k. Daily maximum load and limited segments. Most Cited Cases

State and regional water boards' adoption and approval of a zero trash total maximum daily loads (TMDL) discharge from municipal storm drains into river did not fail to comply with requisite scientific analysis under Clean Water Act; project

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

evaluated trash loading at two drainage basins, and trash TMDL relied on several studies to conclude that urban runoff was the dominant source of trash. Clean Water Act, § 303, 33 U.S.C.A. § 1313.

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McCONNELL, P.J.

***1401** This case concerns the serious environmental problem of litter discharged from municipal storm drains into the Los Angeles River, and efforts of the California Regional Water Quality Control Board, Los Angeles Region (Regional Board) and the State Water Resources Control Board (State Board) [FN1] to ameliorate the problem through the adoption and approval of a planning document setting a target of zero trash discharge within a multi-year implementation period.

FN1. We refer to these entities together as the Water Boards.

The Water Boards appeal a judgment partially granting a petition for writ of mandate brought by the City of Arcadia and 21 other cities (Cities), [FN2] who ***1402** agree trash pollution must be remedied but oppose the target of zero trash as unattainable and inordinately expensive. The Water Boards challenge the court's findings that an assimilative capacity study is a required element of its action; a cost-benefit analysis and consideration of economic factors are required under state law and are not met; the zero trash target is inapplicable to the Los Angeles River Estuary (Estuary) because it does not appear on the state's list of impaired waters; and, the Water Boards failed to comply with the California Environmental Quality Act (CEQA) by not preparing an Environmental Impact report (EIR) or its functional equivalent.

FN2. In addition to Arcadia the Cities include Baldwin Park, Bellflower, Cerritos, Commerce, Diamond Bar, Downey, Irwindale, Lawndale, Monrovia, Montebello, Monterey Park, Pico Rivera, Rosemead, San Gabriel, Santa Fe Springs, Sierra Madre, Signal Hill, South Pasadena, Vernon, West Covina and Whittier.

The Water Boards also contend the court erred by granting the Cities declaratory relief on their claim the Trash total maximum daily load (TMDL) does not apply to "nonwaters," meaning areas that do not drain into navigable waters such as the Los Angeles River or tributaries, as the parties agreed during this proceeding that the trash TMDL applies only to navigable waters.

The Cities also appeal, contending the trial

court erred by not invalidating the Trash TMDL on the additional grounds the Water Boards failed to provide for deemed compliance with the target of zero trash through certain methods; failed to implement load allocations for nonpoint sources of trash pollution; failed to adhere to the data collection and analysis required by federal and state law; relied on nonexistent, illegal and irrational uses to be made of the Los Angeles River; and, violated the Administrative Procedures Act (APA).

We conclude the Cities' appeal lacks merit. As to the Water Boards' appeal, we conclude the court properly invalidated the planning document on the ground of noncompliance with CEQA, and we affirm the judgment insofar as it is based on that ground. We reverse the judgment to the extent it is based on other grounds. Further, we hold the court erred by granting declaratory relief on the nonwaters issue as there was no controversy when the court ruled.

**379 BACKGROUND INFORMATION

I

Statutory and Regulatory Scheme

The "quality of our nation's waters is governed by a 'complex statutory and regulatory scheme ... that implicates both federal and state administrative responsibilities.' " ***1403**(*City of Burbank v. State Water Resources Control Bd.* 2005) 35 Cal.4th 613, 619, 26 Cal.Rptr.3d 304, 108 P.3d 862 (*City of Burbank*).) An overview of applicable law is required to place the facts here in context.

A

Federal Law

In 1972 Congress enacted amendments to the Federal Water Pollution Control Act (Pub.L. No. 92–500 (Oct. 18, 1972) 86 Stat. 816; 33 U.S.C. § 1251 et seq.), which, as amended in 1977, is commonly known as the Clean Water Act. (*City of Burbank, supra,* 35 Cal.4th at pp. 619–620, 26 Cal.Rptr.3d 304, 108 P.3d 862.) Its stated goal is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters" by eliminating the discharge of pollutants into navigable waters. (33 U.S.C. § 1251(a).)

The Clean Water Act places "primary reliance for developing water quality standards on the states." (*Scott v. Hammond* (7th Cir.1984) 741 F.2d 992, 994.) It requires each state to develop such standards and review them at least once every three years for required modifications. (33 U.S.C. § 1313(a), (c)(1).) The standards must include designated uses such as recreation, navigation or the propagation of fish, shellfish and wildlife; water quality criteria sufficient to protect the designated uses; and an antidegradation policy. (40 C.F.R. §§ 131.6, 131.10–131.12 (2003).) The water quality criteria "can be expressed in narrative form or in a numeric form, e.g., specific pollutant concentrations." (*Florida Public Interest Research Group Citizen Lobby, Inc. v. EPA* (11th Cir.2004) 386 F.3d 1070, 1073.) "Narrative criteria are broad statements of desirable water quality goals in a water quality plan. For example, 'no toxic pollutants in toxic amounts' would be a narrative description." (*City of Burbank, supra,* 35 Cal.4th at p. 622, fn. 4, 26 Cal.Rptr.3d 304, 108 P.3d 862.)

The Clean Water Act focuses on two possible sources of pollution: point sources and nonpoint sources. "Point source" means "any discernable, confined and discrete conveyance" such as a pipe, ditch, channel, tunnel, or conduit. (33 U.S.C. § 1362(14).) The Clean Water Act does not define nonpoint source pollution, but it has been described as " ' "nothing more [than] a [water] pollution problem not involving a discharge from a point source." ' " (*Defenders of Wildlife v. EPA* (10th Cir.2005) 415 F.3d 1121, 1123–1124.) FN3

FN3. According to the Environmental Protection Act (EPA), nonpoint source pollution is caused by rainfall or snowmelt moving over and through the ground, and includes excess fertilizers, herbicides, and insecticides from agricultural lands and residential areas; oil, grease and toxic chemicals from urban runoff and energy production; sediment from improperly

> managed construction sites, crop and forest land, and eroding stream banks; salt from irrigation practices and acid drainage from abandoned mines; and bacteria and nutrients from livestock, pet wastes and faulty septic systems. (http:// www. epa. gov/ owow/ nps/ qa. html.)

1404** "Congress dealt with the problem of point source pollution using the National Pollution Discharge Elimination System [NPDES] permit process. Under this approach, compliance rests on technology-*380** based controls that limit the discharge of pollution from any point source into certain waters unless that discharge complies with the [Clean Water] Act's specific requirements." (*San Francisco BayKeeper v. Whitman* (2002) 297 F.3d 877, 880; 33 U.S.C. § 1311(b)(1)(A).) " 'Nonpoint sources, because of their very nature, are not regulated under the NPDES [program]. Instead, Congress addressed nonpoint sources of pollution in a separate portion of the [Clean Water] Act which encourages states to develop areawide waste treatment management plans.' " (*Pronsolino v. Marcus* (N.D.Cal.2000) 91 F.Supp.2d 1337, 1348, citing 33 U.S.C. § 1288; see also 33 U.S.C. § 1329.)

"When the NPDES system fails to adequately clean up certain rivers, streams or smaller water segments, the [Clean Water] Act requires use of a water-quality based approach. States are required to identify such waters ... [and] rank [them] in order of priority, and based on that ranking, calculate levels of permissible pollution called 'total maximum daily loads' or 'TMDLs.' " (*San Francisco BayKeeper v. Whitman, supra,* 297 F.3d at p. 880; 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.7(b) (2003).) "This list of substandard waters is known as the '303(d) list' (section 303 of the Clean Water Act having been codified as [title 33 United States Code] section 1313)." (*City of Arcadia v. EPA* (9th Cir.2005) 411 F.3d 1103, 1105 (*City of Arcadia II*).)

"A TMDL defines the specified maximum amount of a pollutant which can be discharged or 'loaded' into the waters at issue from all combined sources." (*Dioxin/Organochlorine Center v. Clarke* (9th Cir.1995) 57 F.3d 1517, 1520.) "A TMDL must be 'established at a level necessary to implement the applicable water quality standards....' [Citation.] A TMDL assigns a *waste load allocation* ... to each point source, which is that portion of the TMDL's total pollutant load, which is allocated to a point source for which an NPDES permit is required. [Citation.] Once a TMDL is developed, effluent limitations in NPDES permits must be consistent with the [waste load allocations] in the TMDL." (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1095–1096, 1 Cal.Rptr.3d 76; *Dioxin/Organochlorine Center v. Clarke,* at p. 1520.) [FN4] A TMDL requires a ***1405** "margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." (33 U.S.C. § 1313(d)(1)(C).)

> FN4. The Clean Water Act "does not define total maximum daily load. EPA's regulations break it into a 'waste[ ]load allocation' for point sources and a 'load allocation' for nonpoint sources." (*Pronsolino v. Marcus, supra,* 91 F.Supp.2d at p. 1344, fn. 8; 40 C.F.R. § 130.2(g)-(i) (2005).)

The EPA may allow states to adopt and administer NPDES permit programs (*Pronsolino v. Marcus, supra,* 91 F.Supp.2d at p. 1347, fn. 10), and it has authorized California to administer such a program. (54 Fed.Reg. 40664 (Oct. 3, 1989).)

B

State Law

California implements the Clean Water Act through the Porter–Cologne Act (Wat.Code, § 13000 et seq.), which was promulgated in 1969. Under the Porter–Cologne Act, nine regional boards regulate the quality of waters within their regions under the purview of the State Board. (Wat.Code, §§ 13000, 13100, 13200, 13241, 13242.)

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

****381** Regional boards must formulate and adopt water quality control plans, commonly called basin plans, which designate the beneficial uses to be protected, water quality objectives and a program to meet the objectives. (Wat.Code, §§ 13050, subd. (j), 13240.) " 'Water quality objectives' means the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area." (*Id.*, § 13050, subd. (h).)

The EPA must approve or disapprove a state's TMDL within 30 days of its submission. (33 U.S.C. § 1313(d)(2).) If the EPA disapproves a state's submission, it must establish its own TMDL within 30 days of the disapproval. (*Ibid.*)

II

Trash TMDL

The Los Angeles River is a 51–mile flood control channel, largely concrete-lined, which runs through the City of Los Angeles and surrounding municipalities in Los Angeles County and terminates at the Pacific Ocean. In 1990 the Regional Board issued an NPDES storm water permit to the Los Angeles County Department of Public Works as the principal permittee and 84 cities as copermittees, to address various chemical pollutants discharged into the region's water bodies (Municipal NPDES Permit).

***1406** In 1994 the Regional Board adopted a revised water quality control plan, or basin plan (1994 Basin Plan), which includes narrative water quality objectives. It provides that "[w]aters shall not contain floating materials, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses," and "[w]aters shall not contain suspended or settleable material in concentrations that cause nuisance or adversely affect beneficial uses." (Italics omitted.) Beneficial uses of the Los Angeles River and surrounds include wildlife and marine habitat, including habitat for endangered species, and recreational activities such as fishing, walking, hiking, jogging, bicycling, horseback riding, bird watching and photography.

In 1996 and 1998 the Regional Board identified certain reaches of the Los Angeles River on the state's "303(d) list" as being impaired by trash, primarily through storm water runoff in thousands of municipal storm drains. [FN5] On September 19, 2001, the Regional Board adopted a resolution to amend its 1994 Basin Plan to incorporate a TMDL for trash in the Los Angeles River (Trash TMDL). Despite many objections from affected municipalities, the Trash TMDL sets a numeric target of zero trash as "even a single piece of trash can be detrimental, and no level of trash is acceptable in waters of the state." [FN6] "The numeric target is staff's interpretation of the narrative water quality objective [in ****382** the 1994 Basin Plan], including an implicit margin of safety."

FN5. The Regional Board defines "trash" as "man-made litter" within the meaning of Government Code section 68055.1, subdivision (g), which provides: " 'Litter' means all improperly discarded waste material, including, but not limited to, convenience food, beverage, and other produce packages or containers constructed of steel, aluminum, glass, paper, plastic, and other natural and synthetic materials, thrown or deposited on the lands and waters of the state, but not including the properly discarded waste of the primary processing of agriculture, mining, logging, sawmilling, or manufacturing."

FN6. The Regional Board adopted a Trash TMDL in January 2001, which also had a target of zero trash. It reconsidered the matter on September 19, 2001, "to provide clarifying language and greater flexibility in implementing the [Trash] TMDL."

The reduction of trash is to be phased over a 14–year period, including an optional two-year baseline monitoring period. In lieu of baseline mon-

itoring, cities may accept a default baseline allocation of "640 gallons of uncompressed trash per square mile per year," a value based on data the City of Calabasas provided. The Trash TMDL provides for a "review of the current target [of zero trash] ... once a reduction of 50% has been achieved and sustained," "based on the findings of future studies regarding the threshold levels needed for protecting beneficial uses."

Under the Trash TMDL, cities may use a variety of compliance methods, including "[e]nd-of-pipe full capture structural controls," "partial capture ***1407** control systems" and "[i]nstitutional controls." Cities using a full-capture system meeting certain criteria will be deemed in compliance with the zero target if the systems are properly maintained and maintenance records are available for the Regional Board's inspection.

On December 21, 2001, the Regional Board issued an order under Water Code section 13267 to the County of Los Angeles and copermittees under the Municipal NPDES Permit to submit baseline monitoring plans by February 1, 2002, and to monitor trash in the Los Angeles River between January 2002 and December 2003, with a final report due February 2004.[FN7] The Regional Board intends to use resulting data to "refine" the default baseline waste load allocations in the Trash TMDL.

> FN7. In *City of Arcadia v. EPA* (N.D.Cal.2003) 265 F.Supp.2d 1142, 1156 (*City of Arcadia I*), the court noted the Los Angeles County Department of Public Works has assumed responsibility for the baseline monitoring burden for all municipalities to which the Trash TMDL applies. The Trash TMDL states that "[e]ach of the permittees and co-permittees are responsible for monitoring land uses within their jurisdiction," but "monitoring responsibilities may be delegated to a third-party monitoring entity such as the [Department of Public Works]."

In February and July 2002, the State Board and the Office of Administrative Law, respectively, approved the Trash TMDL. In August 2002 the EPA approved it and announced it supersedes an interim TMDL for trash the EPA adopted in March 2002 as a result of a consent decree in litigation between environmental groups and the EPA. (*City of Arcadia I, supra,* 265 F.Supp.2d 1142, 1147.)[FN8]

> FN8. In *City of Arcadia I, supra,* 265 F.Supp.2d at page 1153, the City of Arcadia and other cities unsuccessfully challenged the EPA's approval of the Trash TMDL on the ground it was unauthorized to do so after adopting its own TMDL. In *City of Arcadia II, supra,* 411 F.3d at pages 1106–1107, the court affirmed the lower court's dismissal of the case.

III

Procedural History

The Cities are within the Regional Board's jurisdiction and are permittees under the 2001 Municipal NPDES Permit. In July 2002 the Cities filed a petition for writ of mandate and complaint for declaratory and injunctive relief against the Water Boards. They filed the action in the Los Angeles County Superior Court, but the parties stipulated to its transfer to the San Diego County Superior Court.

The second amended petition alleges numerous grounds on which the Trash TMDL violates the Clean Water Act or the Porter–Cologne Act, and the court adjudicated some issues in favor of each party. It found the ***1408** Water Boards improperly (1) failed to conduct an analysis of the Los Angeles River's assimilative capacity; (2) failed to conduct a cost-benefit analysis or ****383** consider economic factors under Water Code sections 13267 and 13241; (3) purported to apply the Trash TMDL to the Estuary even though it is not listed on the state's 1998 303(d) list as impaired; and (4) failed to prepare a required EIR or its functional equivalent under CEQA. The court issued a writ of mandate commanding the Water Boards to set aside the amendment to the 1994 Basin Plan and the Trash

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

TMDL to the extent it was based on the above findings and to not take any further steps to implement it. The court denied the Water Boards' motion to vacate the judgment or grant a new trial, and judgment was entered on December 24, 2003.

The Cities later moved for an order that the prohibitory terms of the writ of mandate and judgment not be stayed on appeal. (Code Civ. Proc., § 1110b.) The court granted the motion, and further ordered that "to preserve the status quo and prevent injustice to [the Cities], the ... implementation schedule and compliance dates, and all milestones contained in the [Trash TMDL] shall be tolled effective December 24, 2003, through and until a final determination has been rendered on the pending appeal." The Water Boards appealed that order, and in accordance with the parties' stipulation we consolidated it with the other appeals.

DISCUSSION

WATER BOARDS' APPEAL

I

Standard of Review

[1][2] The Water Boards contend a deferential standard of review applies to our review of their action under Code of Civil Procedure section 1085, and the Cities claim an independent standard applies under Code of Civil Procedure section 1094.5. Code of Civil Procedure section 1094.5, the administrative mandamus statute, applies when "the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal." (Code Civ. Proc., § 1094.5, subd. (a).) "Acts of an administrative agency that are quasi-legislative in nature, e.g., establishment of regulations to carry out a statutory policy or direction, are not reviewable by administrative mandamus." (8 Witkin, Cal. Procedure (4th ed. 1997) Extraordinary Writs, § 268, pp. 1067–1068.) Rather, review of a quasi-legislative action is limited to traditional mandamus. (*Id.* at p. 1068.)

[3][4] ***1409** The trial court correctly found this proceeding is for traditional mandamus because the Regional Board's adoption and the State Water Board's approval of the Trash TMDL was quasi-legislative. Under Code of Civil Procedure section 1085, " ' "review is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking in evidentiary support," ' ... [and][t]he petitioner has the burden of proof to show that the decision is unreasonable or invalid as a matter of law. [Citation.] We review the record de novo except where the trial court made foundational factual findings, which are binding on appeal if supported by substantial evidence." (*Citizens for Improved Sorrento Access, Inc. v. City of San Diego* (2004) 118 Cal.App.4th 808, 814, 13 Cal.Rptr.3d 259.)

The Cities' reliance on Water Code section 13330 is misplaced. It provides that "[a]ny party aggrieved by a final decision or order of a regional board *for which the state board denies review* may obtain review of the decision or order of the regional**384** board in the superior court (*id.*, § 13330, subd. (b), italics added), and "[e]xcept as otherwise provided herein, Section 1094.5 of the Code of Civil Procedure shall govern proceedings for which petitions are filed pursuant to this section" (*id.*, § 13330, subd. (d)). Given the language italicized above, Water Code section 13330 necessarily applies to an administrative appeal of a quasi-judicial action under Code of Civil Procedure section 1094.5. Here, an appeal to the State Board was unnecessary because the Trash TMDL was ineffective without its approval. (Wat.Code, § 13245.) Indeed, the State Board notified the Cities in March 2001 that it "lacks statutory authority to accept petitions for review of water quality control plan (basin plan) amendments adopted" by regional boards.

[5][6] As to CEQA issues, the parties agree an abuse of discretion standard applies. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1199, 24 Cal.Rptr.3d

543.) Abuse of discretion "is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Resources Code, § 21168.5.) "Our task on appeal is 'the same as the trial court's.' [Citation.] Thus, we conduct our review independent of the trial court's findings." (*Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602, fn. 3, 35 Cal.Rptr.2d 470.)

II

Assimilative Capacity Study

The trial court invalidated the Trash TMDL based in part on the Cities' argument an "assimilative capacity study" is a required element of a TMDL and none was performed here. In its statement of decision, the court ***1410** explained "[i]t is unreasonable to conclude that the beneficial uses of the [Los Angeles] River could not be maintained with some 'target' other than zero. Of course, it is possible the River would not support a greater target, however, without a study it is yet undetermined."

[7] The Water Boards contend the trial court erred by substituting its own judgment for that of the Water Boards on the issue of whether the adoption of the Trash TMDL should have been preceded by a scientific study of the assimilative capacity of the Los Angeles River. They assert the matter was best suited for their determination rather than the court's and the evidence adequately supports their decision. We agree with the Water Boards.

During the notice and comment period, the Regional Board received numerous complaints that a zero Trash TMDL is infeasible, or at least unwarranted without a scientific assimilative capacity study, or load capacity study, showing a zero limit is the only means of protecting beneficial uses. For instance, the City of Los Angeles worried that "[i]f there's one gum wrapper in the [Los Angeles] River, you can get sued."

The Regional Board responded to one complaint as follows: "For more typical pollutants, the loading parameters are flow and pollutant concentration. For this pollutant [trash], flow does not serve to dilute the pollutant, but merely serves as a transport mechanism. Therefore, the typical loading calculation does not apply to trash." The Regional Board took the position that since littering is unlawful, a target of zero trash in the Los Angeles River is the only defensible position. It also explained that its staff "found no study to document that there is an acceptable level of trash that will cause no harm to aquatic life," and absent such a study it was compelled to adopt a zero target.

****385** At a Regional Board hearing, Dr. Mark Gold, executive director of Heal the Bay, testified he was unaware of any assimilative capacity study having been performed anywhere on trash. He explained, "Basically it's a physical object. It's trash. It's not something that breaks down and becomes part of the environment in many, many cases. And so honestly, it probably won't reach any sort of threshold of being a scientific study of any value."

At a State Board hearing Dave Smith, an EPA team leader working with the Regional Board on the trash issue, testified "it would be difficult to design [an assimilative capacity] study and come up with firm answers." He also explained that both the Regional Board and the State Board "have conducted pretty diligent efforts to find research studies, reports, that look at the affects of trash on the aquatic environment," and neither they nor the EPA could find any literature to support a target of more than zero trash.

***1411** Alex Helperin, of the Natural Resources Defense Council, testified at a Regional Board hearing that "[e]ven small quantities [of trash] can maim and kill wildlife, [which] becomes entangled in it or ingest[s] it. [Trash] [c]an obstruct and repel boaters and contract recreators and compromise the aesthetic quality that's essential to the recognized aspect of non-contact recreation beneficial use for the Los Angeles River."

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

The administrative record includes numerous photographs of copious amounts of trash deposited in the Los Angeles River watershed through storm water drains. Dennis Dickerson, the Executive Officer of the Regional Board, testified he took photographs of trash in the Long Beach area shortly after storms, and among them are photographs of "water birds foraging among the trash." One photograph is of a bird with a cigarette butt in its mouth and another is of a fish trapped in a plastic six-ring can holder.

In arguing an assimilative capacity study is required *before* adopting a TMDL, the Cities rely principally on an EPA document issued January 7, 2000, entitled "Guidance for Developing TMDLs in California" (2000 EPA Guidance). It states: "The TMDL document must describe the relationship between numeric target(s) and identified pollutant sources, and estimate total assimilative capacity (loading capacity) of the water[ ]body for the pollutant of concern.... [¶] The loading capacity is the critical quantitative link between the applicable water quality standards (as interpreted through numeric targets) and the TMDL. Thus, a maximum allowable pollutant load must be estimated to address the site-specific nature of the impairment.... [¶] The loading capacity section must discuss the methods and data used to estimate loading capacity. A range of methods can be used...." (Emphasis omitted.)

The 2000 EPA Guidance, however, contains the following disclaimer: "[I]t does not impose legally-binding requirements on the EPA, the State of California, or the regulated community, and may not apply to a particular situation based upon the circumstances. EPA and State decision makers retain the discretion to adopt approaches on a case-by-case basis that differ from this guidance where appropriate and consistent with the requirements of section 303(d) [of the Clean Water Act] and EPA's regulations."

Smith, of the EPA, testified at a Regional Board hearing that he wrote the 2000 EPA Guidance and the Trash TMDL "fully complies with the Clean Water Act, its regulations and [the 2000 EPA Guidance]." Smith explained the "TMDL process specifically contemplates making decisions under uncertainty," and "[i]t does so by providing that a margin of safety has to be ****386** incorporated in every TMDL to account for the uncertainty in the analysis." Smith said states are required "to move forward to make TMDL decisions ***1412** based on available information and data, not to wait again and again and again for better information to come forward." Generally, " 'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.' " (*United States v. Mead Corp.* (2001) 533 U.S. 218, 227–228, 121 S.Ct. 2164, 150 L.Ed.2d 292.)

In *Natural Resources Defense Council v. Muszynski* (2d Cir.2001) 268 F.3d 91 (*Muszynski*), the plaintiff asked the court to invalidate a TMDL that the EPA had approved to control phosphorus pollution in drinking water, on the ground a margin of safety of only 10 percent was insufficient to account for uncertainty regarding the effects of phosphorus on water quality. The plaintiff argued "that no scientific or mathematical basis prescribed this percentage as opposed to any other." (*Id.* at p. 102.) The EPA countered that "because 'there is no "standard" or guideline for choosing a specific margin of safety, best professional judgment and the available information are used in setting [it].' " (*Ibid.*) The *Muszynski* court agreed with the EPA, explaining: "While the [margin of safety] may ... be set with an uncomfortable degree of discretion, requiring that EPA [or authorized regional board] show a rigorous scientific methodology *dictates one course of action as opposed to another and would effectively prevent the agency from acting in situations where action is required in the face of a clear public health or environmental danger but the magnitude of that danger cannot be effectively quantified.* '[A]s long as Congress delegates power to an agency to regulate on the borders of the unknown, courts cannot interfere with reasonable interpretations of equivocal evidence.' [Citation.] ...

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

[S]imply to reject EPA's efforts to implement the [Clean Water Act] because it must respond to real water quality problems without the guidance of a rigorously precise methodology would essentially nullify the exercise of agency discretion in the form of 'best professional judgment.' " (*Muszynski, supra,* 268 F.3d at pp. 102–103, italics added.)

Further, in *Muszynski, supra,* 268 F.3d 91, 103, the court noted "that approval of the Phase I [margin of safety] was based, in part, on the limited information available. The EPA approval contemplates revision of the [margin of safety] as more information becomes available: 'As additional reservoir data and loading data become available, Phase I model assumptions are being reexamined under Phase II.' "

We conclude federal law does not require the Regional Board to conduct an assimilative capacity study before adopting the Trash TMDL. Moreover, the evidence amply shows that because of the nature of trash, including Styrofoam containers and other materials that are undiluted by water, in contrast to chemical pollutants, and the dangers to wildlife of even small amounts of trash, an assimilative capacity study would be difficult to conduct and of little value at the outset. For instance, given the ill effects of trash in a ***1413** water body it is unlikely such a study would determine the Los Angeles River may be loaded with a certain percentage of trash without affecting beneficial uses, particularly since a TMDL must include a margin of safety that "takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." (33 U.S.C. § 1313(d)(1)(C).) In any event, the Trash TMDL requires the Regional Board to reconsider the zero trash target after a 50 percent reduction of trash is achieved, and no party suggests a trash reduction of at least 50 percent is unwarranted or unattainable. Because of ****387** this escape hatch, compliance with a zero trash target may never actually be mandated. The Water Boards' decision not to conduct or require an assimilative capacity study is within their expertise, not the court's, and we defer to them on the issue.

III

Cost-Benefit Analysis and Economic Considerations

[8] The Water Boards next contend the court erred by finding the Trash TMDL is invalid because they violated state law by not conducting a cost-benefit analysis (Wat.Code, § 13267) or considering economic factors (*id.* at § 13241) before adopting and approving it.

A

Water Code Section 13267

A regional board is authorized to investigate the quality of waters in its region (Wat.Code, § 13267, subd. (a)), and when it requires a polluter to furnish "technical or monitoring program reports," the "burden, including costs, of these reports shall bear a reasonable relationship to the need for the report[s] and the benefits to be obtained from the reports." (Wat.Code, § 13267, subd. (b)(1).) The court found the Regional Board adopted the Trash TMDL under the authority of Water Code section 13267, as the document mentions the statute several times and "expressly requires monitoring plans and submission of data to establish baselines for trash discharges."

The Water Boards persuasively contend Water Code section 13267 is inapplicable, and references to that statute in the Trash TMDL are to contemplated future orders. For instance, the Trash TMDL states "[b]aseline monitoring will be required via [Water Code] Section 13267," and the submission of baseline monitoring plans will be due "30 days after receipt of the Executive Officer's request as authorized by [Water Code] Section 13267." ***1414** It also states that "future storm water permits will be modified to incorporate the Waste Load Allocations and to address monitoring and implementation of this [Trash] TMDL."

Further, the Trash TMDL states "the permittee [under the Municipal NPDES permit] will submit a

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

monitoring plan with the proposed monitoring sites and at least two alternative monitoring locations for each site. The plan must include maps of the drainage and storm drain data for each proposed and alternate monitoring location. The monitoring plan(s) will be submitted to the Regional Board within 30 days after receipt of the Executive Officer's letter requesting such a plan. Such a request is authorized pursuant to [Water Code] [s]ection 13267.... The Regional Board's Executive Officer will have full authority to review the monitoring plan(s), to modify the plan, to select among the alternate monitoring sites, and to approve or disapprove the plan(s)."

Additionally, the Water Boards submit that the December 21, 2001, order the Regional Board issued under Water Code section 13267 to the County of Los Angeles and copermittees under the Municipal NPDES permit regarding baseline monitoring and reporting would have been "useless and unnecessary" had the Trash TMDL itself required monitoring and reporting, and since there was no appeal of the December 21 order to the State Board within 30 days (Wat.Code, § 13320, subd. (a)) the cost-benefit analysis issue is not subject to appellate review. We note that the December 21 order, but not the Trash TMDL, warns that under Water Code section 13268 the "failure to conduct the required monitoring and/or to provide the required information in a timely manner ****388** may result in civil liability imposed by the Regional Board in an amount not to exceed ... $1000."

[9][10] "Our primary aim in construing any law is to determine the legislative intent. [Citation.] In doing so we look first to the words of the statute, giving them their usual and ordinary meaning." (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 501, 247 Cal.Rptr. 362, 754 P.2d 708.) We agree that by its plain terms Water Code section 13267 is inapplicable at the TMDL stage, and thus the court erred by invalidating the Trash TMDL on this ground. The monitoring and reports are required by the December 21, 2001 order, not the Trash TMDL, and the reduction of trash will be implemented by other NPDES permits. "TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans." (*Pronsolino v. Nastri* (9th Cir.2002) 291 F.3d 1123, 1129.) "A TMDL does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source ***1415** controls." (*City of Arcadia I, supra,* 265 F.Supp.2d at p. 1144.) A "TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and water[ ]bodies." (*Id.* at p. 1145.)

B

Water Code Section 13241

[11] Water Code section 13241 provides that "[e]ach regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance." In establishing water quality objectives a regional board is required to consider several factors, including "[e]conomic considerations." (Wat.Code, § 13241, subd. (d).)

The Water Boards contend Water Code section 13241 is inapplicable because the Trash TMDL does not establish water quality objectives, but merely implements, under Water Code section 13242, the existing narrative water quality objectives in the 1994 Basin Plan. It provides that waters shall not contain floating materials, including solids, or suspended or settleable materials in concentrations that adversely affect beneficial uses. The Cities counter that the Trash TMDL effectively establishes new water quality objectives, because when the 1994 Basin Plan was adopted a TMDL for trash was not contemplated and thus economic considerations of such a TMDL were not considered. Further, the Trash TMDL imposes for the first time a numeric limit for trash and significantly increases

the costs of compliance.

We need not, however, decide whether the Trash TMDL adopts new or revised water quality objectives within the meaning of Water Code section 13241, because even if the statute is applicable, the Water Boards sufficiently complied with it.[FN9] Water Code section 13241, subdivision (d) does not define "economic considerations" or specify a particular manner of compliance, and thus, as the Water Boards assert, the matter is within a regional ****389** board's discretion. It appears there is no reported opinion analyzing the "economic considerations" phrase of this statute. In *City of Burbank, supra,* 35 Cal.4th at page 625, 26 Cal.Rptr.3d 304, 108 P.3d 862, the court, without discussion, concluded that in adopting Water Code section 13241 the Legislature intended "that a regional board consider the *cost of compliance* [with numeric pollutant restrictions] when setting effluent limitations in a wastewater discharge permit." (Italics added.)

> FN9. For the same reason, we are not required to reach the Water Boards' assertion that to any extent the California Supreme Court's recent opinion in *City of Burbank, supra,* 35 Cal.4th 613, 26 Cal.Rptr.3d 304, 108 P.3d 862, applies to a TMDL, it precludes them from considering economic factors in establishing the Trash TMDL.

***1416** The Trash TMDL discusses the costs of gathering and disposing of trash at the mouth of the Los Angeles River watershed during the rainy seasons between 1995 and 1999. It also states: "Cleaning up the river, its tributaries and the beaches is a costly endeavor. The Los Angeles County Department of Public Works contracts out the cleaning of over 75,000 catchments (catch basins) for a total cost of slightly over $1 million per year, billed to 42 municipalities.... [¶] Over 4,000 tons of trash are collected from Los Angeles County beaches annually, at a cost of $3.6 million to Santa Monica Bay communities in fiscal years 1988–1989 alone. In 1994 the annual cost to clean the 31 miles of beaches (19 beaches) along Los Angeles County was $4,157,388."

The Trash TMDL also discusses the costs of various types of compliance measures, and explains the "cost of implementing this TMDL will range widely, depending on the method that the Permittees select to meet the Waste Load Allocations. Arguably, enforcement of existing litter ordinances could be used to achieve the final Waste Load Allocations at minimal or no additional cost. The most costly approach in the short-term is the installation of full-capture structural treatment devices on all discharges into the river. However, in the long term this approach would result in lower labor costs and may be less expensive than some other approaches."

The Trash TMDL defines catch basin inserts as "the least expensive structural treatment device in the short term," at a cost of approximately $800 each. It cautions, however, that because catch basin inserts "are not a full capture method, they must be monitored frequently and must be used in conjunction with frequent street sweeping." The Trash TMDL estimates that if the approximately 150,000 catch basins throughout the watershed were retrofitted with inserts, capital costs would be $120 million over 10 years, maintenance and operation costs would be $330 million over 10 years, and maintenance and operation costs after full implementation would be $60 million per year.

Further, the Trash TMDL discusses the full capture vortex separation system (VSS), which "diverts the incoming flow of storm[ ]water and pollutants into a pollutant separation and containment chamber. Solids within the separation chamber are kept in continuous motion, and are prevented from blocking the screen so that water can pass through the screen and flow downstream. This is a permanent device that can be retrofitted for oil separation as well. Studies have shown that VSS [units] remove virtually all of the trash contained in treated water. The cost of installing a VSS is assumed to be high, so limited funds will place a cap on the number of units which can be installed dur-

ing any single fiscal year."

*1417 The Trash TMDL estimates the retrofitting of the entire Los Angeles River watershed with low capacity VSS units would be $945 million in capital costs and $813 million in operation and maintenance costs over 10 years, and $148 million in annual operation and maintenance costs after full implementation. The installation of large capacity VSS units would run **390 approximately $332 million in capital costs and $41 million in operation and maintenance costs over 10 years, and $7.4 million per year in operation and maintenance costs after full implementation. The yearly cost of servicing one VSS unit is estimated to be $2,000. The Trash TMDL explains that "outfitting a large drainage with a number of large VSS [units] may be less costly than using a larger number of small VSS [units]. Maintenance costs decrease dramatically as the size of the system increases." The Trash TMDL also contains a cost comparison of catch basin inserts and low capacity and large capacity VSS units.

Additionally, the Trash TMDL estimates the costs for end-of-pipe nets at between $10,000 and $80,000, depending on the length of the pipe network. It explains that " '[r]elease nets' are a relatively economical way to monitor trash loads from municipal drainage systems. However, in general they can only be used to monitor or intercept trash at the end of a pipe and are considered to be partial capture systems, as nets are usually sized at a 1/2" to 1" mesh."

The Cities assert that "a 'consideration' of economics should have included a discussion of the economic *impacts* associated with the vortex separation systems. Alternatively, the Water Boards could have analyzed other methods of compliance, such as a series of [best management practices], including increased street sweeping, catch basin inserts, release nets, or some other combination of [best management practices] that should have been evaluated for purposes of allowing the municipalities to be in deemed compliance with the zero [Trash] TMDL." (Italics added.) As stated, though, the Trash TMDL does include the estimated costs of several types of compliance methods and a cost comparison of capital costs and costs of operation and maintenance. The Cities cite no authority for the proposition that a consideration of economic factors under Water Code section 13241 must include an analysis of every conceivable compliance method or combinations thereof or the fiscal impacts on permittees.

Given the lack of any definition for "economic considerations" as used in Water Code section 13241, and our deference to the Water Boards' expertise, we conclude the Trash TMDL's discussion of compliance costs is adequate *1418 and does not fulfill the arbitrary or capricious standard. Accordingly, the Trash TMDL is not invalid on this ground.[FN10]

FN10. The Cities also assert that under federal law an economic analysis is a prerequisite to the adoption of a TMDL. They rely on 40 Code of Federal Regulations, part 130.6(c)(4), but it pertains to nonpoint sources of pollution that need not be addressed in a TMDL, as discussed further below. The portion of the regulation covering TMDLs does not mention economics (*id.*, § 130.6(c)(1)). Parts 130.6(5) and (6) of 40 Code of Federal Regulations discuss economics, but in the context of the area wide planning process under section 208(b)(2) of the Clean Water Act (33 U.S.C. § 1288(b)(2)), which is inapplicable here. According to the Water Boards, the Southern California Association of Governments is the designated area-wide planning agency.

IV

Los Angeles River Estuary

[12] Additionally, the Water Boards challenge the court's finding they abused their discretion by attempting to include the Estuary in the Trash TMDL, as the Estuary is not on the state's 1998 303(d)

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

list of impaired waters. The Water Boards contend a water body's formal listing on the state's 303(d) list is not a prerequisite to formulating a TMDL for it. Rather, an agency may simultaneously submit to the EPA the *identification* of a ****391** water body as impaired and a corresponding TMDL.

The Clean Water Act provides: "Each state shall identify those waters within its boundaries for which the effluent limitations ... are not stringent enough to implement any water quality standards applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters." (33 U.S.C. § 1313(d)(1)(A).) Further, it provides that "[e]ach state shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load...." (*Id.* at § 1313(d)(1)(C).) These provisions do not prohibit a regional board from identifying a water body and establishing a TMDL for it at essentially the same time, or indicate that formal designation on a state's 303(d) list is a prerequisite to a TMDL.

Further, 33 United States Code section 1313(d)(2) provides: "Each State shall submit to the [EPA] Administrator from time to time, ... for his [or her] approval the waters identified *and* the loads established under paragraphs (1)(A) [and] ... (1)(C) ... of this subsection. The [EPA] Administrator shall either approve or disapprove such identification *and* load not later than thirty days after the date of submission." (Italics added.) This clarifies that a regional board may simultaneously identify an impaired water body and establish a TMDL for it.

***1419** In *San Francisco BayKeeper v. Whitman, supra,* 297 F.3d 877, 884–885, the court held an agency has no *duty* to submit a TMDL at the same time it identifies an impaired water body, noting the development of a TMDL "to correct the pollution is obviously a more intensive and time-consuming project than simply identifying the polluted waters, as the EPA has indicated." (*Id.* at p. 885.) The Water Boards assert the case does not deprive an agency from exercising its *discretion* to simultaneously submit to the EPA the identification of an impaired water body and a TMDL for it. Given the plain language of 33 United States Code section 1313(d)(2), we agree. Moreover, "[s]tates remain at the front line in combating pollution" (*City of Arcadia II, supra,* 411 F.3d at p. 1106), and "[s]o long as the [s]tate does not attempt to adopt more *lenient* pollution control measures than those already in place under the [Clean Water] Act, [it] does not prohibit state action." (*Id.* at p. 1107.)

[13] Alternatively, the Cities complain the Regional Board did not sufficiently identify the Estuary as being impaired and included in the Trash TMDL until after its adoption and approval by the State Board and Office of Administrative Law and the completion of all public hearings. On July 29, 2002, the Regional Board sent the EPA a memorandum "to provide clarification on specific aspects" of the Trash TMDL. It stated that a "TMDL was established for the reaches of the Los Angeles River, tributaries and lakes listed on the [state's] 1998 303(d) list," and "[i]n addition, a TMDL was established for the Los Angeles River [E]stuary in the City of Long Beach. As described on page 12, paragraph 2 of the [staff] report, staff found that the impairment in the [E]stuary due to trash is 'even more acute in Long Beach where debris flushed down by the upper reaches collects.' [¶] The impairment in the [E]stuary was well documented during TMDL development," and it "would have been included in the 1998 303(d) list if the attached photographic evidence had been available at the time of the listing."

The Trash TMDL lists the reaches of the Los Angeles River "that are impaired by trash, and listed on the [state's] 303(d) ****392** list." The list does not include the Estuary. The Water Boards assert that even so, it was always obvious the Estuary is impaired and included in the Trash TMDL. The Trash TMDL states it is "for the Los Angeles River Watershed," and "watershed" is defined as "a re-

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

gion or area bounded peripherally by a divide and draining ultimately to a particular watercourse or body of water." (Merriam–Webster's Collegiate Dict. (10th ed.1996) p. 1336.) "Estuary" is defined as "a water passage where the tide meets a river current," especially "an arm of the sea at the lower end of a river." (*Id.* at p. 397.)

The Trash TMDL describes the watershed as beginning at the "western end of the San Fernando Valley to the Queensway Bay and Pacific Ocean at Long Beach," and it also states the watershed continues from "Willow Street all ***1420** the way through the [E]stuary." An amici curiae brief by Santa Monica BayKeeper, Inc., Heal the Bay, Inc., and Natural Resources Defense Council, Inc. (collectively BayKeeper), asserts Queensway Bay is the site of the Estuary, and no party has challenged the assertion. Further, the Trash TMDL lists and discusses the beneficial uses of the Estuary, including habitat for many species of birds, some endangered, and fish. It also states beneficial uses "are impaired by large accumulations of suspended and settled debris throughout the river system," and in particular "estuarine habitat" is impaired. Further, the administrative record contains several pictures of trash deposited in the Estuary during high flows, depicting "the variety of ways through which trash ... becomes an integral part of wildlife, affecting all plant and animal communities in the process."

The Trash TMDL's identification of the Estuary as impaired could have been clearer, but we conclude it was sufficient to put all affected parties on notice, and does not meet the arbitrary-and-capricious standard. Further, although the identification of impaired water bodies requires a priority ranking (33 U.S.C. § 1313(d)(2)), and the Trash TMDL does not prioritize the Estuary's need for a TMDL, we agree with amici BayKeeper that any error in the Water Boards' procedure was not prejudicial because the Trash TMDL shows amelioration of the trash problem in the entire Los Angeles River watershed is highly important, and it is unlikely the Water Boards would single out the Estuary for lower priority or that inclusion of the Estuary would disturb their existing priorities.

V

CEQA

[14] The Water Boards challenge the sufficiency of the evidence to support the trial court's finding that the amendment adding the Trash TMDL to the 1994 Basin Plan does not comport with CEQA. The court found the Regional Board's environmental checklist was deficient and there is sufficient evidence of a fair argument that the project may have a significant effect on the environment, thus necessitating an EIR or its functional equivalent. We conclude the court was correct.

A

General Legal Principles

"CEQA compels government first to identify the environmental effects of projects, and then to mitigate those adverse effects through the ***1421** imposition of feasible mitigation measures or through the selection of feasible alternatives." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1233, 32 Cal.Rptr.2d 19, 876 P.2d 505.) CEQA mandates that public agencies refrain from approving projects with significant environmental effects if ****393** there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134, 65 Cal.Rptr.2d 580, 939 P.2d 1280.)

[15][16][17] CEQA is implemented through initial studies, negative declarations and EIR's. (*Sierra Club v. State Bd. of Forestry, supra,* 7 Cal.4th at p. 1229, 32 Cal.Rptr.2d 19, 876 P.2d 505.) "CEQA requires a governmental agency [to] prepare an [EIR] whenever it considers approval of a proposed project that *'may* have a *significant* effect on the environment.' " (*Quail Botanical Gardens Foundation, Inc. v. City of Encinitas, supra,* 29 Cal.App.4th at p. 1601, 35 Cal.Rptr.2d 470.) "If there is no substantial evidence a project 'may have a significant effect on the environment' or the ini-

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

tial study identifies potential significant effects, but provides for mitigation revisions which make such effects insignificant, a public agency must adopt a negative declaration to such effect and, as a result, no EIR is required. [Citations.] However, the Supreme Court has recognized that CEQA requires the preparation of an EIR 'whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact.' [Citations.] Thus, if substantial evidence in the record supports a 'fair argument' significant impacts or effects may occur, an EIR is required and a negative declaration cannot be certified." (*Id.* at pp. 1601–1602, 35 Cal.Rptr.2d 470.)

" 'Significant effect on the environment' means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. An economic or social change by itself shall not be considered a significant effect on the environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant." (Cal.Code Regs., tit. 14, § 15382.)

B

Certified Regulatory Program

[18] "State regulatory programs that meet certain environmental standards and are certified by the Secretary of the California Resources Agency are exempt from CEQA's requirements for preparation of EIRs, negative declarations, and initial studies. [Citations.] Environmental review documents prepared by certified programs may be used instead of environmental documents that CEQA would otherwise require. [Citations.] Certified regulatory ***1422** programs remain subject, however, to other CEQA requirements." (2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2005) § 21.2, p. 1076; Pub. Resources Code, § 21080.5.) Documents prepared by certified programs are considered the "functional equivalent" of documents CEQA would otherwise require. (*Mountain Lion Foundation v. Fish & Game Com., supra,* 16 Cal.4th at p. 113, 65 Cal.Rptr.2d 580, 939 P.2d 1280; 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra,* § 21.10, p. 1086 ["the documentation required of a certified program essentially duplicates" that required for an EIR or negative declaration].)

An "agency seeking certification must adopt regulations requiring that final action on the proposed activity include written responses to significant environmental points raised during the decision-making process. [Citation.] The agency must also implement guidelines for evaluating the proposed activity consistently with the ****394** environmental protection purposes of the regulatory program. [Citation.] The document generated pursuant to the agency's regulatory program must include alternatives to the proposed project and mitigation measures to minimize significant adverse environmental effects [citation], and be made available for review by other public agencies and the public [citation]." (*Mountain Lion Foundation v. Fish & Game Com., supra,* 16 Cal.4th at p. 127, 65 Cal.Rptr.2d 580, 939 P.2d 1280.)

[19] The guidelines for implementation of CEQA (Cal.Code Regs., tit. 14, § 15000 et seq.) do not directly apply to a certified regulatory program's environmental document. (2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra,* § 21.10, p. 1086.) However, "[w]hen conducting its environmental review and preparing its documentation, a certified regulatory program is subject to the broad policy goals and substantive standards of CEQA." (*Ibid.*)

In a certified program, an environmental document used as a substitute for an EIR must include "[a]lternatives to the activity and mitigation measures to avoid or reduce any significant or potentially significant effects that the project might have on the environment," and a document used as a substitute negative declaration must include a "statement that the agency's review of the project

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

would not have any significant or potentially significant effects on the environment and therefore no alternatives or mitigation measures are proposed to avoid or reduce any significant effects on the environment. This statement shall be supported by a checklist or other documentation to show the possible effects that the agency examined in reaching this conclusion." (Cal.Code Regs., tit. 14, § 15252, subd. (a).)

The basin planning process of the State Board and regional boards is a certified regulatory program (Cal.Code Regs., tit. 14, § 15251, subd. (g)), and ***1423** the regulations implementing the program appear in the California Code of Regulations, title 23, sections 3775 to 3782. A regional board's submission of a plan for State Board approval must be accompanied by a brief description of the proposed activity, a completed environmental checklist prescribed by the State Board, and a written report addressing reasonable alternatives to the proposed activity and mitigation measures to minimize any significant adverse environmental impacts. (*Id.*, § 3777, subd. (a).)

C

Environmental Documentation

The Regional Board's environmental documentation in lieu of documents CEQA ordinarily requires consists of a checklist and the Trash TMDL. The checklist asked a series of questions regarding whether implementation of the Trash TMDL would cause environmental impacts, to which the Regional Board responded "yes," "maybe" or "no." "Yes" or "maybe" answers required an explanation. The checklist described beneficial impacts pertaining to plant and animal life, water quality and recreation. The checklist denied the project would have any environmental impact on land, including soil displacement, air, noise, natural resources or traffic, and thus it included no discussion of those factors. The checklist concluded "the proposed Basin Plan amendment [adding the Trash TMDL] could not have a significant effect on the environment."

The Regional Board obviously intended its documentation to be the functional equivalent of a negative declaration. Nonetheless, on appeal the Water Boards claim for the first time that the Regional ****395** Board's environmental review process is tiered, and its documentation meets the requirements of a first tier EIR under Public Resources Code section 21159. They assert the court's criticism of the checklist is baseless "because it ignores the concept of tiered environmental review and specific provisions for pollution control performance standards."

" 'Tiering' refers 'to the coverage of general matters in broader EIRs (such as on general plans or policy statements) with subsequent narrower EIRs or ultimately *site-specific* EIRs incorporating by reference the general discussions and concentrating solely on the issues specific to the EIR subsequently prepared. Tiering is appropriate when the sequence of EIRs is: [¶] ... [f]rom a general plan, policy, or program EIR to a ... site-specific EIR.' " (*Natural Resources Defense Council, Inc. v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 285, 126 Cal.Rptr.2d 615.) "[C]ourts have allowed first tier EIR's to defer detailed analysis to subsequent project EIR's." ***1424**(*Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, 532, 98 Cal.Rptr.2d 334.)

Public Resources Code section 21159, which allows expedited environmental review for mandated projects, provides that an agency "shall perform, at the time of the adoption of a rule or regulation requiring the installation of pollution control equipment, or a performance standard or treatment requirement, an environmental analysis of the reasonably foreseeable methods of compliance.... The environmental analysis shall, at a minimum, include, all of the following: [¶] (1) An analysis of the reasonably foreseeable environmental impacts of the methods of compliance. [¶] (2) An analysis of reasonably foreseeable mitigation measures. [¶] (3) An analysis of reasonably foreseeable alternat-

ive means of compliance with the rule or regulation." (Pub. Resources Code, § 21159, subd. (a).) The Water Boards submit they complied with the statute, and the "tier two environmental review is the responsibility of the local agencies who will determine how they intend to comply with the performance standards" of the Trash TMDL.

Issues not presented to the trial court are ordinarily waived on appeal. (*Royster v. Montanez* (1982) 134 Cal.App.3d 362, 367, 184 Cal.Rptr. 560.) In any event, we conclude the checklist and Trash TMDL are insufficient as either the functional equivalent of a negative declaration FN11 or a tiered EIR. Moreover, an EIR is required since the Trash TMDL itself presents substantial evidence of a fair argument that significant environmental impacts may occur. "Because a negative declaration ends environmental review, the fair argument test provides a low threshold for requiring an EIR." (*Ocean View Estates Homeowners Assn., Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 399, 10 Cal.Rptr.3d 451.)

> FN11. A negative declaration may not be based on a " 'bare bones' " approach in a checklist. (*Snarled Traffic Obstructs Progress v. City and County of San Francisco* (1999) 74 Cal.App.4th 793, 797, fn. 2, 88 Cal.Rptr.2d 455, and cases cited therein.) A "certified program's statement of no significant impact must be supported by documentation *showing* the potential environmental impacts that the agency examined in reaching its conclusions," and "[t]his documentation would be similar to an initial study." (2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra,* § 21.11, pp. 1088–1089, italics added.) Because we conclude an EIR is required, we need not expand on how the checklist and Trash TMDL fail to satisfy negative declaration requirements or their functional equivalent.

****396** The Trash TMDL discusses various compliance methods or combinations thereof that permittees may employ, including the installation of catch basin inserts and VSS units. The Trash TMDL estimates that if the catch basin method is used exclusively, approximately 150,000 catch basins throughout the watershed would require retrofitting at a cost of approximately $120 million. It explains, however, that the "ideal way to capture trash deposited into a storm[ ]drain system would be to install a VSS unit. This device diverts ***1425** the incoming flow of storm[ ]water and pollutants into a pollution separation and containment chamber." Only VSS units or similar full-capture devices will be deemed fully compliant with the zero trash target. The Trash TMDL estimates the cost of installing low capacity VSS units would be $945 million and the cost of installing large capacity VSS units would be $332 million.

The checklist and the Trash TMDL, however, ignore the temporary impacts of the construction of these pollution controls, which logically may result in soils disruptions and displacements, an increase in noise levels and changes in traffic circulation. Further, the Trash TMDL explains that since catch basin inserts "are not a full capture method, they must be monitored frequently and must be used in conjunction with frequent street sweeping." The checklist and the Trash TMDL also ignore the effects of increased street sweeping on air quality, and possible impacts caused by maintenance of catch basin inserts, VSS units and other compliance methods.

Indeed, the County of Los Angeles wrote to the Regional Board that "cleanout of structural controls, such as [catch basin inserts] and VSSs, naturally will increase existing noise levels due to vehicle and vacuuming noises." The City of Los Angeles advised that the Trash TMDL would result in increased maintenance vehicle traffic and "substantial air emissions or deterioration of ambient air quality," increased noise, increased use of natural resources and adverse impacts on existing transportation systems.

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

The Water Boards contend those comments are merely "unsubstantiated opinion and speculation by biased project opponents." Substantial evidence is not "[a]rgument, speculation, unsubstantiated opinion or narrative [or] evidence which is clearly inaccurate or erroneous." (Pub. Resources Code, § 21082.2, subd. (c).) However, letters and testimony from government officials with personal knowledge of the anticipated effects of a project on their communities "certainly supports a fair argument that the project may have a significant environmental impact." (*City of Livermore v. Local Agency Formation Com.* (1986) 184 Cal.App.3d 531, 542, 230 Cal.Rptr. 867.) Again, however, the Trash TMDL itself satisfies the fair argument criterion.

Even if the Water Boards had relied on Public Resources Code section 21159 at the trial court, the environmental documents do not meet its minimum requirements. Neither the checklist nor the Trash TMDL includes an analysis of the reasonably foreseeable impacts of construction and maintenance of pollution control devices or mitigation measures, and in fact the Water Boards develop no argument as to how they ostensibly complied with the statute. While we agree a tiered environmental analysis is appropriate here, the Regional Board did not prepare a first-level EIR or its functional equivalent. We reject the Water Boards' argument the Regional Board did all it ***1426** could because there "is no way to examine project level impacts that are entirely dependent upon the speculative possibilities of how subsequent****397** decision[ ]makers may choose to comply" with the Trash TMDL. Tier two project-specific EIR's would be more detailed under Public Resources Code section 21159.2, but the Trash TMDL sets forth various compliance methods, the general impacts of which are reasonably foreseeable but not discussed.

As a matter of policy, in CEQA cases a public agency must explain the reasons for its actions to afford the public and other agencies a meaningful opportunity to participate in the environmental review process, and to hold it accountable for its actions. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles, supra,* 126 Cal.App.4th 1180, 1198, 24 Cal.Rptr.3d 543.) The Water Boards' CEQA documentation is inadequate, and remand is necessary for the preparation of an EIR or tiered EIR, or functional equivalent, as substantial evidence raises a fair argument the Trash TMDL may have significant impacts on the environment. The court correctly invalidated the Trash TMDL on CEQA grounds.[FN12]

FN12. The Water Boards also contend the trial court erred by staying the implementation schedule for the Trash TMDL pending this appeal. The matter is moot given our holding on the CEQA issue.

VI

Declaratory Relief

[20] In its statement of decision, the trial court explained the Cities "contend [the Water Boards] improperly attempted to control the watershed including the 'entire 584 square miles' of incorporated and unincorporated areas of the County [of Los Angeles], and nowhere in the [Trash] TMDL or the [1994] Basin Plan Amendment did [they] assert that the numeric Waste Load Allocations ... are to apply to the entire 584 square miles of watershed." The court, however, explained the Water Boards "concede the [Trash] TMDL only applies to navigable waters by asserting [they] didn't intend to control non-navigable waters," and it found "the parties are in agreement that the trash load allocations apply to the portion of the subject watershed as defined on pages 3575 and 3584 of the Administrative Record [pages of the Trash TMDL] and the Waste Load Allocations do not apply to non-waters."

The statement of decision nonetheless states the court granted the Cities' "relief as requested" as to "regulation of non-waters." In their third cause of action, the Cities sought a judicial declaration that the amendment to the 1994 Basin Plan and the Trash TMDL are invalid because they violate federal and state law. The judgment declared unenforce-

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

able a July 29, 2002, letter from ***1427** the Regional Board to the EPA that stated the "Waste Load Allocations apply to the entire urbanized portion of the watershed.... The urbanized portion of the watershed was calculated to encompass 584 square miles of the total watershed."

[21] "The fundamental basis of declaratory relief is the existence of an *actual, present controversy.*" (5 Witkin, Cal. Procedure, *supra,* Pleadings, § 817, p. 273.) Because the parties agreed during this proceeding there was no *present* controversy, the judgment should not have included declaratory relief on the nonwaters issue.

CITIES' APPEAL

I

Concepts of "Maximum Extent Practicable" and "Best Management Practices"

[22] The Cities contend a zero target for trash in the Los Angeles River is unattainable,****398** and thus the Trash TMDL violates the law by not deeming compliance through the federal "maximum extent practicable" and "best management practices" standards, which are less stringent than the numeric target of zero. The Cities rely on 33 United States Code section 1342(p)(3)(B)(iii), under which an NPDES permit for a municipal discharge into a storm drain "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 [EPA] Administrator or the State determines appropriate for the control of such pollutants." (Italics added.) FN13 "Best management practices" are generally pollution control measures set forth in NPDES permits. (*BIA, supra,* 124 Cal.App.4th at p. 877, 22 Cal.Rptr.3d 128.)

> FN13. The Clean Water Act and applicable regulations do not define the maximum extend practicable standard. (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 889, 22 Cal.Rptr.3d 128 (*BIA*).) In *BIA*, the NPDES permit at issue defined the standard as "a highly flexible concept that depends on balancing numerous factors." (*Ibid.*)

The Cities assert that "as the [r]ecord reflects, compliance with the 'zero' [Trash] TMDL ... is impossible," and the Water Boards "themselves recognize that 'zero' is an impossible standard to meet." Contrary to the Cities' suggestion, the Water Boards made no implied finding or concession of impossibility. Rather, the record shows that members of the Water Boards questioned whether a zero trash target is actually attainable. A zero limit on ***1428** trash within the meaning of the Trash TMDL *is* attainable because there are methods of deemed compliance with the limit. The record does not show the limit is unattainable, and the burden was on the Cities as opponents of the Trash TMDL to establish impossibility. Further, the impossibility issue is not germane at this juncture, as the matter is at the planning stage with an interim goal of a 50 percent reduction in trash, a goal everyone agrees is necessary and achievable.

In any event, the trial court found 33 United States Code section 1342(p)(3)(B)(iii) inapplicable to the adoption of a TMDL. The court also found state and federal laws authorize regional boards to "use water quality, and not be limited to practicability as the guiding principle for developing limits [in a TMDL] on pollution." Further, the court noted the Cities presented no authority for their proposition the Regional Board is required to adopt a storm water TMDL that is achievable.

We agree with the court's assessment. The statute applicable to establishing a TMDL, 33 United States Code section 1313(d)(1)(C), does not suggest that practicality is a consideration. To the contrary, a regional board is required to establish a TMDL "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety." (33 U.S.C. § 1313(d)(1)(C).) The NPDES permit provision, 33 United States Code 1342(p)(3)(B), is inapplicable because, again,

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

we are only considering the propriety of the Trash TMDL, a precursor to NPDES permits implementing it. Under the Trash TMDL, the numeric target will be reconsidered after several years when a reduction in trash of 50 percent is achieved, and thus it is presently unknown whether compliance with a trash limit of zero will ever actually be mandated.

[23] To bolster their position the Cities rely on **39933 United States Code section 1329(a)(1)(C)). It provides, however, that in a state's assessment report for a *nonpoint* source management program, the state must "describe[ ] the process, including intergovernmental coordination and public participation, for identifying best management practices and measures to control each category and subcategory of nonpoint sources and, where appropriate, particular nonpoint sources identified under subparagraph (B) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source." (*Ibid.*) In *BIA, supra,* 124 Cal.App.4th at page 887, 22 Cal.Rptr.3d 128, we rejected the argument the statute shows Congress intended to apply a maximum extent practicable standard to point source discharges as well as nonpoint discharges. The Cities say they disagree with *BIA*, but they develop no argument revealing any flaw in the opinion. "[P]arties are required ***1429** to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat appellant's ... issue as waived." (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448, 37 Cal.Rptr.2d 126.)

The Cities' reliance on *Defenders of Wildlife v. Browner* (9th Cir.1999) 191 F.3d 1159, for the proposition that municipalities, unlike private companies, may not be required to strictly comply with numeric discharge limits is likewise misplaced. *Defenders of Wildlife v. Browner* involves a challenge to an NPDES permit, not the adoption of a TMDL. Further, the court there rejected the argument that "the EPA [or authorized regional or state board] may not, under the [Clean Water Act], require strict compliance with state water-quality standards, through numerical limits or otherwise." (*Id.* at p. 1166.) The court explained: "Although Congress did not require municipal storm-sewer discharges to comply strictly with [numerical effluent limitations], [section] 1342(p)(3)(B)(iii) [of United States Code, title 33] states that '[p]ermits for discharges from municipal storm sewers ... shall require ... *such other provisions as the* [*EPA*] *Administrator ... determines appropriate for the control of such pollutants.*' (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate.... [¶] Under that discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards.... Under 33 United States Code section 1342(p)(3)(B)(iii), the EPA's choice to include either management practices or numeric limitations in the permits was within its discretion." (*Id.* at pp. 1166–1167.)

In *BIA*, this court similarly held that 33 United States Code section 1342(p)(3)(B)(iii) does not divest a regional board's discretion to impose an NPDES permit condition requiring compliance with state water quality standards more stringent than the maximum-extent-practicable standard. (*BIA, supra,* 124 Cal.App.4th at pp. 871, 882–885, 22 Cal.Rptr.3d 128; see also Wat.Code, § 13377 [waste discharge requirements shall meet federal standards and may also include "more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance"].) Thus, even if the analysis in *Defenders of Wildlife v. Browner* or *BIA* arguably has any application to a TMDL, the opinions do not help the Cities.

Additionally, the Cities' reliance on a November 2002 EPA memorandum on establishing TMDLs and issuing NPDES **400 permits is misplaced, as it postdates the Regional Board's adop-

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

tion of the Trash TMDL and its approval by the State Board and the EPA. Further, the memorandum states it ***1430** is not binding, and "indeed, there may be other approaches that would be appropriate in particular situations. When EPA makes a TMDL or permitting decision, it will make each decision on a case-by-case basis and will be guided by applicable requirements of the [Clean Water Act] and implementing regulations, taking into account comments and information presented at that time by interested persons regarding the appropriateness of applying these recommendations to the particular situation."

II

Nonpoint Sources of Pollution

[24] The Cities contend the court should have invalidated the Trash TMDL on additional grounds, including the Water Boards' failure to identify load allocations and implementation measures for nonpoint sources of trash discharge. The Cities assert the Water Boards are required to adopt implementation measures "for the homeless and aerial sources of trash, [and] also for the other nonpoint sources of trash consisting of State and federal facilities, and other facilities not yet subject to NPDES Permits." The Cities submit that the Clean Water Act does not allow the Water Boards "to effectively impose the burden of the load allocation from all nonpoint sources solely on municipalities."

The Cities further claim the Water Boards acted arbitrarily and capriciously by imposing a trash target of zero on municipalities, but imposing a " 'de minimus' requirement on non-point source discharges." The Cities cite the July 29, 2002, letter from the Regional Board to the EPA, clarifying that it identified nonpoint sources of trash pollution "as wind blown trash and direct deposit of trash into the water," but "as the non-point sources were determined to be de-minimus, we did not believe it necessary to outline a reduction schedule for non-point sources." Contrary to the Cities' position, the Regional Board did not adopt a "de minimus" load allocation for nonpoint sources. Rather, as the trial court found, the Regional Board found the trash pollution from nonpoint sources is de minimus compared to trash pollution from point sources. The TMDL states the "major source of trash in the [Los Angeles River] results from litter, which is intentionally or accidentally discarded in the watershed drainage areas."

In arguing the Trash TMDL is required to include a specific load allocation for nonpoint sources of pollution, the Cities rely on the 2000 EPA Guidance, which provides: "Load allocations for nonpoint sources *may* be expressed as specific allocations for specific discharges or as 'gross allotments' to nonpoint source discharger categories. Separate nonpoint source allocations *should* be established for background loadings. Allocations may be based on a variety ***1431** of technical, economic, and political factors. The methodology used to set allocations *should* be discussed in detail." (Italics added.)

The 2000 EPA Guidance, however, states it does not impose legally binding requirements. Further, the load allocation for nonpoint sources is implicitly zero for trash. Federal regulations define a TMDL as the sum of waste load allocations for point sources, load allocations for nonpoint sources and natural backgrounds. (40 C.F.R. § 130.2(i) (2003).) Since "a TMDL defines the specified maximum amount of a pollutant which can be discharged into a body of water from all sources combined" ****401**(*American Wildlands v. Browner* (10th Cir.2001) 260 F.3d 1192, 1194), and the Trash TMDL specifies a zero numeric target for trash in Los Angeles River, load allocations are necessarily zero as well as waste load allocations.

Additionally, the Cities cite no authority for the proposition the Water Boards are required to identify an implementation program for nonpoint pollution sources. Again, "[w]here a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." (*People v. Ham* (1970) 7 Cal.App.3d 768, 783, 86

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

Cal.Rptr. 906, disapproved on another ground in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3, 98 Cal.Rptr. 217, 490 P.2d 537; *People v. Sierra* (1995) 37 Cal.App.4th 1690, 1693, fn. 2, 44 Cal.Rptr.2d 575.)

In any event, although the Clean Water Act focuses on both point and nonpoint sources of pollution, it is settled that the measure "does not require states to take regulatory action to limit the amount of non-point water pollution introduced into its waterways. While the [Clean Water Act] requires states to designate water standards and identify bodies of water that fail to meet these standards, ' "nothing in the [Clean Water Act] demands that a state adopt a regulatory system for nonpoint sources." ' " (*Defenders of Wildlife v. EPA, supra,* 415 F.3d at pp. 1124–1125, citing *American Wildlands v. Browner, supra,* 260 F.3d 1192, 1197 ["In the [Clean Water] Act, Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution"]; *Appalachian Power Co. v. Train* (4th Cir.1976) 545 F.2d 1351, 1373 ["Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the [Clean Water] Act to regulate only the former"]; *City of Arcadia I, supra,* 265 F.Supp.2d at p. 1145 ["For nonpoint sources, limitations on loadings are not subject to a federal nonpoint source permitting program, and therefore any nonpoint source reductions can be enforced ... only to the extent that a state institutes such reductions as regulatory requirements pursuant to state ***1432** authority"].) "Nonpoint sources, because of their very nature, are not regulated under the NPDES [program]. Instead, Congress addressed nonpoint sources of pollution in a separate portion of the [Clean Water] Act which encourages states to develop areawide waste treatment management plans." (*Pronsolino v. Marcus, supra,* 91 F.Supp.2d at p. 1348, citing 33 U.S.C. § 1288; see also 33 U.S.C. § 1329.)

We conclude the court correctly ruled on this issue.

III

Uses To Be Made of Watershed

[25] The Cities next contend the Trash TMDL is invalid because the Water Boards "improperly relied on nonexistent, illegal and irrational 'uses to be made' of the [Los Angeles] River." (Emphasis omitted.) The Cities complain that the Trash TMDL states a purported beneficial use of one of numerous reaches of the river on the state's 303(d) list is "recreation and bathing, in particular by homeless people who seek shelter there," and the State Board chairman questioned the legality of such uses. The Cities also assert there is no evidence to support the Trash TMDL's finding that swimming is an actual use of the river in any location.

The Cities rely on section 303(d)(1)(A) of the Clean Water Act (33 U.S.C. § 1313(d)(1)(A)), which provides that in identifying impaired waters for its 303(d) list, states "shall establish a priority ranking for such waters, taking into account the severity of the pollution and the *uses to be made* of such waters." (Italics added.)****402** The Cities assert "an 'illegal' use cannot be a 'use to be made' for the water body."

Additionally, the Cities cite Water Code section 13241, which requires regional boards to establish water quality objectives in water quality control plans by considering a variety of factors, including "[p]ast, present, and probable future beneficial uses of water." (Wat.Code, § 13241, subd. (a).) They assert the "Water Boards acted contrary to law by basing the [Trash] TMDL on any uses of the [Los Angeles] River other than the actual 'uses to be made' of the River." (Emphasis omitted.)

The Cities, however, make no showing of prejudice. Swimming and bathing by the homeless are only two among numerous other beneficial uses that the Cities do not challenge, and there is no suggestion the numeric target of zero trash in the Los Angeles River would have been less stringent without consideration of the factors the Cities raise.

***1433** IV

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

Scientific Methodology

[26] Further, the Cities contend the Trash TMDL is invalid on the additional ground that before adopting and approving it the Water Boards failed to comply with the requisite data collection and analysis. The Cities rely on a federal regulation providing that "[s]tates must establish appropriate monitoring methods and procedures (including biological monitoring) necessary to compile and analyze data on the quality of waters of the United States and, to the extent practicable, ground-waters." (40 C.F.R. § 130.4(a) (2003).) "The State's water monitoring program shall include collection and analysis of physical, chemical and biological data and quality assurance and control programs to assure scientifically valid data" in developing, among other things, TMDLs. (*Id.*, § 130.4(b).)

The trial court rejected the Cities' position, finding they failed to establish the Water Boards' scientific data is inadequate or scientifically invalid. The court explained the Water Boards "have not failed to conduct ongoing studies, as they say, how else would [they] know the River is impaired by trash[?] And the Record reveals studies relied upon by the Boards."

This argument is a variation on the assimilative capacity study issue, and we similarly reject it. As the Water Boards point out, "trash is different than other pollutants.... The complex modeling and analytical effort that may be necessary for typical pollutants that may be present in extremely low concentrations have no relevance to calculating a trash TMDL." Further, the Trash TMDL does discuss sources of trash in the Los Angeles River. It states the "City of Los Angeles conducted an Enhanced Catch Basin Cleaning Project in compliance with a consent decree between the [EPA], the State of California, and the City of Los Angeles. The project goals were to determine debris loading rates, characterize the debris, and find an optimal cleaning schedule through enhancing basin cleaning. The project evaluated trash loading at two drainage basins[.]" It goes on to discuss the amounts and types of trash collected in the drainage basins between March 1992 and December 1994. The Cities cite no authority for the notion the Water Boards may not rely on data collected by another entity.

The Trash TMDL also states "[s]everal studies conclude that urban runoff is the dominant source of trash. The large amounts of trash conveyed by the urban storm water to the Los Angeles River is evidenced by the amount of ... trash that accumulates at the base of storm drains."

****403 *1434** Alternatively, the Cities contend a TMDL is not suitable for trash calculation. They rely on 33 United States Code section 1313(d)(1)(C), which provides: "Each State shall establish for [impaired] waters ... the total maximum daily load, for those pollutants which the [EPA] Administrator identifies ... as *suitable for such calculation.* Such load shall be established at a level *necessary* to implement the applicable water quality standards with seasonal variations and a margin of safety." (Italics added.)

The Cities also cite a 1978 EPA regulation that states a TMDL is "suitable for ... calculation" only under "proper technical conditions." (43 Fed.Reg. 60662, 60665 (Dec. 28, 1978) (italics omitted).) "Proper technical conditions" require "the availability of the analytical methods, modeling techniques and data base necessary to develop a technically defensible TMDL." (*Id.* at p. 60662.) The Cities assert the proper technical conditions do not exist, referring to the Trash TMDL's comment that "[e]xtensive research has not been done on trash generation or the precise relationship between rainfall and its deposition in waterways."

The Cities ignore the EPA's determination that a TMDL *may* be calculated for trash as a pollutant. It approved the Regional Board's Trash TMDL, and had previously approved a trash TMDL for the East Fork of the San Gabriel River. (See Cal.Code Regs., tit. 23, § 3933.) Thus, the Cities' view that the 1978 EPA regulation prohibits a TMDL for

135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145
(Cite as: 135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373)

trash is unfounded. TMDL's for trash are relatively new, and there is no evidence that in 1978 the EPA contemplated their establishment.

We find irrelevant the Cities' discussion of the EPA's proposed July 2000 TMDL "rule," as their federal register citation is not a regulation and merely concerns the 2003 withdrawal of a rule that never took effect. (68 Fed.Reg. 13608, 13609 (Mar. 19, 2003) ["The July 2000 rule was controversial from the outset"].) In August 2001 the EPA delayed implementation of the July 2000 rule for further consideration, noting that some local government officials argued "some pollutants are not suitable for TMDL calculation." (66 Fed.Reg. 41817, 41819 (Aug. 9, 2001).) Nothing is said, however, about whether a trash TMDL is unsuitable for calculation, and again, the EPA has approved such TMDLs. The withdrawal of the proposed July 2000 rule left the existing rule regarding the establishment of a TMDL in place. (33 U.S.C. § 1313(d)(1)(C).)

V

APA Requirements

Lastly, the Cities contend the trial court erred by finding the Water Boards did not violate the APA. They assert the July 29, 2002, "clarification ***1435** memorandum" from the Regional Board to the EPA makes substantive changes to the Trash TMDL regulation—the inclusion of the Estuary in the Trash TMDL and designating an allocation of zero for nonpoint pollution sources—violates the notice and hearing provisions of the APA. The Cities also contend the Trash TMDL and the clarification memorandum "establish[ ] a regulation in violation of the APA's elements of 'clarity,' 'consistency,' and 'necessity,' as defined in [Government] Code section 11349."

The APA (Gov.Code, §§ 11340 et seq., 11370) "establishes the procedures by which state agencies may adopt regulations. The agency must give the public notice of its proposed regulatory action [citations]; issue a complete text of the proposed regulation with a statement of the reasons for it [citation]; give interested parties an opportunity to comment on ****404** the proposed regulation [citation]; respond in writing to public comments [citations]; and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law [citation], which reviews the regulation for consistency with the law, clarity, and necessity [citations]." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568, 59 Cal.Rptr.2d 186, 927 P.2d 296.) "One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation [citation], as well as notice of the law's requirements so that they can conform their conduct accordingly [citation]." (*Id.* at pp. 568–569, 59 Cal.Rptr.2d 186, 927 P.2d 296.)

The APA does not apply to "the adoption or revision of state policy for water quality control" unless the agency adopts a "policy, plan, or guideline, or any revision thereof." (Gov.Code, § 11353, subds.(a), (b)(1).) The Water Boards contend that while the Trash TMDL and amendment adding it to the 1994 Basin Plan are policies or plans covered by the APA, the clarification memorandum is not because it does not revise the terms of the Trash TMDL.

We are not required to reach the issue, because assuming the APA is applicable the Cities' position lacks merit. As to the Estuary, we have determined the Trash TMDL sufficiently notified affected parties of its inclusion in the document as an impaired water body. Further, we have determined the load allocation for nonpoint sources of trash pollution is also necessarily zero, and the Trash TMDL is not required to include implementation measures for nonpoint sources. Accordingly, the clarification memorandum is not germane.[FN14]

FN14. We deny the Water Boards' June 16, 2005, request for judicial notice.

***1436** DISPOSITION

The judgment is affirmed insofar as it is based on the Trash TMDL's violation of CEQA, and on a rejection of each of the issues the Cities raised in

their appeal. The judgment is reversed insofar as it is based on the Trash TMDL's lack of an assimilative capacity study, inclusion of the Estuary as an impaired water body, and a cost-benefit analysis under Water Code section 13267 or the consideration of economic factors under Water Code section 13241, and also insofar as it grants declaratory relief regarding the purported inclusion of nonnavigable waters in the Trash TMDL.

The court's postjudgment order staying the Trash TMDL's implementation schedule is affirmed. The parties are to bear their own costs on appeal.

WE CONCUR: McINTYRE and IRION, JJ.

Cal.App. 4 Dist.,2006.
City of Arcadia v. State Water Resources Control Bd.
135 Cal.App.4th 1392, 38 Cal.Rptr.3d 373, 36 Envtl. L. Rep. 20,025, 06 Cal. Daily Op. Serv. 797, 2006 Daily Journal D.A.R. 1145

END OF DOCUMENT

TAB NO. 7

35 Cal.4th 613, 108 P.3d 862, 26 Cal.Rptr.3d 304, 60 ERC 1470, 35 Envtl. L. Rep. 20,071, 05 Cal. Daily Op. Serv. 2861, 2005 Daily Journal D.A.R. 3870

(Cite as: 35 Cal.4th 613, 108 P.3d 862, 26 Cal.Rptr.3d 304)

Supreme Court of California

CITY OF BURBANK, Plaintiff and Appellant,

v.

STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants.

City of Los Angeles, Plaintiff and Respondent,

v.

State Water Resources Control Board et al., Defendants and Appellants.

Nos. S119248, B151175, B152562.

April 4, 2005.

Rehearing Denied June 29, 2005.[FN*]

FN* Brown, J., did not participate therein.

Background: Cities filed petitions for writs of mandate challenging pollutant limitations in wastewater discharge permits issued by regional water quality control boards. The Superior Court, Los Angeles County, Nos. BS060957 and BS060960,Dzintra I. Janavs, J., set aside permits. Regional board and state water resources control board appealed. The Court of Appeal consolidated the cases and reversed. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Kennard, J., held that:

(1) regional board may not consider economic factors as justification for imposing pollutant restrictions in wastewater discharge permit which are less stringent than applicable federal standards, and

(2) when imposing more stringent pollutant restrictions that those required by federal law, regional board may take economic factors into account.

Judgment of Court of Appeal affirmed, and matter remanded.

Brown, J., filed concurring opinion.

Opinion, 4 Cal.Rptr.3d 27, superseded.

West Headnotes

[1] Environmental Law 149E ⚿165

149E Environmental Law
149EV Water Pollution
149Ek163 Constitutional Provisions, Statutes, and Ordinances
149Ek165 k. Purpose. Most Cited Cases

Clean Water Act is a comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., as amended, 33 U.S.C.A. § 1251 et seq.

[2] Environmental Law 149E ⚿197

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek197 k. Conditions and limitations. Most Cited Cases

States 360 ⚿18.31

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.31 k. Environment; nuclear projects. Most Cited Cases

Regional water quality control board may not consider economic factors as justification for imposing pollutant restrictions in wastewater discharge permit which are less stringent than applicable federal standards, despite statute directing board to take such factors into consideration, because the federal constitutional supremacy clause requires state law to yield to federal law. U.S.C.A. Const. Art. 6, cl. 2; Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 301(a), (b)(1)(B, C), 402(a)(1, 3), as amended, 33 U.S.C.A.

§§ 1251 et seq., 1311(a), (b)(1)(B, C), 1342(a)(1, 3); West's Ann.Cal.Water Code §§ 13000 et seq., 13241(d), 13263, 13377.
See 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, §§ 68, 69; 8 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 23:54; Cal. Jur. 3d, Pollution and Conservation Laws, § 126.

[3] Statutes 361 ⇐181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In general. Most Cited Cases

Statutes 361 ⇐184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and purpose of act. Most Cited Cases

When construing any statute, the court's task is to determine the Legislature's intent when it enacted the statute so as to adopt the construction that best effectuates the purpose of the law.

[4] States 360 ⇐18.5

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.5 k. Conflicting or conforming laws or regulations. Most Cited Cases

Under the federal Constitution's supremacy clause, a state law that conflicts with federal law is without effect. U.S.C.A. Const. Art. 6, cl. 2.

[5] Environmental Law 149E ⇐197

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek197 k. Conditions and limitations. Most Cited Cases

When imposing more stringent pollutant restrictions in a wastewater discharge permit than those required by federal law, a regional water quality control board may take into account the economic effects of doing so. Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 101(b), 510, as amended, 33 U.S.C.A. §§ 1251 et seq., 1251(b), 1370; West's Ann.Cal.Water Code §§ 13000 et seq., 13241(d), 13263, 13377.

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KENNARD, J.

***618** **864** Federal law establishes national water quality standards but allows the states to enforce their own water quality laws so long as they comply with federal standards. Operating within this federal-state framework, California's nine Regional Water Quality Control Boards establish water quality policy. They also issue permits for the discharge of treated wastewater; these permits specify the maximum allowable concentration of chemical pollutants in the discharged wastewater.

The question here is this: When a regional board issues a permit to a wastewater treatment facility, must the board take into account the facility's costs of complying with the board's restrictions on pollutants in the wastewater to be discharged? The trial court ruled that California law required a regional board to weigh the economic burden on the facility against the expected environmental benefits of reducing pollutants in the wastewater discharge. The Court of Appeal disagreed. On petitions by the municipal operators of three wastewater treatment facilities, we granted review.

We reach the following conclusions: Because both California law and federal law require regional boards to comply with federal clean water standards, and because the supremacy clause of the United States Constitution requires state law to yield to federal law, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require. When, however, a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit *more stringent* than federal law requires, California law allows the board to take into account economic **865** factors, including the wastewater discharger's cost of compliance. We remand this case for further proceedings to determine whether the pollutant limitations in the permits challenged here meet or exceed federal standards.

*619 I. STATUTORY BACKGROUND

The quality of our nation's waters is governed by a "complex statutory and regulatory scheme ... that implicates both federal and state administrative responsibilities." (*PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511

U.S. 700, 704, 114 S.Ct. 1900, 128 L.Ed.2d 716.) We first discuss California law, then federal law.

A. California Law

In California, the controlling law is the Porter–Cologne Water Quality Control Act (Porter–Cologne Act), which was enacted in 1969. (Wat.Code, § 13000 et seq., added by Stats.1969, ch. 482, § 18, p. 1051.) FN1 Its goal is "to attain the highest water ***307** quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (§ 13001.) As relevant here, one of those regional boards oversees the Los Angeles region (the Los Angeles Regional Board). FN2

FN1. Further undesignated statutory references are to the Water Code.

FN2. The Los Angeles water region "comprises all basins draining into the Pacific Ocean between the southeasterly boundary, located in the westerly part of Ventura County, of the watershed of Rincon Creek and a line which coincides with the southeasterly boundary of Los Angeles County from the ocean to San Antonio Peak and follows thence the divide between San Gabriel River and Lytle Creek drainages to the divide between Sheep Creek and San Gabriel River drainages." (§ 13200, subd. (d).)

Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (§ 13240). The regional boards' water quality plans, called "basin plans," must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. (§ 13050, subd. (j).) Basin plans must be consistent with "state policy for water quality control." (§ 13240.)

B. Federal Law

[1] In 1972, Congress enacted amendments (Pub.L. No. 92–500 (Oct. 18, 1972) 86 Stat. 816) to the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), which, as amended in 1977, is commonly known as the Clean ***620** Water Act. The Clean Water Act is a "comprehensive water quality statute designed 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' " (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, supra,* 511 U.S. at p. 704, 114 S.Ct. 1900, quoting 33 U.S.C. § 1251(a).) The Act's national goal was to eliminate by the year 1985 "the discharge of pollutants into the navigable waters" of the United States. (33 U.S.C. § 1251(a)(1).) To accomplish this goal, the Act established "effluent limitations," which are restrictions on the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents"; these effluent limitations allow the discharge of pollutants only when the water has been satisfactorily treated to conform with federal water quality standards. (33 U.S.C. §§ 1311, 1362(11).)

Under the federal Clean Water Act, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act. (33 U.S.C. § 1370.) This led the California Legislature in 1972 to amend the state's Porter–Cologne Act "to ensure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act." (§ 13372.)

***866** Roughly a dozen years ago, the United States Supreme Court, in *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 112 S.Ct. 1046, 117 L.Ed.2d 239, described the distinct roles of the state and federal agencies in enforcing water quality: "The

Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' 33 U.S.C. § 1251(a). Toward ***308** this end, [the Clean Water Act] provides for two sets of water quality measures. 'Effluent limitations' are promulgated by the [Environmental Protection Agency (EPA)] and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources.[FN3] See §§ 1311, 1314. '[W]ater quality standards' are, in general, promulgated by the States and establish the desired condition of a waterway. See § 1313. These standards supplement effluent limitations 'so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.' *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, n. 12, 96 S.Ct. 2022, 2025, n. 12, 48 L.Ed.2d 578 (1976).

> FN3. A "point source" is "any discernable, confined and discrete conveyance" and includes "any pipe, ditch, channel ... from which pollutants ... may be discharged." (33 U.S.C. § 1362(14).)

***621** "The EPA provides States with substantial guidance in the drafting of water quality standards. See generally 40 CFR pt. 131 (1991) (setting forth model water quality standards). Moreover, [the Clean Water Act] requires, *inter alia,* that state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards. If the EPA recommends changes to the standards and the State fails to comply with that recommendation, the Act authorizes the EPA to promulgate water quality standards for the State. 33 U.S.C. § 1313(c)." (*Arkansas v. Oklahoma, supra,* 503 U.S. at p. 101, 112 S.Ct. 1046.)

Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra,* 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)

With this federal and state statutory framework in mind, we now turn to the facts of this case.

II. FACTUAL BACKGROUND

This case involves three publicly owned treatment plants that discharge wastewater under NPDES permits issued by the Los Angeles Regional Board.

The City of Los Angeles owns and operates the Donald C. Tillman Water Reclamation Plant (Tillman Plant), which serves the San Fernando Valley. The City of Los Angeles also owns and operates the Los Angeles–Glendale Water Reclamation Plant (Los Angeles–Glendale Plant), which processes wastewater from areas within the City of Los Angeles and the independent cities of Glendale and Burbank. Both the Tillman Plant and the Los Angeles–Glendale Plant discharge wastewater directly into the Los Angeles River, now a concrete-lined flood control channel that runs through the City of Los Angeles, ending at the Pacific Ocean. The State Board and the Los Angeles Regional Board consider the Los Angeles River to be a navigable water of the United States for purposes of the federal Clean Water Act.

The third plant, the Burbank Water Reclamation Plant (Burbank Plant), is owned and operated by the City of Burbank,***309** serving residents and businesses within that city. The Burbank Plant discharges wastewater into the Burbank Western Wash, which drains into the Los Angeles River.

*622 All three plants, which together process hundreds of millions of gallons of sewage **867 each day, are tertiary treatment facilities; that is, the treated wastewater they release is processed sufficiently to be safe not only for use in watering food crops, parks, and playgrounds, but also for human body contact during recreational water activities such as swimming.

In 1998, the Los Angeles Regional Board issued renewed NPDES permits to the three wastewater treatment facilities under a basin plan it had adopted four years earlier for the Los Angeles River and its estuary. That 1994 basin plan contained general narrative criteria pertaining to the existing and potential future beneficial uses and water quality objectives for the river and estuary.[FN4] The narrative criteria included municipal and domestic water supply, swimming and other recreational water uses, and fresh water habitat. The plan further provided: "All waters shall be maintained free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life." The 1998 permits sought to reduce these narrative criteria to specific numeric requirements setting daily maximum limitations for more than 30 pollutants present in the treated wastewater, measured in milligrams or micrograms per liter of effluent.[FN5]

FN4. This opinion uses the terms "narrative criteria" or descriptions, and "numeric criteria" or effluent limitations. Narrative criteria are broad statements of desirable water quality goals in a water quality plan. For example, "no toxic pollutants in toxic amounts" would be a narrative description. This contrasts with numeric criteria, which detail specific pollutant concentrations, such as parts per million of a particular substance.

FN5. For example, the permits for the Tillman and Los Angeles–Glendale Plants limited the amount of fluoride in the discharged wastewater to 2 milligrams per liter and the amount of mercury to 2.1 micrograms per liter.

The Cities of Los Angeles and Burbank (Cities) filed appeals with the State Board, contending that achievement of the numeric requirements would be too costly when considered in light of the potential benefit to water quality, and that the pollutant restrictions in the NPDES permits were unnecessary to meet the narrative criteria described in the basin plan. The State Board summarily denied the Cities' appeals.

Thereafter, the Cities filed petitions for writs of administrative mandate in the superior court. They alleged, among other things, that the Los Angeles Regional Board failed to comply with sections 13241 and 13263, part of California's Porter–Cologne Act, because it did not consider the economic burden on the Cities in having to reduce substantially the pollutant content of their discharged wastewater. They also alleged that compliance with the pollutant restrictions set out in the NPDES permits issued by the regional *623 board would greatly increase their costs of treating the wastewater to be discharged into the Los Angeles River. According to the City of Los Angeles, its compliance costs would exceed $50 million annually, representing more than 40 percent of its entire budget for operating its four wastewater treatment plants and its sewer system; the City of Burbank estimated its added costs at over $9 million annually, a nearly 100 percent increase above its $9.7 million annual budget for wastewater treatment.

***310 The State Board and the Los Angeles Regional Board responded that sections 13241 and 13263 do not require consideration of costs of compliance when a regional board issues a NPDES permit that restricts the pollutant content of discharged wastewater.

The trial court stayed the contested pollutant restrictions for each of the three wastewater treatment plants. It then ruled that sections 13241 and 13263 of California's Porter–Cologne Act required

a regional board to consider costs of compliance not only when it adopts a basin or water quality plan but also when, as here, it issues an NPDES permit setting the allowable pollutant content of a treatment plant's discharged wastewater. The court found no evidence that the Los Angeles Regional Board had considered economic factors at either stage. Accordingly, the trial court granted the Cities' petitions for writs of mandate, and it ordered the Los Angeles Regional Board to vacate the contested restrictions on pollutants in the wastewater discharge permits issued to the three municipal plants here and to conduct hearings ****868** to consider the Cities' costs of compliance before the board's issuance of new permits. The Los Angeles Regional Board and the State Board filed appeals in both the Los Angeles and Burbank cases.[FN6]

> FN6. Unchallenged on appeal and thus not affected by our decision are the trial court's rulings that (1) the Los Angeles Regional Board failed to show how it derived from the narrative criteria in the governing basin plan the specific numeric pollutant limitations included in the permits; (2) the administrative record failed to support the specific effluent limitations; (3) the permits improperly imposed daily maximum limits rather than weekly or monthly averages; and (4) the permits improperly specified the manner of compliance.

The Court of Appeal, after consolidating the cases, reversed the trial court. It concluded that sections 13241 and 13263 require a regional board to take into account "economic considerations" when it adopts water quality standards in a basin plan but not when, as here, the regional board sets specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards. We granted the Cities' petition for review.

*624 III. DISCUSSION

A. Relevant State Statutes

The California statute governing the issuance of *wastewater permits* by a regional board is section 13263, which was enacted in 1969 as part of the Porter–Cologne Act. (See 26 Cal.Rptr.3d pp. 306–307, 108 P.3d p. 865, *ante.*) Section 13263 provides in relevant part: "*The regional board,* after any necessary hearing, *shall prescribe requirements as to the nature of any proposed discharge* [of wastewater]. *The requirements* shall implement any relevant water quality control plans that have been adopted, and *shall take into consideration* the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and *the provisions of Section 13241.*" (§ 13263, subd. (a), italics added.)

Section 13241 states: "Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

*****311** "(a) Past, present, and probable future beneficial uses of water.

"(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

"(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

"(d) *Economic considerations.*

"(e) The need for developing housing within the region.

"(f) The need to develop and use recycled water." (Italics added.)

The Cities here argue that section 13263's ex-

press reference to section 13241 requires the Los Angeles Regional Board to consider section 13241 's listed factors, notably "[e]conomic considerations," before issuing NPDES permits requiring specific pollutant reductions in discharged effluent or treated wastewater.

[2] ***625** Thus, at issue is language in section 13263 stating that when a regional board "prescribe[s] requirements as to the nature of any proposed discharge" of treated wastewater it must "take into consideration" certain factors including "the provisions of Section 13241." According to the Cities, this statutory language requires that a regional board make an independent evaluation of the section 13241 factors, including "economic considerations," before restricting the pollutant content in an NPDES permit. This was the view expressed in the trial court's ruling. The Court of Appeal rejected that view. It held that a regional board need consider the section 13241 factors only when it adopts a basin or water quality plan, but not when, as in this case, it issues a wastewater discharge ****869** permit that sets specific numeric limitations on the various chemical pollutants in the wastewater to be discharged. As explained below, the Court of Appeal was partly correct.

B. Statutory Construction

[3] When construing any statute, our task is to determine the Legislature's intent when it enacted the statute "so that we may adopt the construction that best effectuates the purpose of the law." (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715, 3 Cal.Rptr.3d 623, 74 P.3d 726; *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268, 121 Cal.Rptr.2d 203, 47 P.3d 1069.) In doing this, we look to the statutory language, which ordinarily is "the most reliable indicator of legislative intent." (*Hassan, supra,* at p. 715, 3 Cal.Rptr.3d 623, 74 P.3d 726.)

As mentioned earlier, our Legislature's 1969 enactment of the Porter–Cologne Act, which sought to ensure the high quality of water in this state, predated the 1972 enactment by Congress of the precursor to the federal Clean Water Act. Included in California's original Porter–Cologne Act were sections 13263 and 13241. Section 13263 directs regional boards, when issuing wastewater discharge permits, to take into account various factors, including those set out in section 13241. Listed among the section 13241 factors is "[e]conomic considerations." (§ 13241, subd. (d).) The plain language of sections 13263 and 13241 indicates the Legislature's intent in 1969, when these statutes were enacted, that a regional board consider the cost of compliance when setting effluent limitations in a wastewater discharge permit.

Our construction of sections 13263 and 13241 does not end with their plain statutory language, however. We must also analyze them in the context of the statutory scheme of which they are a part. ****312**(*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043, 12 Cal.Rptr.3d 343, 88 P.3d 71.) Like sections 13263 and 13241, section 13377 is part of the Porter–Cologne Act. But unlike the former two statutes, section 13377 was ***626** not enacted until 1972, shortly after Congress, through adoption of the Federal Water Pollution Control Act Amendments, established a comprehensive water quality policy for the nation.

[4] Section 13377 specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, section 13377 forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (33 U.S.C. § 1311(a)), and publicly operated wastewater treatment plants such as those before us here must comply with the act's clean water standards, regardless of cost (see *id.*, §§ 1311(a) , (b)(1)(B) & (C), 1342(a)(1) & (3)). Because section 13263 cannot authorize what federal law for-

bids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards.[FN7] Such a construction of section 13263 would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's ****870** declaration in section 13377 that all discharged wastewater must satisfy federal standards.[FN8] This was also the conclusion of the Court of Appeal. Moreover, under the federal Constitution's supremacy clause (art. VI), a state law that conflicts with federal law is " 'without effect.' " (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407; *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923, 12 Cal.Rptr.3d 262, 88 P.3d 1.) To comport with the principles of federal supremacy, California law cannot authorize this ***627** state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations *****313** that would exceed the mandates of federal law.

> FN7. The concurring opinion misconstrues both state and federal clean water law when it describes the issue here as "whether the Clean Water Act prevents or prohibits the regional water board from considering economic factors to justify pollutant restrictions *that meet the clean water standards in more cost-effective and economically efficient ways.*" (Conc. Opn. of Brown, J., *post,* 26 Cal.Rptr.3d p. 314, 108 P.3d at p. 871, some italics added.) This case has nothing to do with meeting federal standards in more cost effective and economically efficient ways. State law, as we have said, allows a regional board to consider a permit holder's compliance cost to *relax* pollutant concentrations, as measured by numeric standards, for pollutants in a wastewater discharge permit. (§§ 13241 & 13263.) Federal law, by contrast, as stated above in the text, "prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (33 U.S.C. § 1311(a)), and publicly operated wastewater treatment plants such as those before us here must comply with the [federal] act's *clean water standards, regardless of cost* (see *id.,* §§ 1311(a), (b)(1)(B) & (C), 1342(a)(1) & (3))." (Italics added.)
>
> FN8. As amended in 1978, section 13377 provides for the issuance of waste discharge permits that comply with federal clean water law "together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." We do not here decide how this provision would affect the cost-consideration requirements of sections 13241 and 13263 when more stringent effluent standards or limitations in a permit are justified for some reason independent of compliance with federal law.

Thus, in this case, whether the Los Angeles Regional Board should have complied with sections 13263 and 13241 of California's Porter–Cologne Act by taking into account "economic considerations," such as the costs the permit holder will incur to comply with the numeric pollutant restrictions set out in the permits, depends on whether those restrictions meet or exceed the requirements of the federal Clean Water Act. We therefore remand this matter for the trial court to resolve that issue.

C. Other Contentions

The Cities argue that requiring a regional board at the wastewater discharge permit stage to consider the permit holder's cost of complying with the board's restrictions on pollutant content in the water is consistent with federal law. In support, the Cities point to certain provisions of the federal Clean Water Act. They cite section 1251(a)(2) of title 33 United States Code, which sets, as a national goal "

wherever attainable, " an interim goal for water quality that protects fish and wildlife, and section 1313(c)(2)(A) of the same title, which requires consideration, among other things, of waters' "*use and value* for navigation" when revising or adopting a "water quality standard." (Italics added.) These two federal statutes, however, pertain not to permits for wastewater discharge, at issue here, but to establishing water quality standards, not at issue here. Nothing in the federal Clean Water Act suggests that a state is free to disregard or to weaken the federal requirements for clean water when an NPDES permit holder alleges that compliance with those requirements will be too costly.

[5] At oral argument, counsel for amicus curiae National Resources Defense Council, which argued on behalf of California's State Board and regional water boards, asserted that the federal Clean Water Act incorporates state water policy into federal law, and that therefore a regional board's consideration of economic factors to justify greater pollutant concentration in discharged wastewater would conflict with the federal act even if the specified pollutant restrictions were not less stringent than those required under federal law. We are not persuaded. The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to "enforce any effluent limitation" that is not "*less stringent* " than the federal standard (*id.* § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit ***628** a state—when imposing effluent limitations that are *more stringent* than required by federal law—from taking into account the economic effects of doing so.

Also at oral argument, counsel for the Cities asserted that if the three municipal wastewater treatment facilities ceased releasing their treated wastewater into the concrete channel that makes up the Los Angeles River, it would (other than during the rainy season) contain no water at all, and thus would not be a "navigable water" of the ****871** United States subject to the Clean Water Act. (See *Solid Waste Agency v. United States Army Corps of Engineers* (2001) 531 U.S. 159, 172, 121 S.Ct. 675, 148 L.Ed.2d 576 ["The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."].) It is unclear when the Cities first raised this issue. The Court of Appeal did not discuss it in its opinion, and the Cities did not seek rehearing on this ground. (See ***314**Cal. Rules of Court, rule 28(c)(2).) Concluding that the issue is outside our grant of review, we do not address it.

CONCLUSION

Through the federal Clean Water Act, Congress has regulated the release of pollutants into our national waterways. The states are free to manage their own water quality programs so long as they do not compromise the federal clean water standards. When enacted in 1972, the goal of the Federal Water Pollution Control Act Amendments was to *eliminate* by the year 1985 the discharge of pollutants into the nation's navigable waters. In furtherance of that goal, the Los Angeles Regional Board indicated in its 1994 basin plan on water quality the intent, insofar as possible, to remove from the water in the Los Angeles River toxic substances in amounts harmful to humans, plants, and aquatic life. What is not clear from the record before us is whether, in limiting the chemical pollutant content of wastewater to be discharged by the Tillman, Los Angeles–Glendale, and Burbank wastewater treatment facilities, the Los Angeles Regional Board acted only to implement requirements of the federal Clean Water Act or instead imposed pollutant limitations that exceeded the federal requirements. This is an issue of fact to be resolved by the trial court.

DISPOSITION

We affirm the judgment of the Court of Appeal reinstating the wastewater discharge permits to the extent that the specified numeric limitations on

chemical pollutants are necessary to satisfy federal Clean Water Act requirements for treated wastewater. The Court of Appeal is directed to remand this ***629** matter to the trial court to decide whether any numeric limitations, as described in the permits, are "more stringent" than required under federal law and thus should have been subject to "economic considerations" by the Los Angeles Regional Board before inclusion in the permits.

WE CONCUR: GEORGE, C.J., BAXTER, WERDEGAR, CHIN, and MORENO, JJ.

Concurring Opinion by BROWN, J.

I write separately to express my frustration with the apparent inability of the government officials involved here to answer a simple question: How do the federal clean water standards (which, as near as I can determine, are the state standards) prevent the state from considering economic factors? The majority concludes that because "the supremacy clause of the United States Constitution requires state law to yield to federal law, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than applicable federal standards require." (Maj. opn., *ante,* 26 Cal.Rptr.3d at p. 306, 108 P.3d at p. 864.) That seems a pretty self-evident proposition, but not a useful one. The real question, in my view, is whether the Clean Water Act prevents or prohibits the regional water board from considering economic factors to justify pollutant restrictions that *meet* the clean water standards in more cost-effective and economically efficient ways. I can see no reason why a federal law—which purports to be an example of cooperative federalism—would decree such a result. I do not think the majority's reasoning is at fault here. Rather, the agencies involved seemed to have worked hard to make this simple question impenetrably obscure.

A brief review of the statutory framework at issue is necessary to understand my concerns.

*****315 **872 I. Federal Law**

"In 1972, Congress enacted the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), commonly known as the Clean Water Act (CWA) [Citation.] ... [¶] Generally, the CWA 'prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions. [Citation.]' ... The most important of those exceptions is pollution discharge under a valid NPDES [National Pollution Discharge Elimination System] permit, which can be issued either by the Environmental Protection Agency (EPA), or by an EPA-approved state permit program such as California's. [Citations.] NPDES permits are valid for five years. [Citation.] [¶] Under the CWA's NPDES permit program, the states are required to develop *water quality standards.* [Citations.] A water quality standard 'establish[es] the desired condition of a waterway.' [Citation.] A water quality standard for any ***630** given waterway, or 'water body,' has two components: (1) the designated beneficial uses of the water body and (2) the *water quality criteria* sufficient to protect those uses. [Citations.] [¶] Water quality criteria can be either *narrative* or *numeric.* [Citation.]" (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1092–1093, 1 Cal.Rptr.3d 76.)

With respect to satisfying water quality standards, "a polluter must comply with *effluent limitations.* The CWA defines an effluent limitation as 'any restriction established by a State or the [EPA] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.' [Citation.] 'Effluent limitations are a means of *achieving* water quality standards.' [Citation.] [¶] NPDES permits establish effluent limitations for the polluter. [Citations.] CWA's NPDES permit system provides for a two-step process for the establishing of effluent limitations. First, the polluter must comply with *technology-based effluent limitations,* which are limitations based on the best available or practical technology for the reduc-

tion of water pollution. [Citations.] [¶] Second, the polluter must also comply with more stringent *water quality-based effluent limitations* (WQBEL's) where applicable. In the CWA, Congress 'supplemented the "technology-based" effluent limitations with "water quality-based" limitations "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.' " [Citation.] [¶] The CWA makes WQBEL's applicable to a given polluter whenever WQBEL's are 'necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations....' [Citations.] Generally, NPDES permits must conform to state water quality laws insofar as the state laws impose more stringent pollution controls than the CWA. [Citations.] Simply put, WQBEL's implement water quality standards." (*Communities for a Better Environment v. State Water Resources Control Bd., supra,* 109 Cal.App.4th at pp. 1093–1094, 1 Cal.Rptr.3d 76, fns. omitted.)

This case involves water quality-based effluent limitations. As set forth above, "[u]nder the CWA, states have the primary role in promulgating water quality standards." (*Piney Run Preservation Ass'n v. Commrs. of Carroll Co.* (4th Cir.2001) 268 F.3d 255, 265, fn. 9.) "Under the CWA, the water quality standards referred to in section 301 [see 33 U.S.C. § 1311] are primarily the states' handiwork." ***316** (*American Paper Institute, Inc. v. U.S. Envtl. Protection Agency* (D.C.Cir.1993) 996 F.2d 346, 349 (*American Paper*).) In fact, upon the 1972 passage of the CWA, "[s]tate water quality standards in effect at the time ... were deemed to be the initial water quality benchmarks for CWA purposes.... The states were to revisit and, if ***631** necessary, revise those initial standards at least once every three years." (*American Paper,* at p. 349.) Therefore, "once a water quality standard has been promulgated, section 301 of the CWA requires all NPDES permits for point sources to incorporate discharge limitations necessary to satisfy that standard." (*American Paper,* at p. 350.) Accordingly, it appears that in most instances, ****873** state water quality standards are identical to the federal requirements for NPDES permits.

II. State Law

In California, pursuant to the Porter–Cologne Water Quality Control Act (Wat.Code, § 13000 et seq.; Stats.1969, ch. 482, § 18, p. 1051; hereafter Porter–Cologne Act), the regional water quality control boards establish water quality standards—and therefore federal requirements for NPDES permits—through the adoption of water quality control plans (basin plans). The basin plans establish water quality objectives using enumerated factors—including economic factors—set forth in Water Code section 13241.

In addition, as one court observed: "The Porter–Cologne Act ... established nine regional boards to prepare water quality plans (known as basin plans) and issue permits governing the discharge of waste. (Wat.Code, §§ 13100, 13140, 13200, 13201, 13240, 13241, 13243.) The Porter–Cologne Act identified these permits as 'waste discharge requirements,' and provided that the waste discharge requirements must mandate compliance with the applicable regional water quality control plan. (Wat.Code, §§ 13263, subd. (a), 13377, 13374.)[¶] Shortly after Congress enacted the Clean Water Act in 1972, the California Legislature added Chapter 5.5 to the Porter–Cologne Act, for the purpose of adopting the necessary federal requirements to ensure it would obtain EPA approval to issue NPDES permits. (Wat.Code, § 13370, subd. (c).) As part of these amendments, the Legislature provided that the state and regional water boards 'shall, as required or authorized by the [Clean Water Act], issue waste discharge requirements ... which apply and ensure compliance with all applicable provisions [of the Clean Water Act], together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.' (Wat.Code, § 13377.) Water Code section 13374

provides that '[t]he term "waste discharge requirements" as referred to in this division is the equivalent of the term "permits" as used in the [Clean Water Act].' [¶] California subsequently obtained the required approval to issue NPDES permits. [Citation.] Thus, the waste discharge requirements issued by the regional water boards ordinarily also serve as NPDES permits under federal law. (Wat.Code, § 13374.)" (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 875, 22 Cal.Rptr.3d 128.)

***632** Applying this federal-state statutory scheme, it appears that throughout this entire process, the Cities of Burbank and Los Angeles (Cities) were unable to have economic factors considered because the Los Angeles Regional Water Quality Control Board (Board)—the body responsible to enforce the statutory framework—failed to comply with its statutory mandate.

*****317** For example, as the trial court found, the Board did not consider costs of compliance when it initially established its basin plan, and hence the water quality standards. The Board thus failed to abide by the statutory requirement set forth in Water Code section 13241 in establishing its basin plan. Moreover, the Cities claim that the initial narrative standards were so vague as to make a serious economic analysis impracticable. Because the Board does not allow the Cities to raise their economic factors in the permit approval stage, they are effectively precluded from doing so. As a result, the Board appears to be playing a game of "gotcha" by allowing the Cities to raise economic considerations when it is not practical, but precluding them when they have the ability to do so.

Moreover, the Board acknowledges that it has neglected other statutory provisions that might have provided an additional opportunity to air these concerns. As set forth above, pursuant to the CWA, "[t]he states were to revisit and, if necessary, revise those initial standards at least once every three years—a process commonly known as triennial review. [Citation.] Triennial reviews consist of public hearings in which current water quality standards are examined to assure that they 'protect the public health or welfare, enhance the quality of water and serve the purposes' of the Act. [Citation.] Additionally, the CWA ****874** directs states to consider a variety of competing policy concerns during these reviews, including a waterway's 'use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes.' " (*American Paper, supra,* 996 F.2d at p. 349.)

According to the Cities, "[t]he last time that the narrative water quality objective for toxicity contained in the Basin Plan was reviewed and modified was 1994." The Board does not deny this claim. Accordingly, the Board has failed its duty to allow public discussion—including economic considerations—at the required intervals when making its determination of proper water quality standards.

What is unclear is why this process should be viewed as a contest. State and local agencies are presumably on the same side. The costs will be paid by taxpayers and the Board should have as much interest as any other agency in fiscally responsible environmental solutions.

***633** Our decision today arguably allows the Board to continue to shirk its statutory duties. The majority holds that when read together, Water Code sections 13241, 13263, and 13377 do not allow the Board to consider economic factors when issuing NPDES permits to satisfy federal CWA requirements. (Maj. opn., *ante,* 26 Cal.Rptr.3d at pp. 311–312, 108 P.3d at pp. 869–870.) The majority then bifurcates the issue when it orders the Court of Appeal "to remand this matter to the trial court to decide whether any numeric limitations, as described in the permits, are 'more stringent' than required under federal law and thus should have been subject to 'economic considerations' by the Los Angeles Regional Board before inclusion in the permits." (*Id.* at p. 314, 108 P.3d at p. 871.)

The majority overlooks the feedback loop established by the CWA, under which federal standards are linked to state-established water quality standards, including narrative water quality criteria. (See 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1) (2004).) Under the CWA, NPDES permit requirements include the state narrative criteria, which are incorporated into the Board's basin plan under the description "no toxins in toxic amounts." As far as I can determine, NPDES permits***318 designed to achieve this narrative criteria (as well as designated beneficial uses) will usually implement the state's basin plan, while satisfying federal requirements as well.

If federal water quality standards are typically identical to state standards, it will be a rare instance that a state exceeds its own requirements and economic factors are taken into consideration.[FN1] In light of the Board's initial failure to consider costs of compliance and its repeated failure to conduct required triennial reviews, the result here is an unseemly bureaucratic bait-and-switch that we should not endorse. The likely outcome of the majority's decision is that the Cities will be economically burdened to meet standards imposed on them in a highly questionable manner.[FN2] In these times of tight fiscal budgets, it is difficult to imagine imposing additional financial burdens on municipalities without at least allowing them to present alternative views.

FN1. (But see *In the Matter of the Petition of City and County of San Francisco, San Francisco Baykeeper et al.* (Order No. WQ 95–4, Sept. 21, 1995) 1995 WL 576920.)

FN2. Indeed, given the fact that "water quality standards" in this case are composed of broadly worded components (i.e., a narrative criteria and "designated beneficial uses of the water body"), the Board possessed a high degree of discretion in setting NPDES permit requirements. Based on the Board's past performance, a proper exercise of this discretion is uncertain.

Based on the facts of this case, our opinion today appears to largely retain the status quo for the Board. If the Board can actually demonstrate that only the precise limitations at issue here, implemented in only one way, will achieve the desired water standards, perhaps its obduracy is justified. That case has yet to be made.

***634** Accordingly, I cannot conclude that the majority's decision is wrong. The analysis ****875** may provide a reasonable accommodation of conflicting provisions. However, since the Board's actions "make me wanna holler and throw up both my hands," [FN3] I write separately to set forth my concerns and concur in the judgment—*dubitante.*[FN4]

FN3. Marvin Gaye (1971) "Inner City Blues."

FN4. I am indebted to Judge Berzon for this useful term. (See *Credit Suisse First Boston Corp. v. Grunwald* (9th Cir.2005) 400 F.3d 1119 (conc. opn. of Berzon, J.).)

Cal.,2005.
City of Burbank v. State Water Resources Control Bd.
35 Cal.4th 613, 108 P.3d 862, 26 Cal.Rptr.3d 304, 60 ERC 1470, 35 Envtl. L. Rep. 20,071, 05 Cal. Daily Op. Serv. 2861, 2005 Daily Journal D.A.R. 3870

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TAB NO. 8

124 Cal.App.4th 866, 22 Cal.Rptr.3d 128, 34 Envtl. L. Rep. 20,149, 04 Cal. Daily Op. Serv. 10,694, 2004 Daily Journal D.A.R. 14,492
(Cite as: 124 Cal.App.4th 866, 22 Cal.Rptr.3d 128)

H

Court of Appeal, Fourth District, Division 1, California.
BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY et al., Plaintiffs and Appellants,
v.
STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Respondents,
San Diego Baykeeper et al., Interveners and Respondents.

No. D042385.
Dec. 7, 2004.
Certified for Partial Publication.[FN1]

FN1. Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of Discussion parts III, IV, V, VI and VII.

As Modified on Denial of Rehearing Jan. 4, 2005.
Review Denied March 30, 2005.[FN*]

FN* Baxter, J., and Brown, J., dissented.

Background: Building industry association filed petition for writ of mandate against regional and state water control boards, challenging issuance of comprehensive municipal stormwater sewer permit, as including water quality standard provisions which allegedly were too stringent and impossible to satisfy, and so violative of federal Clean Water Act standard. Environmental groups intervened as defendants. The Superior Court, San Diego County, Wayne L. Peterson, J., denied petition. Association appealed.

Holding: The Court of Appeal, Haller, J., held that water boards were not prohibited by Clean Water Act "maximum extent practicable" standard of stormwater pollutant abatement from including provisions in permit which required that municipalities comply with state water quality standards.

Affirmed.

West Headnotes

[1] Administrative Law and Procedure 15A 749

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak749 k. Presumptions. Most Cited Cases

Administrative Law and Procedure 15A 750

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak750 k. Burden of Showing Error. Most Cited Cases

In exercising its independent judgment when reviewing an administrative proceeding, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.

[2] Administrative Law and Procedure 15A 683

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak681 Further Review
15Ak683 k. Scope. Most Cited Cases

On review of a trial court's determination of a challenge to an administrative ruling, the Court of Appeal applies a substantial evidence standard when reviewing the trial court's factual determinations on the administrative record.

124 Cal.App.4th 866, 22 Cal.Rptr.3d 128, 34 Envtl. L. Rep. 20,149, 04 Cal. Daily Op. Serv. 10,694, 2004 Daily Journal D.A.R. 14,492
(Cite as: 124 Cal.App.4th 866, 22 Cal.Rptr.3d 128)

[3] Administrative Law and Procedure 15A ⚿ 683

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak681 Further Review
15Ak683 k. Scope. Most Cited Cases

On review of a trial court's determination of a challenge to an administrative ruling, an appellate court conducts a de novo review of the trial court's legal determinations, and is also not bound by the legal determinations made by the agency.

[4] Statutes 361 ⚿219(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(1) k. In General. Most Cited Cases

Court of Appeal gives appropriate consideration to an administrative agency's expertise underlying its interpretation of an applicable statute.

[5] Statutes 361 ⚿219(6.1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(6) Particular Federal Statutes
361k219(6.1) k. In General. Most Cited Cases

In determining the meaning of the Clean Water Act and its amendments, federal courts generally defer to the construction of a statutory provision by the Environmental Protection Agency (EPA) if the disputed portion of the statute is ambiguous. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

[6] Statutes 361 ⚿219(6.1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(6) Particular Federal Statutes
361k219(6.1) k. In General. Most Cited Cases

Court of Appeal considers and gives due deference to statutory interpretations of Clean Water Act by regional and state water control boards. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

[7] Environmental Law 149E ⚿197

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek197 k. Conditions and Limitations. Most Cited Cases

Regional and state water control boards, in issuing comprehensive municipal stormwater sewer permit, were not prohibited by Clean Water Act "maximum extent practicable" standard of stormwater pollutant abatement from including provisions in permit which required that municipalities comply with state water quality standards; language of pertinent statute communicated basic principle that boards, which had been federally approved to issue permit, retained discretion to impose appropriate water pollution controls in addition to those that came within definition of "maximum extent practicable," this principle was consistent with legislative history and purpose of Act, and there was no showing that applicable water quality standards were unattainable. Federal Water Pollution Control Act Amendments of 1972, § 402(p)(3)(B)(iii), 33 U.S.C.A. § 1342(p)(3)(B)(iii).

See 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, §§ 66-69; Cal. Jur. 3d, Pollution and Conservation Laws, § 113 et seq.

[8] Statutes 361 ⚿200

124 Cal.App.4th 866, 22 Cal.Rptr.3d 128, 34 Envtl. L. Rep. 20,149, 04 Cal. Daily Op. Serv. 10,694, 2004 Daily Journal D.A.R. 14,492
(Cite as: 124 Cal.App.4th 866, 22 Cal.Rptr.3d 128)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k200 k. Mistakes in Writing; Grammar, Spelling, or Punctuation. Most Cited Cases

While punctuation and grammar should be considered in interpreting a statute, neither is controlling unless the result is in harmony with the clearly expressed intent of the Legislature.

[9] Statutes 361 ⚿214

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k214 k. In General. Most Cited Cases

If the statutory language is susceptible to more than one reasonable interpretation, a court must look to a variety of extrinsic aids to interpreting the statute, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.

[10] Appeal and Error 30 ⚿900

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k900 k. Nature and Extent in General. Most Cited Cases

Appeal and Error 30 ⚿901

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k901 k. Burden of Showing Error. Most Cited Cases

All lower court judgments and orders are presumed correct, and persons challenging them on appeal must affirmatively show reversible error.

[11] Appeal and Error 30 ⚿757(3)

30 Appeal and Error
30XII Briefs
30k757 Statement of Case or of Facts
30k757(3) k. Statement of Evidence. Most Cited Cases

A party challenging the sufficiency of evidence to support a judgment on appeal must summarize, and cite to, all of the material evidence, not just the evidence favorable to his or her appellate positions.

[12] Administrative Law and Procedure 15A ⚿750

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak750 k. Burden of Showing Error. Most Cited Cases

The party challenging the scope of an administrative permit has the burden of showing the agency abused its discretion or its findings were unsupported by the facts.

****130** Latham & Watkins, David L. Mulliken, Eric M. Katz, Paul N. Singarella, Kelly E. Richardson and Daniel P. Brunton, San Diego, for Plaintiffs and Appellants.

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David S. Beckman, Heather L. Hoecherl, Los Angles, and Anjali I. Jaiswal, for Interveners and Respondents.

Marco Gonzalez, for Intervener and Respondent San Diego BayKeeper.

Law Offices of Rory Wicks and Rory R. Wicks,

124 Cal.App.4th 866, 22 Cal.Rptr.3d 128, 34 Envtl. L. Rep. 20,149, 04 Cal. Daily Op. Serv. 10,694, 2004 Daily Journal D.A.R. 14,492
(Cite as: 124 Cal.App.4th 866, 22 Cal.Rptr.3d 128)

San Diego, for Surfrider Foundation, Waterkeeper Alliance, The Ocean Conservancy, Heal the Bay, Environmental Defense Center, Santa Monica Bay-Keeper, Orange County CoastKeeper, Ventura CoastKeeper, Environmental Health Coalition, Cal-Beach Advocates, San Diego Audubon Society, Endangered Habitats League, and Sierra Club, Amici Curiae on behalf of Defendants and Respondents, and Interveners and Respondents.

HALLER, J.

***871** This case concerns the environmental regulation of municipal storm sewers that carry excess water runoff to lakes, lagoons, rivers, bays, and the ocean. The waters flowing through these sewer systems have accumulated numerous harmful pollutants that are then discharged into the water body without receiving any treatment. To protect against the resulting water quality impairment, federal and state laws impose regulatory controls on storm sewer discharges. In particular, municipalities and other public entities are required to obtain, and comply with, a regulatory permit limiting the quantity and quality of water runoff that can be discharged from these storm sewer systems.

In this case, the California Regional Water Control Board, San Diego Region, (Regional Water Board) conducted numerous public hearings and then issued a comprehensive municipal storm sewer permit governing 19 local public entities. Although these entities did not bring an administrative challenge to the permit, one business organization, the Building Industry Association of San Diego County (Building Industry), filed an administrative appeal with the State Water Resources Control Board (State Water Board). After making some modifications to the permit, the State Water Board denied the appeal. Building Industry then petitioned for a writ of mandate in the superior court, asserting numerous claims, including that the permit violates state and federal law because the permit provisions are too stringent and impossible to satisfy. Three environmental groups intervened as defendants in the action. After a hearing, the trial court found Building Industry failed to prove its claims and entered judgment in favor of the administrative agencies (the Water Boards) and the intervener environmental groups.

On appeal, Building Industry's main contention is that the regulatory permit violates federal law because it allows the Water Boards to impose municipal storm sewer control measures more stringent than a federal standard known as "maximum extent practicable." (****131**33 U.S.C. § 1342(p)(3)(B)(iii).) FN2 In the published portion of this opinion, we reject this contention, and conclude the Water Boards had the authority to include a permit provision requiring compliance with state water quality standards. In the unpublished portion of the opinion, we find Building Industry's additional contentions to be without merit. We affirm the judgment.

> FN2. Further statutory references are to title 33 of the United States Code, unless otherwise specified.

***872** RELEVANT BACKGROUND INFORMATION

I. *Summary of Relevant Clean Water Act Provisions*

Before setting forth the factual background of this particular case, it is helpful to summarize the federal and state statutory schemes for regulating municipal storm sewer discharges.[FN3]

> FN3. The systems that carry untreated urban water runoff to receiving water bodies are known as "[m]unicipal separate storm sewer" systems (40 C.F.R. § 122.26(b)(8)), and are often referred to as "MS4s" (40 C.F.R. § 122.30). For readability, we will identify these systems as municipal storm sewers. To avoid confusion in this case, we will generally use descriptive names, rather than initials or acronyms, when referring to parties and concepts.

A. *Federal Statutory Scheme*

When the United States Congress first enacted the Federal Water Pollution Control Act in 1948,

the Congress relied primarily on state and local enforcement efforts to remedy water pollution problems. (*Middlesex Cty. Sewerage Auth. v. Sea Clammers* (1981) 453 U.S. 1, 11, 101 S.Ct. 2615, 69 L.Ed.2d 435; *Tahoe–Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal.App.3d 1421, 1433, 259 Cal.Rptr. 132.) However, by the early 1970's, it became apparent that this reliance on local enforcement was ineffective and had resulted in the "accelerating environmental degradation of rivers, lakes, and streams...." (*Natural Resources Defense Council, Inc. v. Costle* (D.C.Cir.1977) 568 F.2d 1369, 1371 (*Costle*); see *EPA v. State Water Resources Control Board* (1976) 426 U.S. 200, 203, 96 S.Ct. 2022, 48 L.Ed.2d 578.) In response, in 1972 Congress substantially amended this law by mandating compliance with various minimum technological effluent standards established by the federal government and creating a comprehensive regulatory scheme to implement these laws. (See *EPA v. State Water Resources Control Board, supra,* 426 U.S. at pp. 204–205, 96 S.Ct. 2022.) The objective of this law, now commonly known as the Clean Water Act, was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (§ 1251(a).)

The Clean Water Act employs the basic strategy of prohibiting pollutant emissions from "point sources" [FN4] unless the party discharging the pollutants obtains a permit, known as an NPDES [FN5] permit. (See *EPA v. State Water Resources Control Board, supra,* 426 U.S. at p. 205, 96 S.Ct. 2022.) It is "unlawful ***873** for any person to discharge a pollutant without obtaining a permit and complying with its terms." (*Ibid.;* § 1311(a); see ****132***Costle, supra,* 568 F.2d at p. 1375.) An NPDES permit is issued by the United States Environmental Protection Agency (EPA) or by a state that has a federally approved water quality program. (§ 1342(a), (b); *EPA v. State Water Resources Control Board, supra,* 426 U.S. at p. 209, 96 S.Ct. 2022.) Before an NPDES is issued, the federal or state regulatory agency must follow an extensive administrative hearing procedure. (See 40 C.F.R. §§ 124.3, 124.6, 124.8, 124.10; see generally Wardzinski et al., *National Pollutant Discharge Elimination System Permit Application and Issuance Procedures*, in The Clean Water Act Handbook (Evans edit., 1994) pp. 72–74 (Clean Water Act Handbook).) NPDES permits are valid for five years. (§ 1342(b)(1)(B).)

> FN4. The Clean Water Act defines a "point source" to be "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." (§ 1362(14).)
>
> FN5. NPDES stands for National Pollution Discharge Elimination System.

Under the Clean Water Act, the proper scope of the controls in an NPDES permit depends on the applicable state water quality standards for the affected water bodies. (See *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1092, 1 Cal.Rptr.3d 76.) Each state is required to develop water quality standards that establish " 'the desired condition of a waterway.' " (*Ibid.*) A water quality standard for any given water segment has two components: (1) the designated beneficial uses of the water body; and (2) the water quality criteria sufficient to protect those uses. (*Ibid.*) As enacted in 1972, the Clean Water Act mandated that an NPDES permit require compliance with state water quality standards and that this goal be met by setting forth a specific "effluent limitation," which is a restriction on the amount of pollutants that may be discharged at the point source. (§§ 1311, 1362(11).)

Shortly after the 1972 legislation, the EPA promulgated regulations exempting most municipal storm sewers from the NPDES permit requirements. (*Costle, supra,* 568 F.2d at p. 1372; see *Defenders*

124 Cal.App.4th 866, 22 Cal.Rptr.3d 128, 34 Envtl. L. Rep. 20,149, 04 Cal. Daily Op. Serv. 10,694, 2004 Daily Journal D.A.R. 14,492
(Cite as: 124 Cal.App.4th 866, 22 Cal.Rptr.3d 128)

of Wildlife v. Browner (9th Cir.1999) 191 F.3d 1159, 1163 (*Defenders of Wildlife*).) When environmental groups challenged this exemption in federal court, the Ninth Circuit held a storm sewer is a point source and the EPA did not have the authority to exempt categories of point sources from the Clean Water Act's NPDES permit requirements. (*Costle, supra,* 568 F.2d at pp. 1374–1383.) The *Costle* court rejected the EPA's argument that effluent-based storm sewer regulation was administratively infeasible because of the variable nature of storm water pollution and the number of affected storm sewers throughout the country. (*Id.* at pp. 1377–1382.) Although the court acknowledged the practical problems relating to storm sewer regulation, the court found the EPA had the flexibility under the Clean Water Act to design regulations that would overcome these problems. (*Id.* at pp. 1379–1383.)

***874** During the next 15 years, the EPA made numerous attempts to reconcile the statutory requirement of point source regulation with the practical problem of regulating possibly millions of diverse point source discharges of storm water. (*Defenders of Wildlife, supra,* 191 F.3d at p. 1163; see Gallagher, *Clean Water Act* in Environmental Law Handbook (Sullivan edit., 2003) p. 300 (Environmental Law Handbook); Eisen, *Toward a Sustainable Urbanism: Lessons from Federal Regulation of Urban Stormwater Runoff* (1995) 48 Wash. U.J. Urb. & Contemp. L. 1, 40–41 (*Regulation of Urban Stormwater Runoff*).)

Eventually, in 1987, Congress amended the Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. (§ 1342(p); see ****133***Defenders of Wildlife, supra,* 191 F.3d at p. 1163; *Natural Resources Defense Council v. U.S. E.P.A.* (1992) 966 F.2d 1292, 1296.) In these amendments, enacted as part of the Water Quality Act of 1987, Congress distinguished between industrial and municipal storm water discharges. With respect to *industrial* storm water discharges, Congress provided that NPDES permits "shall meet all applicable provisions of this section and section 1311 [requiring the EPA to establish effluent limitations under specific timetables] ...." (§ 1342(p)(3)(A).) With respect to *municipal* storm water discharges, Congress clarified that the EPA had the authority to fashion NPDES permit requirements to meet water quality standards without specific numerical effluent limits and instead to impose "controls to reduce the discharge of pollutants to the maximum extent practicable ...." (§ 1342(p)(3)(B)(iii); see *Defenders of Wildlife, supra,* 191 F.3d at p. 1163.) Because the statutory language pertaining to municipal storm sewers is at the center of this appeal, we quote the relevant portion of the statute in full:

"(B) Permits for discharges from municipal storm sewers—

"(i) may be issued on a system- or jurisdiction-wide basis;

"(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

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

To ensure this scheme would be administratively workable, Congress placed a moratorium on many new types of required stormwater permits until 1994 (§ 1342(p)(1)), and created a phased approach to necessary municipal ***875** stormwater permitting depending on the size of the municipality (§ 1342(p)(2)(D)). (See *Environmental Defense Center, Inc. v. U.S. E.P.A.* (9th Cir.2003) 344 F.3d 832, 841–842.)

B. *State Statutory Scheme*

124 Cal.App.4th 866, 22 Cal.Rptr.3d 128, 34 Envtl. L. Rep. 20,149, 04 Cal. Daily Op. Serv. 10,694, 2004 Daily Journal D.A.R. 14,492
(Cite as: 124 Cal.App.4th 866, 22 Cal.Rptr.3d 128)

Three years before the 1972 Clean Water Act, the California Legislature enacted its own water quality protection legislation, the Porter–Cologne Water Quality Control Act (Porter–Cologne Act), seeking to "attain the highest water quality which is reasonable...." (Wat.Code, § 13000.) The Porter–Cologne Act created the State Water Board to formulate statewide water quality policy and established nine regional boards to prepare water quality plans (known as basin plans) and issue permits governing the discharge of waste. (Wat.Code, §§ 13100 , 13140, 13200, 13201, 13240, 13241, 13243.) The Porter–Cologne Act identified these permits as "waste discharge requirements," and provided that the waste discharge requirements must mandate compliance with the applicable regional water quality control plan. (Wat.Code, §§ 13263, subd. (a), 13377, 13374.)

Shortly after Congress enacted the Clean Water Act in 1972, the California Legislature added chapter 5.5 to the Porter–Cologne Act, for the purpose of adopting the necessary federal requirements to ensure it would obtain EPA approval to issue NPDES permits. (Wat.Code, § 13370, subd. (c).) As part of these amendments, the Legislature provided that the state and regional water boards "shall, as required or authorized by the [Clean Water Act], issue waste discharge requirements ... which apply and ensure compliance with all applicable provisions ****134** [of the Clean Water Act], together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." (Wat.Code, § 13377.) Water Code section 13374 provides that "[t]he term 'waste discharge requirements' as referred to in this division is the equivalent of the term 'permits' as used in the [Clean Water Act]."

California subsequently obtained the required approval to issue NPDES permits. (*WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1453, 126 Cal.Rptr.2d 389.) Thus, the waste discharge requirements issued by the regional water boards ordinarily also serve as NPDES permits under federal law. (Wat.Code, § 13374.)

II. *The NPDES Permit at Issue in this Case*

Under its delegated authority and after numerous public hearings, in February 2001 the Regional Water Board issued a 52–page NPDES permit ***876** and Waste Discharge Requirements (the Permit) governing municipal storm sewers owned by San Diego County, the San Diego Unified Port District, and 18 San Diego-area cities (collectively, "Municipalities").[FN6] The first 10 pages of the Permit contain the Regional Water Board's detailed factual findings. These findings describe the manner in which San Diego-area water runoff absorbs numerous harmful pollutants and then is conveyed by municipal storm sewers into local waters without any treatment. The findings state that these storm sewer discharges are a leading cause of water quality impairment in the San Diego region, endangering aquatic life and human health. The findings further state that to achieve applicable state water quality objectives, it is necessary not only to require municipalities to comply with existing pollution-control technologies, but also to require compliance with applicable "receiving water limits" (state water quality standards) and to employ an "iterative process" of "development, implementation, monitoring, and assessment" to improve existing technologies.

> FN6. Under the Clean Water Act, entities responsible for NPDES permit conditions pertaining to their own discharges are referred to as "copermittees." (40 C.F.R. § 122.26(b)(1).) For clarity and readability, we shall refer to these entities as Municipalities.

Based on these factual findings, the Regional Water Board included in the Permit several overall prohibitions applicable to municipal storm sewer discharges. Of critical importance to this appeal, these prohibitions concern two categories of restrictions. First, the Municipalities are prohibited from

124 Cal.App.4th 866, 22 Cal.Rptr.3d 128, 34 Envtl. L. Rep. 20,149, 04 Cal. Daily Op. Serv. 10,694, 2004 Daily Journal D.A.R. 14,492
(Cite as: 124 Cal.App.4th 866, 22 Cal.Rptr.3d 128)

discharging those pollutants "which have not been reduced to the *maximum extent practicable....* " FN7 (Italics added). Second, the Municipalities are **135 prohibited from discharging pollutants "which cause or contribute to exceedances of receiving water quality objectives ..." and/or that "cause or contribute to the violation of water quality standards...." This second category of restrictions (referred to in this opinion as the "Water Quality Standards provisions") essentially provide that a Municipality may not discharge pollutants if those pollutants would cause the receiving water body to exceed the applicable water quality standard. It is these latter restrictions that are challenged by Building Industry in this appeal.

> FN7. The Permit does not precisely define this phrase, and instead, in its definition section, contains a lengthy discussion of the variable nature of the maximum extent practicable concept, referred to as MEP. A portion of this discussion is as follows: "[T]he definition of MEP is dynamic and will be defined by the following process over time: municipalities propose their definition of MEP by way of their [local storm sewer plan]. Their total collective and individual activities conducted pursuant to the [plan] becomes their proposal for MEP as it applies both to their overall effort, as well as to specific activities (e.g., MEP for street sweeping, or MEP for municipal separate storm sewer maintenance). In the absence of a proposal acceptable to the [Regional Water Board], the [Regional Water Board] defines MEP." The definition also identifies several factors that are "useful" in determining whether an entity has achieved the maximum extent practicable standard, including "Effectiveness," "Regulatory Compliance," "Public Acceptance," "Cost," and "Technical Feasibility."

*877 Part C of the Permit (as amended) qualifies the Water Quality Standards provisions by detailing a procedure for enforcing violations of those standards through a step-by-step process of "timely implementation of control measures ...," known as an "iterative" process. Under this procedure, when a municipality "caus[es] or contribute[s] to an exceedance of an applicable water quality standard," the municipality must prepare a report documenting the violation and describing a process for improvement and prevention of further violations. The municipality and the regional water board must then work together at improving methods and monitoring progress to achieve compliance. But the final provision of Part C states that "Nothing in this section shall prevent the [Regional Water Board] from enforcing any provision of this Order while the [municipality] prepares and implements the above report."

In addition to these broad prohibitions and enforcement provisions, the Permit requires the Municipalities to implement, or to require businesses and residents to implement, various pollution control measures referred to as "best management practices," which reflect techniques for preventing, slowing, retaining or absorbing pollutants produced by stormwater runoff. These best management practices include structural controls that minimize contact between pollutants and flows, and nonstructural controls such as educational and public outreach programs. The Permit also requires the Municipalities to regulate discharges associated with new development and redevelopment and to ensure a completed project will not result in significantly increased discharges of pollution from storm water runoff.

III. *Administrative and Trial Court Challenges*

After the Regional Water Board issued the Permit, the Building Industry, an organization representing the interests of numerous construction-related businesses, filed an administrative challenge with the State Water Board. Although none of the Municipalities joined in the administrative appeal, Building Industry claimed its own independent standing based on its assertion that the Permit

124 Cal.App.4th 866, 22 Cal.Rptr.3d 128, 34 Envtl. L. Rep. 20,149, 04 Cal. Daily Op. Serv. 10,694, 2004 Daily Journal D.A.R. 14,492
(Cite as: 124 Cal.App.4th 866, 22 Cal.Rptr.3d 128)

would impose indirect obligations on the regional building community. (See Wat.Code, § 13320 [permitting any "aggrieved person" to challenge regional water board action].) Among its numerous contentions, Building Industry argued that the Water Quality Standards provisions in the Permit require strict compliance with state water quality standards beyond what is "practicable" and therefore violate federal law.

In November 2001, the State Water Board issued a written decision rejecting Building Industry's appeal after making certain modifications to the Permit. (Cal. Wat. Resources Control Bd. Order WQ2001–15 (Nov. 15, 2001).) Of particular relevance here, the State Water Board modified the Permit to make clear that the iterative enforcement process applied to the Water Quality Standards provisions in the Permit. But ***878** the State Water Board did not delete the Permit's provision stating ****136** that the Regional Water Board retains the authority to enforce the Water Quality Standards provisions even if a Municipality is engaged in this iterative process.

Building Industry then brought a superior court action against the Water Boards, challenging the Regional Board's issuance of the Permit and the State Water Board's denial of Building Industry's administrative challenge.[FN8] Building Industry asserted numerous legal claims, including that the Water Boards: (1) violated the Clean Water Act by imposing a standard greater than the "maximum extent practicable" standard; (2) violated state law by failing to consider various statutory factors before issuing the Permit; (3) violated the California Environmental Quality Act (CEQA) by failing to prepare an environmental impact report (EIR); and (4) made findings that were factually unsupported.

> FN8. Several other parties were also named as petitioners: Building Industry Legal Defense Foundation, California Business Properties Association, Construction Industry Coalition for Water Quality, San Diego County Fire Districts Association, and the City of San Marcos. However, because these entities were not parties in the administrative challenge, the superior court properly found they were precluded by the administrative exhaustion doctrine from challenging the administrative agencies' compliance with the federal and state water quality laws. Although these entities were named as appellants in the notice of appeal, they are barred by the exhaustion doctrine from asserting appellate contentions concerning compliance with federal and state water quality laws. However, as to any other claims (such as CEQA), these entities are proper appellants. For ease of reference and where appropriate, we refer to the appellants collectively as Building Industry.

Three environmental organizations, San Diego BayKeeper, Natural Resources Defense Council, and California CoastKeeper (collectively, Environmental Organizations), requested permission to file a complaint in intervention, seeking to uphold the Permit and asserting a direct and substantial independent interest in the subject of the action. Over Building Industry's objections, the trial court permitted these organizations to file the complaint and enter the action as parties-interveners.

After reviewing the lengthy administrative record and the parties' briefs, and conducting an oral hearing, the superior court ruled in favor of the Water Boards and Environmental Organizations (collectively, respondents). Applying the independent judgment test, the court found Building Industry failed to meet its burden to establish the State Water Board abused its discretion in approving the Permit or that the administrative findings are contrary to the weight of the evidence. In particular, the court found Building Industry failed to establish the Permit requirements were "impracticable under federal law or unreasonable under state law," and noted that there was evidence showing the Regional Water Board considered many practical aspects of

124 Cal.App.4th 866, 22 Cal.Rptr.3d 128, 34 Envtl. L. Rep. 20,149, 04 Cal. Daily Op. Serv. 10,694, 2004 Daily Journal D.A.R. 14,492
(Cite as: 124 Cal.App.4th 866, 22 Cal.Rptr.3d 128)

the regulatory *879 controls before issuing the Permit. Rejecting Building Industry's legal arguments, the court also stated that under federal law the Water Boards had the discretion "to require strict compliance with water quality standards" or "to require less than strict compliance with water quality standards." The court also sustained several of respondents' evidentiary objections, including to documents relating to the legislative history of the Clean Water Act.

Building Industry appeals, challenging the superior court's determination that the Permit did not violate the federal Clean Water Act. In its appeal, Building Industry does not reassert its claim that the Permit violates state law, except for its contentions pertaining to CEQA.

DISCUSSION

I. *Standard of Review*

[1] A party aggrieved by a final decision of the State Water Board may obtain review of the decision by filing a timely **137 petition for writ of mandate in the superior court. (Wat.Code, § 13330, subd. (a).) Code of Civil Procedure section 1094.5 governs the proceedings, and the superior court must exercise its independent judgment in examining the evidence and resolving factual disputes. (Wat.Code, § 13330, subd. (d).) "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817, 85 Cal.Rptr.2d 696, 977 P.2d 693.)

[2][3][4][5][6] In reviewing the trial court's factual determinations on the administrative record, a Court of Appeal applies a substantial evidence standard. (*Fukuda v. City of Angels, supra,* 20 Cal.4th at p. 824, 85 Cal.Rptr.2d 696, 977 P.2d 693.) However, in reviewing the trial court's legal determinations, an appellate court conducts a de novo review. (See *Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 129, 133 Cal.Rptr.2d 249.) Thus, we are not bound by the legal determinations made by the state or regional agencies or by the trial court. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7–8, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) But we must give appropriate consideration to an administrative agency's expertise underlying its interpretation of an applicable statute.[FN9] (*Ibid.*)

FN9. We note that in determining the meaning of the Clean Water Act and its amendments, federal courts generally defer to the EPA's statutory construction if the disputed portion of the statute is ambiguous. (See *Chevron U.S.A. v. Natural Res. Def. Council, Inc.* (1984) 467 U.S. 837, 842–844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (*Chevron*).) However, the parties do not argue this same principle applies to a *state agency's* interpretation of the Clean Water Act. Nonetheless, under governing state law principles, we do consider and give due deference to the Water Boards' statutory interpretations in this case. (See *Yamaha Corp. of America v. State Bd. of Equalization, supra,* 19 Cal.4th at pp. 7–8, 78 Cal.Rptr.2d 1, 960 P.2d 1031.)

*880 II. *Water Boards' Authority to Enforce Water Quality Standards in NPDES Permit*

Building Industry's main appellate contention is very narrow. Building Industry argues that two provisions in the Permit (the Water Quality Standards provisions) violate federal law because they prohibit the Municipalities from discharging runoff from storm sewers if the discharge would cause a water body to exceed the applicable water quality standard established under state law.[FN10] Building Industry contends that under federal law the "maximum extent practicable" standard is the "exclusive" measure that may be applied to municipal storm sewer discharges and a regulatory agency may not require a Municipality to comply

124 Cal.App.4th 866, 22 Cal.Rptr.3d 128, 34 Envtl. L. Rep. 20,149, 04 Cal. Daily Op. Serv. 10,694, 2004 Daily Journal D.A.R. 14,492
(Cite as: 124 Cal.App.4th 866, 22 Cal.Rptr.3d 128)

with a state water quality standard if the required controls exceed a "maximum extent practicable" standard.

> FN10. These challenged Permit provisions state "Discharges from [storm sewers] which cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited" (Permit, § A.2), and "Discharges from [storm sewers] that cause or contribute to the violation of water quality standards ... are prohibited" (Permit, § C.1).

In the following discussion, we first reject respondents' contentions that Building Industry waived these arguments by failing to raise a substantial evidence challenge to the court's factual findings and/or **138 to reassert its state law challenges on appeal. We then focus on the portion of the Clean Water Act (§ 1342(p)(3)(B)(iii)) that Building Industry contends is violated by the challenged Permit provisions. On our de novo review of this legal issue, we conclude the Permit's Water Quality Standards provisions are proper under federal law, and Building Industry's legal challenges are unsupported by the applicable statutory language, legislative purpose, and legislative history.

A. *Building Industry Did Not Waive the Legal Argument*

Respondents (the Water Boards and Environmental Organizations) initially argue that Building Industry waived its right to challenge the Permit's consistency with the maximum extent practicable standard because Building Industry did not challenge the trial court's *factual* findings that Building Industry failed to prove any of the Permit requirements were "impracticable" or "unreasonable."

In taking this position, respondents misconstrue the nature of Building Industry's appellate contention challenging the Water Quality Standards provisions. Building Industry's contention concerns the scope of the authority given to the Regional Water Board under the Permit terms. Specifically, *881 Building Industry argues that the Regional Water Board does not have the authority to require the Municipalities to adhere to the applicable water quality standards because federal law provides that the "maximum extent practicable" standard is the exclusive standard that may be applied to storm sewer regulation. This argument—concerning the proper scope of a regulatory agency's authority—presents a purely legal issue, and is not dependent on the court's factual findings regarding the practicality of the specific regulatory controls identified in the Permit.

Respondents alternatively contend that Building Industry waived its right to challenge the propriety of the Water Quality Standards provisions under federal law because the trial court found the provisions were valid under state law and Building Industry failed to reassert its state law challenges on appeal. Under the particular circumstances of this case, we conclude Building Industry did not waive its rights to challenge the Permit under federal law.

Although it is well settled that the Clean Water Act authorizes states to impose water quality controls that are more stringent than are required under federal law (§ 1370; see *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 705, 114 S.Ct. 1900, 128 L.Ed.2d 716; *Northwest Environmental Advocates v. Portland* (9th Cir.1995) 56 F.3d 979, 989), and California law specifically allows the imposition of controls more stringent than federal law (Wat.Code, § 13377), the Water Boards made a tactical decision in the superior court to assert the Permit's validity based solely on federal law, and repeatedly made clear they were not seeking to justify the Permit requirements based on the Boards' independent authority to act under state law. On appeal, the Water Boards continue to rely primarily on federal law to uphold the Permit requirements, and their assertions that we may decide the matter based solely on state law are in the nature of asides rather than direct arguments. On this record, it would be improper to rely

solely on state law to uphold the challenged Permit provisions.

B. *The Water Quality Standards Requirement Does Not Violate Federal Law*

[7] We now turn to Building Industry's main substantive contention on appeal—****139** that the Permit's Water Quality Standards provisions (fn.10, *ante*) violate federal law. Building Industry's contention rests on its interpretation of the 1987 Water Quality Act amendments containing NPDES requirements for municipal storm sewers. The portion of the relevant statute reads: "(B) Permits for discharges from municipal storm sewers ... [¶] ... [¶] (iii) shall require controls to reduce the discharge of pollutants to the *maximum extent practicable, including* management practices, control techniques and ***882** system, design and engineering methods, and such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants." (§ 1342(p)(3)(B)(iii), italics added.)

1. *Statutory Language*

Focusing on the first 14 words of subdivision (iii), Building Industry contends the statute means that the maximum extent practicable standard sets the upper limit on the type of control that can be used in an NPDES permit, and that each of the phrases following the word " *including* " identify examples of "maximum extent practicable" controls. (§ 1342(p)(3)(B)(iii), italics added.) Building Industry thus reads the final "and such other provisions" clause as providing the EPA with the authority only to include *other* types of "maximum extent practicable" controls in an NPDES storm sewer permit.

Respondents counter that the term "including" refers only to the three identified types of pollution control procedures—(1) "management practices"; (2) "control techniques"; and (3) "system, design and engineering methods"—and that the last phrase, "*and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants,* " provides the EPA (or the approved state regulatory agency) the specific authority to go beyond the maximum extent practicable standard to impose effluent limitations or water-quality based standards in an NPDES permit. In support, respondents argue that because the word "system" in section 1342(p)(3)(B)(iii) is singular, it necessarily follows from parallel-construction grammar principles that the word "system" is part of the phrase "system, design and engineering methods" rather than the phrase "control techniques and system." Under this view and given the absence of a comma after the word "techniques," respondents argue that the "and such other provisions" clause cannot be fairly read as restricted by the "maximum extent practicable" phrase, and instead the "and such other provisions" clause is a separate and distinct clause that acts as a second direct object to the verb "require" in the sentence. (§ 1342(p)(3)(B)(iii).)

Building Industry responds that respondents' proposed statutory interpretation is "not logical" because if the "and such other provisions" phrase is the direct object of the verb "require," the sentence would not make sense. Building Industry states that "permits" do not generally "require" provisions; they "include" or "contain" them.

As a matter of grammar and word choice, respondents have the stronger position. The second part of Building Industry's proposed interpretation—"control techniques and system, design, and engineering methods"—without a comma after the word "techniques" does not logically serve as a ***883** parallel construct with the "and such other provisions" clause. Moreover, we disagree that the "and such other provisions" clause cannot be a direct object to the word "require." (§ 1342(p)(3)(B)(iii).) Although it is not the clearest way of articulating the concept, the language of section 1342(p)(3)(B)(iii) does communicate the basic ****140** principle that the EPA (and/or a state approved to issue the NPDES permit) retains the discretion to impose "appropriate" water pollution controls in addition to those that come within the

definition of " 'maximum extent practicable.' " (*Defenders of Wildlife, supra,* 191 F.3d at pp. 1165–1167.) We find unpersuasive Building Industry's reliance on several statutory interpretation concepts, *ejusdem generis, noscitur a sociis,* and *expressio unius est exclusion alterius,* to support its narrower statutory construction.

2. *Purpose and History of Section 1342(p)(3)(B)(iii)*

[8][9] Further, "[w]hile punctuation and grammar should be considered in interpreting a statute, neither is controlling unless the result is in harmony with the clearly expressed intent of the Legislature." (*In re John S.* (2001) 88 Cal.App.4th 1140, 1144, fn. 1, 106 Cal.Rptr.2d 476; see *Estate of Coffee* (1941) 19 Cal.2d 248, 251, 120 P.2d 661.) If the statutory language is susceptible to more than one reasonable interpretation, a court must also "look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340, 14 Cal.Rptr.3d 857, 92 P.3d 350.)

The legislative purpose underlying the Water Quality Act of 1987, and section 1342(p) in particular, supports that Congress intended to provide the EPA (or the regulatory agency of an approved state) the discretion to require compliance with water quality standards in a municipal storm sewer NPDES permit, particularly where, as here, that compliance will be achieved primarily through an iterative process.

Before section 1342(p) was enacted, the courts had long recognized that the EPA had the authority to require a party to comply with a state water quality standard even if that standard had not been translated into an effluent limitation. (See *EPA v. State Water Resources Control Board, supra,* 426 U.S. at p. 205, fn. 12, 96 S.Ct. 2022; *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology, supra,* 511 U.S. at p. 715, 114 S.Ct. 1900; *Northwest Environmental Advocates v. Portland* (9th Cir.1995) 56 F.3d 979, 987; *Natural Resources Defense Council v. U.S.E.P.A.* (9th Cir.1990) 915 F.2d 1314, 1316.) Specifically, section 1311(b)(1)(C) gave the regulatory agency the authority to impose "any more stringent limitation including those necessary to meet water quality standards," and section 1342(a)(2) provided that "[t]he [EPA] Administrator shall ***884** prescribe conditions for [NPDES] permits to assure compliance" with requirements identified in section 1342(a)(1), which encompass state water quality standards. The United States Supreme Court explained that when Congress enacted the 1972 Clean Water Act, it retained "[w]ater quality standards ... as a supplementary basis for effluent limitations, ... so that numerous point sources despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels...." (*EPA v. State Water Resources Control Board, supra,* 426 U.S. at p. 205, fn. 12, 96 S.Ct. 2022; see also *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101, 112 S.Ct. 1046, 117 L.Ed.2d 239.)

There is nothing in section 1342(p)(3)(B)(iii)'s statutory language or legislative history showing that Congress intended to eliminate this discretion when it amended the Clean Water Act in 1987. ****141** To the contrary, Congress added the NPDES storm sewer requirements to strengthen the Clean Water Act by making its mandate correspond to the practical realities of municipal storm sewer regulation. As numerous commentators have pointed out, although Congress was reacting to the physical differences between municipal storm water runoff and other pollutant discharges that made the 1972 legislation's blanket effluent limitations approach impractical and administratively burdensome, the primary point of the legislation was to address these administrative problems while giving the administrative bodies the tools to meet the fundamental goals of the Clean Water Act in the context of stormwater pollution. (See *Regulation of Urban Stormwater Runoff, supra,* 48 Wash.U.J. Urb. &

124 Cal.App.4th 866, 22 Cal.Rptr.3d 128, 34 Envtl. L. Rep. 20,149, 04 Cal. Daily Op. Serv. 10,694, 2004 Daily Journal D.A.R. 14,492
(Cite as: 124 Cal.App.4th 866, 22 Cal.Rptr.3d 128)

Contemp. L. at pp. 44–46; Environmental Law Handbook, *supra,* at p. 300; Clean Water Act Handbook, *supra,* at pp. 62–63.) In the 1987 congressional debates, the Senators and Representatives emphasized the need to prevent the widespread and escalating problems resulting from untreated storm water toxic discharges that were threatening aquatic life and creating conditions dangerous to human health. (See Remarks of Sen. Durenberger, 133 Cong. Rec. 1279 (Jan. 14, 1987); Remarks of Sen. Chaffee, 133 Cong. Rec. S738 (daily ed. Jan 14, 1987); Remarks of Rep. Hammerschmidt, 133 Cong. Rec. 986 (Jan. 8, 1987); Remarks of Rep. Roe, 133 Cong. Rec. 1006, 1007 (Jan. 8, 1987); Remarks of Sen. Stafford, 132 Cong. Rec. 32381, 32400 (Oct. 16, 1986).) This legislative history supports that in identifying a maximum extent practicable standard Congress did not intend to substantively bar the EPA/state agency from imposing a more stringent water quality standard if the agency, based on its expertise and technical factual information and after the required administrative hearing procedure, found this standard to be a necessary and workable enforcement mechanism to achieving the goals of the Clean Water Act.

To support a contrary view, Building Industry relies on comments by Minnesota Senator David Durenberger during the lengthy congressional ***885** debates on the 1987 Water Quality Act amendments.[FN11] (132 Cong. Rec. 32400 (Oct. 16, 1986); 133 Cong. Rec. S752 (daily ed. Jan. 14, 1987).) In the cited portions of the Congressional Record, Senator Durenberger states that NPDES permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable. Such controls include management practices, control techniques and systems, design and engineering methods, and such other provisions, as the Administrator determines appropriate for the control of pollutants in the stormwater discharge." (*Ibid.*) When viewing these statements in context, it is apparent that the Senator was merely paraphrasing the words of the proposed statute and was not intending to address the issue of whether the maximum extent practicable standard was a regulatory ceiling or whether he believed the proposed amendments limited the EPA's existing discretion.[FN12]

FN11. We agree with Building Industry that the trial court's refusal to consider this legislative history on the basis that it was not presented to the administrative agencies was improper. However, this error was not prejudicial because we apply a de novo review standard in interpreting the relevant statutes.

FN12. In the cited remarks, Senator Durenberger in fact expressed his dissatisfaction with the EPA's prior attempts to regulate municipal storm sewers. He pointed out, for example, that "[r]unoff from municipal separate storm sewers and industrial sites contain significant values of both toxic and conventional pollutants," and that despite the Clean Water Act's "clear directive," the EPA "has failed to require most stormwater point sources to apply for permits which would control the pollutants in their discharge." (133 Cong. Rec. 1274, 1279–1280 (daily ed. Jan. 14, 1987).)

****142** Building Industry's reliance on comments made by Georgia Representative James Rowland, who participated in drafting the 1987 Water Quality Act amendments, is similarly unhelpful. During a floor debate on the proposed amendments, Representative Rowland noted that cities have "millions of" stormwater discharge points and emphasized the devastating financial burden on cities if they were required to obtain a permit for each of these points. (133 Cong. Rec. 522 (daily ed. Feb. 3, 1987).) Representative Rowland then explained that the amendments would address this problem by "allow[ing] communities to obtain far less costly single jurisdictionwide permits." (*Ibid.*) Viewed in context, these comments were directed at the need for statutory provisions permitting the EPA to issue jurisdiction-wide permits thereby preventing unnecessary administrative costs to the cities, and do not

reflect a desire to protect cities from the cost of complying with strict water quality standards when deemed necessary by the regulatory agency.

3. Interpretations by the EPA and Other Courts

Our conclusion that Congress intended section 1342(p)(3)(B)(iii) to provide the regulatory agency with authority to impose standards stricter than a "maximum extent practicable" standard is consistent with interpretations by ***886** the EPA and the Ninth Circuit. In its final rule promulgated in the Federal Register, the EPA construed section 1342(p)(3)(B)(iii) as providing the administrative agency with the authority to impose water-quality standard controls in an NPDES permit if appropriate under the circumstances. Specifically, the EPA stated this statutory provision requires "controls to reduce the discharge of pollutants to the maximum extent practicable, *and where necessary water quality-based controls* ...." (55 Fed.Reg. 47990, 47994 (Nov. 16, 1990), italics added.) We are required to give substantial deference to this administrative interpretation, which occurred after an extensive notice and comment period. (See *ibid.; Chevron, supra,* 467 U.S. at pp. 842–844, 104 S.Ct. 2778.)

The only other court that has interpreted the "such other provisions" language of section 1342(p)(3)(B)(iii) has reached a similar conclusion. (*Defenders of Wildlife, supra,* 191 F.3d at pp. 1166–1167.) In *Defenders of Wildlife,* environmental organizations brought an action against the EPA, challenging provisions in an NPDES permit requiring several Arizona localities to adhere to various best management practice controls without requiring numeric effluent limitations. (*Id.* at p. 1161.) The environmental organizations argued that section 1342(p) did not allow the EPA to issue NPDES permits without requiring strict compliance with effluent limitations. (*Defenders of Wildlife, supra,* at p. 1161.) Rejecting this argument, the Ninth Circuit found section 1342(p)(3)(B)(iii)'s statutory language "unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly" with effluent limitations. (*Defenders of Wildlife, supra,* at p. 1164.)

But in a separate part of the opinion, the *Defenders of Wildlife* court additionally rejected the reverse argument made by the affected municipalities (who were the interveners in the action) that "the EPA may not, under the [Clean Water Act], require strict compliance with state water-quality standards, through numerical limits or otherwise." (*Defenders of Wildlife, supra,* 191 F.3d at p. 1166.) The court stated: "Although Congress did not require****143** municipal storm-sewer discharges to comply strictly with [numerical effluent limitations], § 1342(p)(3)(B)(iii) states that '[p]ermits for discharges from municipal storm sewers ... shall require ... *such other provisions as the Administrator ... determines appropriate for the control of such pollutants.*' (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate.... [¶] *Under that discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants.* The EPA also has the authority to require less than strict compliance with state water-quality standards.... Under 33 U.S.C. § 1342(p)(3)(B)(iii), the EPA's choice to include either management practices or numeric limitations in the permits was within its discretion. [Citations.]" (*Defenders of Wildlife, supra,* 191 F.3d at pp. 1166–1167, second italics added.) Although dicta, this ***887** conclusion reached by a federal court interpreting federal law is persuasive and is consistent with our independent analysis of the statutory language.[FN13]

FN13. Building Industry's reliance on two other Ninth Circuit decisions to support a contrary statutory interpretation is misplaced. (See *Natural Res. Def. Council, Inc. v. U.S.E.P.A., supra,* 966 F.2d at p. 1308; *Environmental Defense Center, Inc. v. U.S. E.P.A.* (9th Cir.2003) 344 F.3d 832.) Neither of these decisions addressed the issue of the scope of a regulatory agency's authority to exceed the maximum

124 Cal.App.4th 866, 22 Cal.Rptr.3d 128, 34 Envtl. L. Rep. 20,149, 04 Cal. Daily Op. Serv. 10,694, 2004 Daily Journal D.A.R. 14,492
(Cite as: 124 Cal.App.4th 866, 22 Cal.Rptr.3d 128)

extent practicable standard in issuing NPDES permits for municipal storm sewers.

To support its interpretation of section 1342(p)(3)(B)(iii), Building Industry additionally relies on the statutory provisions addressing nonpoint source runoff (a diffuse runoff not channeled through a particular source), which were also part of the 1987 amendments to the Clean Water Act. (§ 1329.) In particular, Building Industry cites to section 1329(a)(1)(C), which states, "The Governor of each State shall ... prepare and submit to the [EPA] Administrator for approval, a report which ... [¶] ... [¶] describes the process ... for identifying best management practices and measures to control each [identified] category ... of nonpoint sources and ... to reduce, to the *maximum extent practicable,* the level of pollution resulting from such category...." (Italics added.) Building Industry argues that because this "nonpoint source" statutory language expressly identifies only the maximum extent practicable standard, we must necessarily conclude that Congress meant to similarly limit the storm sewer point source pollution regulations to the maximum extent practicable standard.

The logic underlying this analogy is flawed because the critical language in the two statutory provisions is different. In the nonpoint source statute, Congress chose to include only the maximum extent practicable standard (§ 1329(a)(1)(C)); whereas in the municipal storm sewer provisions, Congress elected to include the "and such other provisions" clause (§ 1342(p)(3)(B)(iii)). This difference leads to the reasonable inference that Congress had a different intent when it enacted the two statutory provisions. Moreover, because of a fundamental difference between point and nonpoint source pollution, Congress has historically treated the two types of pollution differently and has subjected each type to entirely different requirements. (See *Pronsolino v. Nastri* (9th Cir.2002) 291 F.3d 1123, 1126–1127.) Given this different treatment, it would be improper to presume Congress intended to apply the same standard in both statutes. Building Industry's citation to comments during the 1987 congressional debates regarding nonpoint source regulation does **144 not support Building Industry's contentions.

*888 4. *Contention that it is "Impossible" for Municipalities to Meet Water Quality Standards*

We also reject Building Industry's arguments woven throughout its appellate briefs, and emphasized during oral arguments, that the Water Quality Standards provisions violate federal law because compliance with those standards is "impossible." The argument is not factually or legally supported.

[10][11] First, there is no showing on the record before us that the applicable water quality standards are unattainable. The trial court specifically concluded that Building Industry failed to make a factual showing to support this contention, and Building Industry does not present a proper appellate challenge to this finding sufficient to warrant our reexamining the evidence. All judgments and orders are presumed correct, and persons challenging them must affirmatively show reversible error. (*Walling v. Kimball* (1941) 17 Cal.2d 364, 373, 110 P.2d 58.) A party challenging the sufficiency of evidence to support a judgment must summarize (and cite to) *all* of the material evidence, not just the evidence favorable to his or her appellate positions. (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887–888, 160 Cal.Rptr. 516, 603 P.2d 881; *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282, 188 Cal.Rptr. 123.) Building Industry has made no attempt to comply with this well established appellate rule in its briefs.

In a supplemental brief, Building Industry attempted to overcome this deficiency by asserting that "[t]he record clearly establishes that [the Water Quality Standards provisions] are unattainable during the period the permit is in effect." This statement, however, is not supported by the proffered citation or by the evidence viewed in the light most favorable to the respondents. Further, the fact that many of the Municipalities' storm sewer discharges currently violate water quality standards does not mean that the Municipalities cannot comply with

124 Cal.App.4th 866, 22 Cal.Rptr.3d 128, 34 Envtl. L. Rep. 20,149, 04 Cal. Daily Op. Serv. 10,694, 2004 Daily Journal D.A.R. 14,492
(Cite as: 124 Cal.App.4th 866, 22 Cal.Rptr.3d 128)

the standards during the five-year term of the Permit. Additionally, Building Industry's assertions at oral argument that the trial court never reached the "impossibility" issue and/or that respondents' counsel conceded the issue below are belied by the record, including the trial court's rejection of Building Industry's specific challenge to the proposed statement of decision on this very point.[FN14]

> FN14. Because we are not presented with a proper appellate challenge, we do not address the trial court's factual determinations in this case concerning whether it is possible or practical for a Municipality to achieve any specific Permit requirement.

[12] We reject Building Industry's related argument that it was respondents' burden to affirmatively show it is feasible to satisfy each of the applicable Water Quality Standards provisions. The party challenging the scope of an administrative permit, such as an NPDES, has the burden of ***889** showing the agency abused its discretion or its findings were unsupported by the facts. (See *Fukuda v. City of Angels, supra,* 20 Cal.4th at p. 817, 85 Cal.Rptr.2d 696, 977 P.2d 693; *Huntington Park Redevelopment Agency v. Duncan* (1983) 142 Cal.App.3d 17, 25, 190 Cal.Rptr. 744.) Thus, it was not respondents' burden to affirmatively demonstrate it was possible for the Municipalities to meet the Permit's requirements.

Building Industry alternatively contends it was not required to challenge the facts underlying the trial court's determination that the Permit requirements were feasible****145** because the court's determination was wrong as a matter of law. Specifically, Building Industry asserts that a Permit requirement that is more stringent than a "maximum extent practicable" standard is, by definition, "not practicable" and therefore "technologically impossible" to achieve under any circumstances. Building Industry relies on a dictionary definition of "practicable," which provides that the word means " 'something that can be done; feasible,' " citing the 1996 version of "Webster's Encyclopedic Unabridged Dictionary."

This argument is unpersuasive. The federal maximum extent practicable standard it is not defined in the Clean Water Act or applicable regulations, and thus the Regional Water Board properly included a detailed description of the term in the Permit's definitions section. (See *ante,* fn. 7.) As broadly defined in the Permit, the maximum extent practicable standard is a highly flexible concept that depends on balancing numerous factors, including the particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness. This definition conveys that the Permit's maximum extent practicable standard is a term of art, and is not a phrase that can be interpreted solely by reference to its everyday or dictionary meaning. Further, the Permit's definitional section states that the maximum extent practicable standard "considers economics and is generally, but not necessarily, *less* stringent than BAT." (Italics added.) BAT is an acronym for "best available technology economically achievable," which is a technology-based standard for industrial storm water dischargers that focuses on reducing pollutants by treatment or by a combination of treatment and best management practices. (See *Texas Oil & Gas Ass'n v. U.S. E.P.A.* (5th Cir.1998) 161 F.3d 923, 928.) If the maximum extent practicable standard is generally "less stringent" than another Clean Water Act standard that relies on available technologies, it would be unreasonable to conclude that anything more stringent than the maximum extent practicable standard is necessarily impossible. In other contexts, courts have similarly recognized that the word "practicable" does not necessarily mean the most that can possibly be done. (See *Nat. Wildlife Federation v. Norton* (E.D.Cal.2004) 306 F.Supp.2d 920, 928, fn. 12 ["[w]hile the meaning of the term 'practicable' in the [Endangered Species Act] is not entirely clear, the term does not simply equate to 'possible' "]; ***890***Primavera Familienstiftung v. Askin* (S.D.N.Y.1998) 178 F.R.D. 405, 409 [noting that "impracticability does not mean impossibility, but rather difficulty or inconveni-

124 Cal.App.4th 866, 22 Cal.Rptr.3d 128, 34 Envtl. L. Rep. 20,149, 04 Cal. Daily Op. Serv. 10,694, 2004 Daily Journal D.A.R. 14,492
(Cite as: 124 Cal.App.4th 866, 22 Cal.Rptr.3d 128)

ence"].)

We additionally question whether many of Building Industry's "impossibility" arguments are premature on the record before us. As we have explained, the record does not support that any required control is, or will be, impossible to implement. Further, the Permit allows the Regional Water Board to enforce water quality standards during the iterative process, but does not impose any obligation that the Board do so. Thus, we cannot determine with any degree of certainty whether this obligation would ever be imposed, particularly if it later turns out that it is not possible for a Municipality to achieve that standard.

Finally, we comment on Building Industry's repeated warnings that if we affirm the judgment, all affected Municipalities will be in immediate violation of the Permit because they are not now complying with applicable water quality standards, subjecting them to immediate and substantial civil penalties, and leading to a potential "shut down" of public operations. These doomsday arguments are unsupported. The Permit makes clear that Municipalities**146 are required to adhere to numerous specific controls (none of which are challenged in this case) and to comply with water quality standards through "timely implementation of control measures" by engaging in a cooperative iterative process where the Regional Water Board and Municipality work together to identify violations of water quality standards in a written report and then incorporate approved modified best management practices. Although the Permit allows the regulatory agencies to enforce the water quality standards during this process, the Water Boards have made clear in this litigation that they envision the ongoing iterative process as the centerpiece to achieving water quality standards. Moreover, the regulations provide an affected party reasonable time to comply with new permit requirements under certain circumstances. (See 40 C.F.R. § 122.47.) There is nothing in this record to show the Municipalities will be subject to immediate penalties for violation of water quality standards.

We likewise find speculative Building Industry's predictions that immediately after we affirm the judgment, citizens groups will race to the courthouse to file lawsuits against the Municipalities and seek penalties for violation of the Water Quality Standards provisions.[FN15] As noted, the applicable laws provide time for an affected entity to comply with new standards. Moreover, although we do not reach the enforcement issue in this case, we note the *891 Permit makes clear that the iterative process is to be used for violations of water quality standards, and gives the Regional Water Board the discretionary authority to enforce water quality standards during that process. Thus, it is not at all clear that a citizen would have standing to compel a municipality to comply with a water quality standard despite an ongoing iterative process. (See § 1365(a)(1)(2).)

FN15. The Clean Water Act allows a citizen to sue a discharger to enforce limits contained in NPDES permits, but requires the citizen to notify the alleged violator, the state, and the EPA of its intention to sue at least 60 days before filing suit, and limits the enforcement to nondiscretionary agency acts. (See § 1365(a)(1)(2).)

III.–VII.[FN*]

FN* See footnote 1, *ante*.

DISPOSITION

Judgment affirmed. Appellants to pay respondents' costs on appeal.

WE CONCUR: BENKE, Acting P.J., and AARON, J.

Cal.App. 4 Dist.,2004.
Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.
124 Cal.App.4th 866, 22 Cal.Rptr.3d 128, 34 Envtl. L. Rep. 20,149, 04 Cal. Daily Op. Serv. 10,694, 2004 Daily Journal D.A.R. 14,492

124 Cal.App.4th 866, 22 Cal.Rptr.3d 128, 34 Envtl. L. Rep. 20,149, 04 Cal. Daily Op. Serv. 10,694, 2004 Daily Journal D.A.R. 14,492

(Cite as: 124 Cal.App.4th 866, 22 Cal.Rptr.3d 128)

END OF DOCUMENT

TAB NO. 9

33 Cal.4th 859, 94 P.3d 589, 16 Cal.Rptr.3d 466, 190 Ed. Law Rep. 636, 04 Cal. Daily Op. Serv. 6945, 2004 Daily Journal D.A.R. 9404

(Cite as: 33 Cal.4th 859, 94 P.3d 589, 16 Cal.Rptr.3d 466)

H

Supreme Court of California
SAN DIEGO UNIFIED SCHOOL DISTRICT,
Plaintiff and Respondent,
v.
COMMISSION ON STATE MANDATES, Defendant and Appellant;
California Department of Finance, Real Party in Interest and Appellant.

No. S109125.
Aug. 2, 2004.

Background: School district petitioned for writ of administrative mandate to require the Commission on State Mandates to approve test claim for costs of mandatory and discretionary expulsion of students. The Superior Court, San Diego County, No. GIC737638,Linda B. Quinn, J., granted the petition. Commission and Department of Finance appealed. The Court of Appeal affirmed. Review was granted, superseding opinion of Court of Appeal.

Holdings: The Supreme Court, George, C.J., held that:
(1) all hearing costs incurred by district as result of mandatory actions related to expulsions for student's possession of firearm, at time relevant to this proceeding, constituted "higher level of service" within meaning of state constitutional provision, and thus were fully reimbursable, and
(2) hearing costs incurred by district as result of actions related to discretionary expulsions did not constitute "new program or higher level of service," and, in any event, did not trigger right to reimbursement, as costs of procedures exceeding federal due process requirements were de minimis.

Affirmed in part and reversed in part.

Opinion, 122 Cal.Rptr.2d 614, superseded.

West Headnotes

[1] Schools 345 ⇐19(1)

345 Schools
345II Public Schools
345II(A) Establishment, School Lands and Funds, and Regulation in General
345k16 School Funds
345k19 Apportionment and Disposition
345k19(1) k. In general. Most Cited Cases

All hearing costs incurred by school district as result of mandatory actions related to expulsions of students for possession of firearm, at time relevant to mandamus proceeding initiated by district, constituted state–mandated "higher level of service" within meaning of state constitutional provision providing for reimbursement of local government for costs of "new program or higher level of service" imposed on local government by statute or state regulation, and thus were fully reimbursable; providing public schooling clearly constituted governmental function, enhancing safety of those who attended such schools constituted service to public, and mandatory expulsion provision did not implement federal law or regulation then extant. West's Ann.Cal. Const. Art. 13B, § 6; West's Ann.Cal.Educ.Code §§ 48915(c, d), 48918; West's Ann.Cal.Educ.Code § 48915(b) (1994).
See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 549.

[2] Schools 345 ⇐19(1)

345 Schools
345II Public Schools
345II(A) Establishment, School Lands and Funds, and Regulation in General
345k16 School Funds
345k19 Apportionment and Disposition
345k19(1) k. In general. Most Cited Cases

Hearing costs incurred by school district as result of actions related to discretionary expulsions did

not constitute "new program or higher level of service," triggering right to reimbursement under state constitutional provision mandating reimbursement of local government for costs of "new program or higher level of service" imposed on local government by statute or state regulation, and, in any event, procedures related to discretionary expulsions were adopted to implement federal due process mandate, and thus were nonreimbursable, and costs exceeding federal requirements were de minimis, and so also nonreimbursable. U.S.C.A. Const.Amend. 14; West's Ann.Cal. Const. Art. 13B, § 6; West's Ann.Cal.Educ.Code §§ 48915(e), 48918 ; West's Ann.Cal.Educ.Code § 48915(c) (1994); West's Ann.Cal.Gov.Code §§ 17514, 17556(c), 17561(a).

***467 *865 **590** Paul M. Starkey, Camille Shelton, Sacramento, and Katherine A. Tokarski for Defendant and Appellant.

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Lozano Smith, Diana McDonough, San Rafael, Harold M. Freiman, San Ramon, Jan E. Tomsky, San Rafael, and Gregory A. Floyd, Fresno, for California School Boards Association Education Legal Alliance as Amicus Curiae on behalf of Plaintiff and Respondent.

***866** Steven M. Woodside, County Counsel (Sonoma) as Amicus Curiae on behalf of Plaintiff and Respondent.

**591 GEORGE, C.J.

Article XIII B, section 6, of the California Constitution provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service...." FN1 (Hereafter article XIII B, section 6.)

> FN1. The provision continues: "except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." (Cal. Const., art. XIII B, § 6.)

Plaintiff San Diego Unified School District (District), like all other public school districts in the state, is, and was at the time relevant in this proceeding, governed by statutes that regulate the expulsion of students. (Ed.Code, § 48900 et seq.) Whenever an expulsion recommendation is made (and before a student may be expelled), the District is required by Education Code section 48918 to afford the student a hearing with various procedural protections—including notice of the hearing and the right to representation by ***468** counsel, preparation of findings of fact, notices related to any expulsion and the right of appeal, and preparation of a hearing record. Providing these procedural protections requires the District to expend funds, for which the District asserts a right to reimbursement from the state pursuant to article XIII B, section 6, and implementing legislation, Government Code section 17500 et seq.

We granted review to consider two questions: (1) Are the hearing costs incurred as a result of the *mandatory* actions related to expulsions that are compelled by Education Code section 48915 fully reimbursable—or are those hearing costs reimburs-

able only to the extent such costs are attributable to hearing procedures that exceed the procedures required by federal law? (2) Are any hearing costs incurred in carrying out expulsions that are *discretionary* under Education Code section 48915 reimbursable? After we granted review and filed our decision in *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203 (*Kern High School Dist.*), we added the following preliminary question to be addressed: Do the Education Code ***867** statutes cited above establish a "new program" or "higher level of service" under article XIII B, section 6? Finally, we also asked the parties to brief the effect of the decision in *Kern High School Dist., supra,* 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203, on the present case.

We conclude that Education Code section 48915, insofar as it compels suspension and mandates a recommendation of expulsion for certain offenses, constitutes a "higher level of service" under article XIII B, section 6, and imposes a reimbursable state mandate for *all* resulting hearing costs—even those costs attributable to procedures required by federal law. In this respect, we shall affirm the judgment of the Court of Appeal.

We also conclude that *no* hearing costs incurred in carrying out those expulsions that are *discretionary* under Education Code section 48915 —including costs related to hearing procedures claimed to exceed the requirements of federal law—are reimbursable. As we shall explain, to the extent that statute makes expulsions discretionary, it does not reflect a new program or a higher level of service related to an existing program. Moreover, even if the hearing *procedures* set forth in Education Code section *48918* constitute a new program or higher level of service, we conclude that *this* statute does not trigger any right to reimbursement, because the hearing provisions that assertedly exceed federal requirements are merely incidental to fundamental federal due process requirements and the added costs of such procedures are de minimis. For these reasons, we conclude such hearing provisions should be treated, for purposes of ruling upon a request for reimbursement, as part of the nonreimbursable underlying *federal* mandate and not as a state mandate. Accordingly, we shall reverse the judgment of the Court of Appeal insofar as it compels reimbursement****592** of any costs incurred pursuant to discretionary expulsions.

I

A. *Education Code sections 48918 and 48915*

We first describe the relevant provisions of two statutes— Education Code sections 48918 and 48915 —pertaining to the expulsion of students from public schools.

Education Code section 48918 specifies the right of a student to an expulsion hearing and sets forth procedures that a school district must ***868** follow when conducting*****469** such a hearing. (Stats.1990, ch. 1231, § 2, pp. 5136–5139.) FN2

> FN2. For purposes of our present inquiry, section 48918, at the time relevant here (mid–1993 through mid–1994) read essentially as it had for the prior decade, and as it has in the ensuing decade. That provision first was enacted in 1975 (see Stats.1975, ch. 1253, § 4, pp. 3277–3278) as Education Code, former section 10608. (This enactment apparently was a response to the United States Supreme Court's decision in *Goss v. Lopez* (1975) 419 U.S. 565, 581, 95 S.Ct. 729, 42 L.Ed.2d 725 (*Goss*) [recognizing due process requirements applicable to public school students who are suspended for more than 10 days].) The statute was renumbered as Education Code, former section 48914 in 1976 (Stats.1976, ch. 1010, § 2, pp. 3589–3590) and was substantially augmented in 1977 (Stats.1977, ch. 965, § 24, pp. 2924–2926). After relatively minor amendments in 1978 and 1982, the section in 1983 was substantially restated, further augmented, and renumbered as Education

Code section 48918 (Stats.1983, ch. 498, § 91, p. 2118). Amendments adopted in 1984 and 1988 made relatively minor changes, and further similar modifications were made in 1990, reflecting the version of the statute here at issue. Subsequent amendments in 1995, 1996, 1998, and 1999 made further changes that are irrelevant to the issue presented in the case now before us.

In identifying the right to a hearing, subdivision (a) of this statute declares that a student is "entitled" to an expulsion hearing within 30 days after the school principal determines that the student has committed an act warranting expulsion.[FN3] *In practical effect, this means that whenever a school principal makes such a determination and recommends to the school board that a student be expelled, an expulsion hearing is mandated.*[FN4]

FN3. The provision reads: "The pupil shall be entitled to a hearing to determine whether the pupil should be expelled. An expulsion hearing shall be held within 30 schooldays after the date the principal or the superintendent of schools determines that the pupil has committed any of the acts enumerated in Section 48900...." (Ed.Code, § 48918, subd. (a). (Subdivision (b) of § 48900 presently includes—as it did at the time relevant here—the offense of possession of a firearm.)

FN4. Of course, if a student does not invoke his or her entitlement to such a hearing, and instead waives the right to such a hearing, the hearing need not be held.

In specifying the substantive and procedural requirements for such an expulsion hearing, Education Code section 48918 sets forth rules and procedures, some of which, the parties agree, codify requirements of federal due process and some of which may exceed those requirements.[FN5] These rules and procedures govern, among other things, notice of a hearing and the right to representation by counsel, preparation of findings of fact, notices related to the expulsion and the right of appeal, and preparation of a hearing record. (See § 48918, subds. (a) through former subd. (j) (currently subd. (k).)

FN5. See *Goss, supra,* 419 U.S. 565, 581, 95 S.Ct. 729, 42 L.Ed.2d 725; *Gonzales v. McEuen* (C.D.Cal.1977) 435 F.Supp. 460, 466–467 (concluding that former Education Code section 10608 [current § 48918] met federal due process requirements pertaining to expulsions from public schools); 7 Witkin, Summary of California Law (9th ed.1988), Constitutional Law, § 549, p. 754 (noting that Education Code section 48918 and related legislation were enacted in response to the decision in *Goss*).

***869** The second statute at issue in this matter is Education Code section 48915. Discrete subdivisions of this statute address circumstances in which a principal *must* recommend to the school board that a student be expelled, and circumstances in which a principal *may* recommend that a student be expelled.

First, there is what the parties characterize as the "mandatory expulsion provision," Education Code section 48915, former subdivision (b). As it read during the time relevant in this proceeding (mid–1993 *****470** through mid–1994), this subdivision (1) compelled a school principal to *immediately suspend* any ****593** student found to be in possession of a firearm at school or at a school activity off school grounds, and (2) mandated a *recommendation* to the school district governing board that the student be *expelled.* The provision further required the governing board, upon confirmation of the student's knowing possession of a firearm, either to expel the student or "refer" him or her to an alternative education program housed at a separate school site.[FN6] (Compare this former provision with *current* Ed.Code, § 48915, subds. (c) and (d).)[FN7]

FN6. An earlier and similar, albeit broader, version of the provision—extending not only to possession of firearms but also to possession of explosives and certain knives—existed briefly and was effective for approximately two and one-half months in late 1993. That initial statute, former section 48915, subdivision (b) (as amended Stats.1993, ch. 1255, § 2, pp. 7284–7285), which was effective only from October 11, 1993 through December 31, 1993, provided: "The principal or the superintendent of schools shall immediately suspend pursuant to Section 48911, and shall recommend to the governing board the expulsion of, any pupil found to be in possession of a firearm, knife of no reasonable use to the pupil, or explosive at school or at a school activity off school grounds. The governing board shall expel that pupil or, as an alternative, refer that pupil to an alternative education program, whenever the principal or the superintendent of schools and the governing board confirm that: [¶] (1) The pupil was in knowing possession of the firearm, knife, or explosive. [¶] (2) Possession of the firearm, knife of no reasonable use to the pupil, or explosive was verified by an employee of the school district. [¶] (3) There was no reasonable cause for the pupil to be in possession of the firearm, knife, or explosive."

As subsequently amended by Statutes 1993, chapter 1256, section 2, pages 7286–7287, effective January 1, 1994, Education Code section 48915, former subdivision (b), read: "The principal or the superintendent of schools shall immediately suspend, pursuant to Section 48911, any pupil found to be in possession of a firearm at school or at a school activity off school grounds and shall recommend expulsion of that pupil to the governing board. The governing board shall expel that pupil or refer that pupil to a program of study that is appropriately prepared to accommodate students who exhibit discipline problems and is not provided at a comprehensive middle, junior, or senior high school or housed at the schoolsite attended by the pupil at the time the expulsion was recommended to the school board, whenever the principal or superintendent of schools and the governing board confirm the following: [¶] (1) The pupil was in knowing possession of the firearm. [¶] (2) An employee of the school district verifies the pupil's possession of the firearm."

FN7. The current subdivisions of Education Code section 48915 set forth a list of mandatory expulsion conduct broader than that set forth in former subdivision (b), and require a school board both to *expel and refer* to other institutions all students found to have committed such conduct. The present subdivisions read: "(c) The principal or superintendent of schools shall immediately suspend, pursuant to Section 48911, and shall recommend expulsion of a pupil that he or she determines has committed any of the following acts at school or at a school activity off school grounds: [¶] (1) Possessing, selling, or otherwise furnishing a firearm. This subdivision does not apply to an act of possessing a firearm if the pupil had obtained prior written permission to possess the firearm from a certificated school employee, which is concurred in by the principal or the designee of the principal. This subdivision applies to an act of possessing a firearm only if the possession is verified by an employee of a school district. [¶] (2) Brandishing a knife at another person. [¶] (3) Unlawfully selling a controlled substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and

> Safety Code. [¶] (4) Committing or attempting to commit a sexual assault as defined in subdivision (n) of Section 48900 or committing a sexual battery as defined in subdivision (n) of Section 48900.[¶] (5) Possession of an explosive. [¶] (d) The governing board shall order a pupil expelled upon finding that the pupil committed an act listed in subdivision (c), and shall refer that pupil to a program of study that meets all of the following conditions: [¶] (1) Is appropriately prepared to accommodate pupils who exhibit discipline problems. [¶] (2) Is not provided at a comprehensive middle, junior, or senior high school, or at any elementary school. [¶] (3) Is not housed at the schoolsite attended by the pupil at the time of suspension." (Stats.2001, ch. 116, § 1.)

***471 *870** This provision, as it read at the time relevant here, did not mandate expulsion per se [FN8] —but it *did* require immediate suspension followed by a mandatory expulsion recommendation (and it provided that a student found by the governing board to have possessed**594** a firearm would be removed from the school site by limiting disposition to either expulsion or "referral" to an alternative school). Moreover, as noted above, whenever expulsion is recommended a student has a right to an expulsion hearing. Accordingly, it is appropriate to characterize the former provision as *mandating* immediate suspension, a recommendation of expulsion, *and hence, an expulsion hearing.* For convenience, we accept the parties' description of this aspect of Education Code section 48915 as constituting a "mandatory expulsion provision."

> FN8. As the Department of Finance observed in an August 22, 1994, communication to the Commission in this matter, "nothing in [Education Code section 48915] ... requires a district governing board or a county board of education to expel a pupil," and even "unauthorized and knowing possession of a firearm, does not result in mandated expulsion. Section 48915 subdivision (b) provides for the choice of the governing board to either expel the pupil in possession of a firearm, or refer the pupil to an alternative program of study...."

The second aspect of Education Code section 48915 relevant here consists of what we shall call the "discretionary expulsion provision." (*Id.*, former subd. (c), subsequently subd. (d), currently subd. (e).) During the period relevant in this proceeding (as well as currently), this subdivision of Education Code section 48915 recognized that a principal possesses *discretion* to recommend that a student be expelled for specified conduct other than firearm possession (conduct such as damaging or stealing school property or private property, using or selling illicit drugs, receiving stolen property, possessing tobacco or drug paraphernalia, or engaging in disruptive behavior). The former provision (like the current provision) further specified that the school district governing board "may" order a student expelled upon finding that the ***871** student, while at school or at a school activity off school grounds, engaged in such conduct.[FN9]

> FN9. Education Code, section 48915, former subdivision (c) (as amended Stats.1992, ch. 909, § 3, p. 4226; amended and redesignated as former subd. (d) by Stats.1993, ch. 1255, § 2, pp. 7284–7285; further amended Stats.1993, ch. 1256, § 2, p. 7287, and Stats.1994, ch. 1198, § 7, p. 7271) provided, at the time relevant here: "Upon recommendation by the principal, superintendent of schools, or by a hearing officer or administrative panel appointed pursuant to subdivision (d) of Section 48918, the governing board *may* order a pupil expelled upon finding that the pupil violated subdivision (f), (g), (h), (i), (j), (k), or (*l*) of Section 48900, or Section 48900.2 or 48900.3, and either of the following: [¶] (1) That other means of correc-

tion are not feasible or have repeatedly failed to bring about proper conduct. [¶] (2) That due to the nature of the violation, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others." (Italics added.)

At the time relevant here, subdivisions (f) through (*l*) of section 48900 (as amended Stats.1992, ch. 909, § 1, pp. 4224–4225; Stats.1994, ch. 1198, § 5, pp. 7269–5270) provided: "A pupil shall *not* be suspended from school or recommended for expulsion *unless* the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has: [¶] ... [¶] (f) Caused or attempted to cause damage to school property or private property. [¶] (g) Stolen or attempted to steal school property or private property. [¶] (h) Possessed or used tobacco, or any products containing tobacco or nicotine products.... However, this section does not prohibit use or possession by a pupil of his or her own prescription products. [¶] (i) Committed an obscene act or engaged in habitual profanity or vulgarity. [¶] (j) Had unlawful possession of, or unlawfully offered, arranged, or negotiated to sell any drug paraphernalia, as defined in Section 11014.5 of the Health and Safety Code. [¶] (k) Disrupted school activities or otherwise willfully defied the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties. [¶] (*l*) Knowingly received stolen school property or private property." (Italics added.)

At the time relevant here, section 48900.2 (Stats.1992, ch. 909, § 2, p. 4225) provided: "In addition to the reasons specified in Section 48900, a pupil may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has committed sexual harassment as defined in Section 212.5.[¶] For the purposes of this chapter, the conduct described in Section 212.5 must be considered by a reasonable person of the same gender as the victim to be sufficiently severe or pervasive to have a negative impact upon the individual's academic performance or to create an intimidating, hostile, or offensive educational environment. This section shall not apply to pupils enrolled in kindergarten and grades 1 to 3, inclusive."

Section 48900.3 (Stats.1994, ch. 1198, § 6, p. 7270), at the time relevant here, provided: "In addition to the reasons specified in Sections 48900 and 48900.2, a pupil in any of grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has caused, attempted to cause, threatened to cause, or participated in an act of, hate violence, as defined in subdivision (e) of [former] Section 33032.5 [current section 233]."

In addition, section 48900.4 (Stats.1994, ch. 1017, § 1, p. 6196) provided, at the time relevant here: "In addition to the grounds specified in Sections 48900 and 48900.2, a pupil enrolled in any of grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has intentionally engaged in harassment, threats, or intimidation, directed against

> a pupil or group of pupils, that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of that pupil or group of pupils by creating an intimidating or hostile educational environment."
>
> (All of these current provisions— sections 48915, subdivision (e), 48900, 48900.2, 48900.3, and 48900.4 —read today substantially the same as they did at the time relevant in the present case.)

***472 *872 **595 B. *Proceedings under Government Code section 17500 et seq.*

Procedures governing the constitutional requirement of reimbursement under article XIII B, section 6, are set forth in Government Code section 17500 et seq. The Commission on State Mandates (Commission) (Gov.Code, § 17525) is charged with the responsibility of hearing and deciding, subject to judicial review by an administrative writ of mandate, claims for reimbursement made by local governments or school districts. (Gov.Code, § 17551.) Government Code section 17561, subdivision (a), provides that the "state shall reimburse each ... school district for all 'costs mandated by the state,' as defined in section 17514." Government Code section 17514, in turn, defines "costs mandated by the state" to mean, in relevant part, "any increased costs which a ... school district is required to incur ... as a result of any statute ... which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution." Finally, Government Code section 17556 sets forth circumstances in which there shall be no reimbursement, including, under subdivision (c), circumstances in which "[t]he statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or ***473 executive order mandates costs which exceed the mandate in that federal law or regulation."

In March 1994, the District filed a "test claim" with the Commission, asserting entitlement to reimbursement for the costs of hearings provided with respect to both categories of cases described above—that is, those hearings triggered by mandatory expulsion recommendations, and those hearings resulting from discretionary expulsion recommendations. (See Gov.Code, § 17521; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331–333, 285 Cal.Rptr. 66, 814 P.2d 1308.) FN10 The District sought reimbursement for costs incurred between July 1, 1993, and June 30, 1994, under statutes effective through the latter date.

> FN10. As observed by amicus curiae California School Boards Association, a "test claim is like a class action—the Commission's decision applies to all school districts in the state. If the district is successful, the Commission goes to the Legislature to fund the statewide costs of the mandate for that year and annually thereafter as long as the statute is in effect."

In August 1998, after holding hearings on the District's claim (as amended in April 1995, to reflect legislation that became effective in 1994), the Commission issued a "Corrected Statement of Decision" in which it determined that Education Code section 48915's requirement of suspension and a *873 mandatory recommendation of expulsion for firearm possession constituted a "new program or higher level of service," and found that because costs related to some of the resulting hearing provisions set forth in Education Code section 48918 (primarily various notice, right of inspection, and recording provisions) exceeded the requirements of federal due process, those additional hearing costs constituted reimbursable state-mandated costs. FN11 As to the vast majority of the remaining **596 hearing procedures triggered by Education Code section 48915's requirement of suspension and a mandatory recommendation of expulsion for firearm possession—for example, procedures gov-

erning such matters as the hearing itself and the board's decision; a statement of facts and charges; notice of the right to representation by counsel; written findings; recording of the hearing; and the making of a record of the expulsion—the Commission found that those procedures were enacted to comply with federal due process requirements, and hence fell within the exception set forth in Government Code section 17556, subdivision (c), and ***474** did not impose a reimbursable state mandate. The Commission further found that with respect to Education Code section 48915's *discretionary* expulsions, there was no right to reimbursement for costs incurred in holding expulsion hearings, because such expulsions do not constitute a new program or higher level of service, and in any event such expulsions are not *mandated* by the state, but instead represent a choice by the principal and the school board.

> FN11. The Commission concluded that the costs incurred in providing the following state-mandated procedures under Education Code section 48918 exceeded federal due process requirements, and were reimbursable: (i) adoption of rules and regulations pertaining to pupil expulsions (§ 48918, first par. & *passim*); (ii) inclusion in the notice of hearing of (a) a copy of the disciplinary rules of the District, (b) a notice of the parents' obligation to notify a new school district, upon enrollment, of the pupil's expulsion, and (c) a notice of the opportunity to inspect and obtain copies of all documents to be used at the hearing (§ 48918, subd. (b)); (iii) allowing, upon request, the pupil or parent to inspect and obtain copies of the documents to be used at the hearing (§ 48918, subd. (b)); (iv) sending of written notice concerning (a) any decision to expel or suspend the enforcement of an expulsion order during a period of probation, (b) the right to appeal the expulsion to the county board of education, and (c) the obligation of the parent to notify a new school district, upon enrollment, of the pupil's expulsion (§ 48918, former subd. (i), currently subd. (j); (v) maintenance of a record of each expulsion, including the cause thereof (§ 48918, former subd. (j), currently subd. (k); and (vi) the recording of expulsion orders and the causes thereof in the pupil's mandatory interim record (and, upon request, the forwarding of this record to any school in which the pupil subsequently enrolls) (§ 48918, former subd. (j), currently subd. (k)).

In October 1999, the District brought this proceeding for an administrative writ of mandate challenging the Commission's decision. The trial court issued a writ commanding the Commission to render a new decision finding (i) all costs associated with hearings triggered by compulsory suspensions and mandatory expulsion recommendations are reimbursable, and (ii) hearing costs associated with discretionary expulsions are reimbursable to the limited ***874** extent that required hearing procedures exceed federal due process mandates. The Commission (defendant) and the Department of Finance (real party in interest, hereafter Department) appealed, and the Court of Appeal affirmed the judgment rendered by the trial court.

II

A. *Costs associated with hearings triggered by compulsory suspensions and mandatory expulsion recommendations*

1. *"New program or higher level of service"?*

We address first the issue that we asked the parties to brief: Does Education Code section 48915, former subdivision (b) (current subds. (c) & (d)), which mandated suspension and an expulsion recommendation for those students who possess a firearm at school or at a school activity off school grounds, and which also required a school board, if it found the charge proved, either to expel or to "refer" such a student to an alternative educational program housed at a separate school site, constitute

a "new program or higher level of service" under article XIII B, section 6 of the state Constitution, and under Government Code section 17514?

We addressed the meaning of the Constitution's phrase "new program or higher level of service" in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202 (*County of Los Angeles*). That case concerned whether local governments are entitled to reimbursement for costs incurred in complying with legislation that required local agencies to provide the same increased level of workers' compensation benefits for their employees as private individuals or organizations were required to provide for their employees. We stated:

"Looking at the language of [article XIII B, section 6] then, it seems clear that by itself the term 'higher level of service' is meaningless. It must be read in conjunction with the predecessor phrase 'new program' to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs.' But the term 'program' itself is not defined in article XIII B. What programs **597 then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term—[(1)] programs that carry out the governmental function of providing services to the public, or [(2)] laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents ***475 and entities in the state." (*County of Los Angeles, supra,* 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202.)

*875 We continued in *County of Los Angeles:* "The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. In their ballot arguments, the proponents of article XIII B explained section 6 to the voters: 'Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them.' (Ballot Pamp., Proposed Amend. to Cal. Const. with arguments to voters, Spec. Statewide Elec. (Nov. 6, 1979) p. 18. Italics added.) In this context the phrase 'to force programs on local governments' confirms that *the intent underlying section 6 was to require reimbursement to local agencies 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.* " (*County of Los Angeles, supra,* 43 Cal.3d 46, 56–57, 233 Cal.Rptr. 38, 729 P.2d 202, italics added.)

It was clear in *County of Los Angeles, supra,* 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, that the law at issue did not meet the second test for a "program or higher level of service"—it did not implement a state policy by imposing unique requirements upon local governments, but instead applied workers' compensation contribution rules generally to all employers in the state. Nor, we held, did the law requiring local agencies to shoulder a general increase in workers' compensation benefits amount to a reimbursable "program or higher level of service" under the first test described above. (*Id.,* at pp. 57–58, 233 Cal.Rptr. 38, 729 P.2d 202.) The law increased the cost of employing public servants, but it did not in any tangible manner increase the level of service provided by those employees to the public.

We reaffirmed and applied the test set out in *County of Los Angeles, supra,* 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, in *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 244 Cal.Rptr. 677, 750 P.2d 318 (*Lucia Mar*). The state law at issue in *Lucia Mar* required local school districts to pay a portion of the cost of educating pupils in *state* schools for the severely handi-

capped—costs that the state previously had paid in full.

We determined that the contributions called for under the law were used to fund a "program" within both definitions of that term set forth in *County of Los Angeles*. (*Lucia Mar, supra,* 44 Cal.3d 830, 835, 244 Cal.Rptr. 677, 750 P.2d 318.) We stated: "[T]he education of handicapped children is clearly a governmental function providing a service to the public, and the [state law] imposes requirements on school districts not imposed on all the states residents. Nor can there be any doubt that although the schools for the handicapped have been operated by the state for many years, the program was new insofar as plaintiffs are ***876** concerned, since at the time [the state law] became effective they were not required to contribute to the education of students from their districts at such schools. [ ] ... To hold, under the circumstances of this case, that a shift in funding of an existing program from the state to a local entity is not a new program as to the local agency would, we think, violate the intent underlying section 6 of article XIII B.... Section 6 was intended to preclude the state from shifting to local *****476** agencies the financial responsibility for providing public services in view of ... restrictions on the taxing and spending power of the local entities." (*Lucia Mar, supra,* 44 Cal.3d 830, 835–836, 244 Cal.Rptr. 677, 750 P.2d 318; see also ****598** *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 98, 61 Cal.Rptr.2d 134, 931 P.2d 312 [legislation excluding indigents from Medi–Cal coverage transferred obligation for such costs from state to counties, and constituted a reimbursable "new program or higher level of service"].)

We again applied the alternative tests set forth in *County of Los Angeles, supra,* 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522 (*City of Sacramento*). In that case we considered whether a state law implementing federal "incentives" that encouraged states to extend unemployment insurance coverage to all public employees constituted a program or higher level of service under article XIII B, section 6. We concluded that it did not because, as in *County of Los Angeles,* (1) providing unemployment compensation protection to a city's own employees was not a service to the public; and (2) the statute did not apply uniquely to local governments—indeed, the same requirements previously had been applied to most employers, and extension of the requirement (by eliminating a prior exemption for local governments) merely placed local government employers on the same footing as most private employers. (*City of Sacramento, supra,* 50 Cal.3d at pp. 67–68, 266 Cal.Rptr. 139, 785 P.2d 522.)

Subsequently, the Court of Appeal in *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754 (*City of Richmond*), following *County of Los Angeles, supra,* 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, and *City of Sacramento, supra,* 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, concluded that requiring local governments to provide death benefits to local safety officers, under both the Public Employees Retirement System and the workers' compensation system, did not constitute a higher level of service to the public. The Court of Appeal arrived at that determination even though—as might also have been argued in *County of Los Angeles* and *City of Sacramento*—such benefits may "generate a higher quality of local safety officers" and thereby, in a general and indirect sense, provide the public with a "higher level of service" by its employees. (*City of Richmond, supra,* 64 Cal.App.4th 1190, 1195, 75 Cal.Rptr.2d 754.)

Viewed together, these cases (*County of Los Angeles, supra,* 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, *City of Sacramento, supra,* 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, and ***877***City of Richmond, supra,* 64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754) illustrate the circumstance that simply because a state law or order may *increase the costs* borne by local government *in providing*

services, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting "service to the public" under article XIII B, section 6, and Government Code section 17514.[FN12]

> FN12. Indeed, as the court in *City of Richmond, supra,* 64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754, observed: "Increasing the cost of providing services cannot be equated with requiring an increased level of service under [article XIII B,] section 6 .... A higher cost to the local government for compensating its employees is not the same as a higher cost of providing [an increased level of] services to the public." (*Id.,* at p. 1196, 75 Cal.Rptr.2d 754; accord, *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484, 235 Cal.Rptr. 101 [temporary increase in PERS benefit to retired employees, resulting in higher contribution rate by local government, does not constitute a higher level of service to the public].)

477** By contrast, Courts of Appeal have found a reimbursable "higher level of service" concerning an existing "program" when a state law or executive order mandates not merely some change that increases the cost of providing services, but an increase in the actual level or quality of governmental services provided. In *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537–538, 234 Cal.Rptr. 795 (*Carmel Valley*), for example, an executive order required that county firefighters be provided with protective clothing and safety equipment. Because this increased safety equipment apparently was designed to result in more effective fire protection, the mandate evidently was intended to produce a higher level of service to the public, thereby satisfying the first alternative test set out in *County of Los Angeles, supra,* 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202. Similarly, in ***599Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173, 275 Cal.Rptr. 449 (*Long Beach*), an executive order required school districts to take specific steps to measure and address racial segregation in local public schools. The appellate court held that this constituted a "higher level of service" to the extent the order's requirements exceeded federal constitutional and case law requirements by mandating school districts to undertake defined remedial actions and measures that were merely advisory under prior governing law.

[1] The District and the Commission assert that the "mandatory" aspect of Education Code section 48915, insofar as it compels suspension and mandates an expulsion recommendation for firearm possession (and thereafter restricts the board's options to expulsion or referral to an off-site alternative school), carries out a governmental function of providing services to the public and hence constitutes an increased or higher level of service concerning an existing program under the first alternative test of *County of Los Angeles, supra,* 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202. They argue, in essence, that the present matter is more analogous to the latter cases ***878**(*Carmel Valley, supra,* 190 Cal.App.3d 521, 234 Cal.Rptr. 795, and *Long Beach, supra,* 225 Cal.App.3d 155, 275 Cal.Rptr. 449)—both of which involved measures designed to increase the level of governmental service provided to the public—than to the former cases (*County of Los Angeles, supra,* 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, *City of Sacramento, supra,* 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, and *City of Richmond, supra,* 64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754)—in which the cost of employment was increased but the resulting governmental services themselves were not directly enhanced or increased. As we shall explain, we agree with the District and the Commission.

The statutory requirements here at issue—immediate suspension and mandatory recommendation of expulsion for students who possess a firearm, and the limitation upon the ensuing options of the school board (expulsion or refer-

ral)—reasonably are viewed as providing a "higher level of service" to the public under the commonly understood sense of that term: (i) the requirements are new in comparison with the preexisting scheme in view of the circumstance that they did not exist prior to the enactment of Statutes of 1993, chapters 1255 (Assem. Bill No. 342 (1993–1994 Reg. Sess.) (Assembly Bill No. 342)) and 1256 (Senate Bill ***478 No. 1198 (1993–1994 Reg. Sess.) (Senate Bill No. 1198)); and (ii) the requirements were intended to provide an enhanced service to the public—*safer schools for the vast majority of students* (that is, those who are not expelled or referred to other school sites). In other words, the legislation was premised upon the idea that by removing potentially violent students from the general school population, the safety of those students who remain thereby is increased. (See, e.g., Stats.1993, ch. 1255, § 4, pp. 7285–7286 ["In order to ensure public safety on school campuses ... it is necessary that this act take effect immediately"]; Sen. Com. on Ed. (Apr. 28, 1993), Analysis of Assem. Bill No. 342, p. 2 [noting legislative purpose to enhance public safety]; see also Assem. Com. on Ed. (July 14, 1993), Analysis of Sen. Bill No. 1198, p. 1 [noting legislative purpose to remove those who possess firearms from the general school population by increasing the frequency of expulsion for such conduct].)

In challenging this conclusion, the Department relies upon *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 263 Cal.Rptr. 351 (*Department of Industrial Relations*). In that case, the state enacted enhanced statewide safety regulations that governed all public and private elevators, and thereafter the County of Los Angeles sought reimbursement for the costs of complying with the new regulations. The Court of Appeal found that the regulations constituted neither a new program nor a higher level of service concerning an existing program under either of the two alternative tests set out in *County of Los Angeles, supra,* 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202. The court concluded that the elevator regulations did not meet the first alternative test, because the regulations did not carry out a governmental function of providing services to the public; the court found instead that ***879** "[p]roviding elevators equipped with fire and earthquake ****600** safety features simply is not a 'government function of providing services to the public.' " (*Department of Industrial Relations, supra,* 214 Cal.App.3d at p. 1546, 263 Cal.Rptr. 351.) Moreover, the court found, the second ("uniqueness") test was not met—the regulation applied to all elevators, not only those owned or operated by local governments.

The Department asserts that *Department of Industrial Relations, supra,* 214 Cal.App.3d 1538, 263 Cal.Rptr. 351, is analogous, and argues that the "service" afforded by mandatory suspensions followed by a required expulsion recommendation, etc., is "not qualitatively different from the safety regulations at issue in [*Department of Industrial Relations*]. School districts carrying out such expulsions are not providing a service to the public...." We disagree. Providing public schooling clearly constitutes a governmental function, and enhancing the safety of those who attend such schools constitutes a service to the public. Moreover, here, unlike the situation in *Department of Industrial Relations,* the law implementing this state policy applies uniquely to local public schools. We conclude that *Department of Industrial Relations* does not conflict with the conclusion that the mandatory suspension and expulsion recommendation requirements, together with restrictions placed upon a district's resolution of such a case, constitute an increased or higher level of service to the public under the constitutional provision and the implementing statutes.

Of course, even if, as we have concluded above, a statute effectuates an increased or higher level of governmental service to the public concerning an existing program, this "does not necessarily lead to the conclusion that the program is a *state* mandate***479** under California Constitution, art-

icle XIII B, section 6." (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 818, 38 Cal.Rptr.2d 304, italics added (*County of Los Angeles II*).) We turn to the question whether the hearing costs at issue, flowing from compulsory suspensions and mandatory expulsion recommendations, are mandated by the state.

2. *Are the hearing costs state mandated?*

As noted above, a compulsory suspension and a mandatory recommendation of expulsion under Education Code section 48915 in turn trigger a mandatory expulsion hearing. All parties agree that any such resulting expulsion hearing must comply with basic federal due process requirements, such as notice of charges, a right to representation by counsel, an explanation of the evidence supporting the charges, and an opportunity to call and cross-examine witnesses and to present evidence. (See *ante,* fn. 5.) But as also noted above, article XIII B, section 6, and the implementing statutes ***880** (Gov.Code, § 17500 et seq.), by their terms, provide for reimbursement only of *state*-mandated costs, not *federally* mandated costs. The Commission and the Department assert that this circumstance raises the question: Do all or some of a district's costs in complying with the mandatory expulsion provision of Education Code section 48915 constitute a nonreimbursable *federal* mandate?

In the absence of the operation of Education Code section 48915's mandatory provision (specifically, compulsory immediate suspension and a mandatory expulsion recommendation), a school district would not automatically incur the due process hearing costs that are mandated by federal law pursuant to *Goss, supra,* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725, and related cases, and codified in Education Code section 48918. Instead, a district would incur such hearing costs only if a school principal first were to exercise discretion to recommend expulsion. Accordingly, in its mandatory aspect, Education Code section 48915 appears to constitute a state mandate, in that it establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing.

The Department and the Commission agree to a point, but argue that a district's costs incurred in complying with this state mandate are reimbursable only if, and to the extent that, hearing procedures set forth in Education Code section 48918 exceed the requirements of federal due process. In support, they rely upon ****601**Government Code section 17556, which—in setting forth circumstances in which the Commission shall *not* find costs to be mandated by the state—provides that "[t]he commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: ... (c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation." FN13

FN13. Government Code section 17556 reads in full: "The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: [¶] (a) The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph. [¶] (b) The stat-

> ute or executive order affirmed for the state that which had been declared existing law or regulation by action of the courts. [¶] (c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation. [¶] (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. [¶] (e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate. [¶] (f) The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a statewide election. [¶] (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."

***480 *881** We agree with the District and the Court of Appeal below that, as applied to the present case, it cannot be said that Education Code section 48915's mandatory expulsion provision "*implemented a federal law or regulation.*" (Italics added.) Education Code section 48915, at the time relevant here, did not implement any federal law; as explained below, federal law did not *then* mandate an expulsion recommendation—or expulsion—for firearm possession.[FN14] Moreover, although the Department argues that in this context Government Code section 17556, subdivision (c)'s phrase "the statute" should be viewed as referring not to Education Code section 48915's mandatory expulsion recommendation requirement, but instead to the mandatory due process hearing under Education Code section 48918 that is triggered by such an expulsion recommendation, it still cannot be said that section 48918 itself required the District to incur any costs. As noted above, Education Code section 48918 sets out requirements for expulsion hearings that must be held when a district seeks to expel a student—but neither section 48918 nor federal law requires that any such expulsion recommendation be made in the first place, and hence section 48918 does not implement any federal mandate that school districts hold such hearings and incur such costs whenever a student is found in possession of a firearm. Accordingly, we conclude that the so-called exception to reimbursement described in Government Code section 17556, subdivision (c), is inapplicable in this context.

> FN14. Subsequent amendments to federal law may alter this conclusion with regard to future test claims concerning Education Code section 48915's mandatory expulsion provision—see *post,* 16 Cal.Rptr.3d pages 481–482, 94 P.3d pages 602–603.

Because it is state law (Education Code section 48915's mandatory expulsion provision), and not federal due process law, that requires the District to take steps that in turn require it to incur hearing costs, it follows, contrary to the view of the Commission and the Department, that we cannot characterize *any* of the hearing costs incurred by the District, triggered by the mandatory provision of Education Code section 48915, as constituting a federal mandate (and hence being nonreimbursable). We conclude **602 that under the statutes existing at the time of the test claim in this case (state legislation in effect through ***481** mid–1994), *all* such hearing costs—those designed to satisfy the minimum requirements of federal due process, and those that may exceed **882** those requirements—are, with respect to the mandatory expulsion provision of section 48915, state mandated costs, fully reim-

bursable by the state.[FN15]

FN15. In Exhibit No. 1 to its claim, the District presented the declaration of a San Diego Unified School District official, estimating that in order to process "350 proposed expulsions" during the period spanning July 1, 1993, to June 30, 1994, the District would incur approximately $94,200 "in staffing and other costs"—yielding an average estimated cost of approximately $270 per hearing during the relevant period. It is unclear from the record how many of these 350 hearings would be triggered by Education Code section 48915's mandatory expulsion provision (and constitute state-mandated costs subject to reimbursement under article XIII B, section 6), and how many of these 350 hearings would be triggered by Education Code section 48915's discretionary provision (and, as explained *post,* in part II.B, constitute a nonreimbursable *federal* mandate).

We note that in the proceedings below, the Commission did not confine reimbursement only to those matters as to which the district on its own initiative would not have sought expulsion in the absence of the statutory requirement that it seek expulsion—and the Department has not raised that point in the trial court or on appeal.

Against this conclusion, the Department, in its supplemental briefing, offers a wholly new theory, not advanced in any of the proceedings below, in support of its belated claim that *all* hearing costs triggered by Education Code section 48915's mandatory expulsion provision are in fact nonreimbursable *federal* mandates, and not, as we have concluded above, reimbursable state mandates. As we shall explain, we reject the Department's contention, as applied to the test case here at issue (involving state statutes in effect through mid–1994).

The Department cites 20 United States Code section 7151, part of the federal No Child Left Behind Act of 2001, which provides, as relevant here: "Each State receiving Federal funds under any subchapter of this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school, under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing."[FN16]

FN16. "Firearm," as defined in 18 United States Code section 921, includes guns and explosives.

The Department further asserts that more than $2.8 billion in federal funds under the No Child Left Behind Act are included "for local use" in the 2003–04 state budget. (Cal. State Budget, 2003–04, Budget Highlights, p. 4.) The Department argues that in light of the requirements set forth in 20 United States Code section 7151, and the amount of federal program funds at issue under the No Child Left Behind Act, the financial consequences to the state and to the school districts of failing to comply with 20 United States Code section 7151 are such that as a practical matter, ***883**Education Code section 48915's mandatory expulsion provision in reality constitutes an implementation of federal law, and hence resulting costs are nonreimbursable except to the extent they exceed the requirements of federal law. (See Govt.Code, § 17556, subd. (c); see also *Kern High School Dist., supra,* 30 Cal.4th 727, 749–751, 134 Cal.Rptr.2d 237, 68 P.3d 1203; *City of Sacramento, supra,* 50 Cal.3d 51, 70–76, 266 Cal.Rptr. 139, 785 P.2d 522.) Moreover, the Department asserts, to the extent school districts are ****482** compelled by federal law, through Education Code section 48915's mandatory expulsion

provision, to hold hearings pursuant to section 48918 in cases of firearm possession on school grounds, under 20 United States Code section 7164 (defining prohibited uses of program funds), *all* costs of such hearings properly may be paid out of federal program funds, and hence we should "view the ... provision of program funding as satisfying, in advance, any reimbursement requirement." (*Kern High School Dist., supra,* 30 Cal.4th 727, 747, 134 Cal.Rptr.2d 237, 68 P.3d 1203.)

****603** Although the Department asserts that this federal law and program existed at the time relevant in this matter (that is, through mid–1994), our review of the statutes and relevant history suggests otherwise. Title 20 of the United States Code, section 7151, and the remainder of the No Child Left Behind Act, became effective on January 8, 2002. The predecessor legislation cited by the Department—the Gun–Free Schools Act of 1994 (former 20 U.S.C. § 8921(a)), although containing a substantially identical mandatory expulsion provision (*id.,* § 8921(b)(1)) [FN17]—was not effective until July 1, 1995 (108 Stat. 3518, § 3). In turn, the predecessor legislation to *that* Act cited by the Department, the Elementary and Secondary Education Act of 1965 (former 20 U.S.C. § 6301 et seq.)—as it existed at the time relevant here (July 1, 1993, through June 30, 1994)—contained no such mandatory expulsion provision. Accordingly, it appears that despite the Department's late discovery of 20 United States Code section 7151, at the time relevant here (regarding legislation in effect through mid–1994), neither 20 United States Code section 7151, nor either of its predecessors, compelled states to enact a law such as Education Code section 48915's mandatory expulsion provision. Therefore, we reject the Department's assertion that, during the time period at issue in this case, Education Code section 48915's mandatory expulsion provision constituted an implementation of a federal, rather than a state, mandate.

> FN17. The prior law stated: "Except as provided in paragraph (3), each State receiving Federal funds under this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to a school under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis." (Pub.L. No. 103–382, § 14601(b)(1) (Oct. 20, 1994) 108 Stat. 3518.)

Although we conclude that all hearing costs triggered by Education Code section 48915's mandatory expulsion provision constitute reimbursable state-mandated expenses under the statutes as they existed during the period ***884** covered by the District's present test claim, we do not foreclose the possibility that 20 United States Code section 7151 or its predecessor, 20 United States Code section 8921, may lead to a different conclusion when applied to versions of Education Code section 48915 effective in years 1995 and thereafter. Indeed, we note that at least one subsequent test claim that has been filed with the Commission may raise the federal statutory issue advanced by the Department. [FN18]

> FN18. See Pupil Expulsions II (4th Amendment), CSM No. 01–TC–18 (filed June 3, 2002). This claim, filed by the San Juan Unified School District, asserts reimbursable state mandates with respect to, among numerous other statutes, Education Code section 48915, as amended effective in 2002.

B. *Costs associated with hearings triggered by discretionary expulsion recommendations*

[2] We next consider whether reimbursement is required for the costs associated*****483** with hearings triggered under discretionary expulsion provisions. Again, we address first the issue that we

asked the parties to brief: Does the discretionary expulsion provision of Education Code section 48915 (former subd. (c), thereafter subd. (d), currently subd. (e)), which, as noted above, recognized that a principal possesses *discretion* to recommend that a student be expelled for specified conduct other than firearm possession (conduct such as damaging or stealing property, using or selling illicit drugs, possessing tobacco or drug paraphernalia, etc.), and further specified that the school district governing board "may" order a student expelled upon finding that the student, while at school or at a school activity off school grounds, engaged in such conduct, constitute a "new program or higher level of service" under article XIII B, section 6 of the state Constitution, and under Government Code section 17514?

We answer this question in the negative. The discretionary expulsion provision of Education Code section 48915 does not constitute a "new" program or higher level of service, because provisions recognizing discretion to suspend or expel were set forth in statutes predating 1975. (See Educ.Code, former ****604** § 10601, Stats.1959, ch. 2, § 3, p. 860 [providing that a student may be suspended for good cause]; *id.,* former § 10602 (Stats.1970, ch. 102, § 102, p. 159 (defining "good cause"); *id.,* former section 10601.6 (Stats.1972, ch. 164, § 2, p. 384 (further defining "good cause").))) FN19 Accordingly, the discretionary expulsion provision of Education Code section 48915 is not a "new" program under article XIII B, section 6, and the implementing statutes, ***885** nor does it reflect a higher level of service related to an existing program. (*County of Los Angeles, supra,* 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202.)

> FN19. As the Commission observed in its Corrected Statement of Decision in this matter: "The authorization for governing boards to expel pupils from school for inappropriate behaviors has been in existence since before 1975. The behaviors defined as inappropriate under current law, subdivisions (a) though (*l*) of section 48900, 48900.2, and 48900.3, meet prior laws' definitions of 'good cause' and 'misconduct' as reasons for expulsion." (Italics deleted.)

The District maintains, nevertheless, that once it elects to pursue expulsion, it is obligated to abide by the procedural hearing requirements of Education Code section 48918 and accordingly is mandated by that section to incur costs associated with such compliance. The District asserts that in this respect, *section 48918* constitutes a "new program or higher level of service" related to an existing program under article XIII B, section 6 and under Government Code section 17514. We shall assume for analysis that this is so. FN20

> FN20. The requirements of Education Code section 48918 would appear to be "new" for purposes of the reimbursement provisions, in that they did not exist prior to 1975 and were enacted in that year and subsequently. (See *ante,* fn. 2.) The requirements also would appear to meet both alternative tests set forth in *County of Los Angeles, supra,* 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202—that is, by implementing procedures that direct and guide the process of expulsion from public school, the statute appears to carry out a governmental function of providing services to public school students who face expulsion; or, it would seem, section 48918 constitutes a law that, to implement state policy, imposes unique requirements on local governments.

The District recognizes, of course, that under Government Code, section 17556, subdivision (c), it is not entitled to reimbursement to the extent Education Code section 48918 merely implements federal due process law, but the District argues that it has a right to reimbursement for its costs of complying with section 48918 *to* ******484*** *the extent* those costs are attributable to hearing procedures

that *exceed* federal due process requirements. (See Govt.Code, § 17556, subd. (c).) The District asserts that its costs in complying with various notice, right of inspection, and recording requirements (see *ante,* fn. 11) fall into this category and are reimbursable.

The Department and the Commission argue in response that any right to reimbursement for hearing costs triggered by discretionary expulsions—even costs limited to those procedures that assertedly exceed federal due process hearing requirements—is foreclosed by virtue of the circumstance that when a school pursues a discretionary expulsion, it is not acting under compulsion of any law but instead is exercising a choice. In support, the Department and the Commission rely upon *Kern High School Dist., supra,* 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203, and *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 200 Cal.Rptr. 642 (*City of Merced*).

In *Kern High School Dist., supra,* 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203, school districts asserted that costs incurred in complying with statutory notice and agenda requirements for committee meetings concerning various state and federally funded educational programs constituted a reimbursable state mandate, because once ***886** school districts *elected* to participate in the underlying state and federal programs, the districts had no option but to hold program-related committee meetings and abide by the challenged notice and agenda requirements. (*Id.,* at p. 742, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) We rejected the school districts' position, reasoning in part that because the districts' participation in the underlying programs was voluntary, the notice and agenda costs incurred as a result of that voluntary participation were not the product of legal compulsion and did not constitute a reimbursable state mandate on that basis. ****605**(*Id.,* at p. 745, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) FN21

> FN21. We also proceeded to hold that in any event, because the school districts were free to use program funds to pay for the challenged increased costs, the districts had, in practical effect, already been given funds by the Legislature to cover the challenged costs. (*Kern High School Dist., supra,* 30 Cal.4th at pp. 748–754, 134 Cal.Rptr.2d 237, 68 P.3d 1203.)

In reaching that conclusion in *Kern High School Dist., supra,* 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203, we discussed *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642. In that case, the city wished either to purchase or to condemn, pursuant to its eminent domain authority, certain privately owned real property. The city elected to proceed by eminent domain, under which it was required by then recent legislation (Code Civ. Proc., § 1263.510) to compensate the property owner for loss of "business goodwill." The city so compensated the property owner and then sought reimbursement from the state, arguing that the new statutory requirement that it compensate for business goodwill amounted to a reimbursable state mandate. (*City of Merced, supra,* 153 Cal.App.3d at p. 780, 200 Cal.Rptr. 642.) The Court of Appeal concluded that the city's increased costs flowing from its election to condemn the property did not constitute a reimbursable state mandate. (*Id.,* at pp. 781–783, 200 Cal.Rptr. 642.) The court reasoned: "[W]hether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. *The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is* ******485*** *exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.*" (*Id.,* at p. 783, 200 Cal.Rptr. 642, italics added.)

Summarizing this aspect of *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642, in *Kern High School Dist., supra,* 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203, we stated: "[T]he core point articulated by the court in *City of Merced* is that *activities undertaken at the option or discretion of a local government entity* (that is, actions

undertaken without any legal compulsion or threat of penalty for nonparticipation) *do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.*" (*Kern High School Dist.*, at p. 742, 134 Cal.Rptr.2d 237, 68 P.3d 1203, italics added.)

The Department and the Commission argue that in the present case the District, like the claimants in *Kern High School Dist.*, errs by focusing upon ***887** the final result—a school district's legal obligation to comply with statutory hearing procedures—rather than focusing upon whether the school district has been *compelled* to put itself in the position in which such a hearing (with resulting costs) is required.

The District and amici curiae on its behalf (consistently with the opinion of the Court of Appeal below) argue that the holding of *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642, should not be extended to apply to situations beyond the context presented in that case and in *Kern High School Dist., supra,* 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203. The District and amici curiae note that although any particular expulsion recommendation may be discretionary, as a practical matter it is inevitable that some school expulsions will occur in the administration of any public school program.[FN22]

> FN22. Indeed, the Court of Appeal below suggested that the present case is distinguishable from *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642, in light of article I, section 28, subdivision (c), of the state Constitution. That constitutional subdivision, part of Proposition 8 (known as the Victims' Bill of Rights initiative, adopted by the voters at the Primary Election in June 1982), states: "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." The Court of Appeal below concluded: "In light of a school district's constitutional obligation to provide a safe educational environment ..., the incurring of [hearing] costs [under Education Code section 48918] cannot properly be viewed as a nonreimbursable 'downstream' consequence of a decision to [seek to] expel a student under [Education Code section 48915's discretionary provision] for damaging or stealing school or private property, using or selling illicit drugs, receiving stolen property, engaging in sexual harassment or hate violence, or committing other specified acts of misconduct ... that warrant such expulsion."
>
> Building upon this theme, amicus curiae on behalf of the District, California School Boards Association, argues that based upon article I, section 28, subdivision (c), of the state Constitution, together with Education Code section 48200 et seq. and article IX, section 5 of the state Constitution (establishing and implementing a right of public education), *no* expulsion recommendation is "truly discretionary." Indeed, amicus curiae argues, school districts may not, "either as a matter of law or policy, realistically choose to [forgo] expelling [a] student [who commits one of the acts, other than firearm possession, referenced in Education Code section 48915's discretionary provision], because doing so would fail to meet that school district's legal obligations to provide a safe, secure and peaceful learning environment for the other students."

****606** Upon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement*****486** under ***888** article XIII B, section 6 of the state Constitution

and Government Code section 17514, whenever an entity makes an initial discretionary decision that in turn triggers mandated costs. Indeed, it would appear that under a strict application of the language in *City of Merced,* public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 [FN23] and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, as explained above, in *Carmel Valley, supra,* 190 Cal.App.3d 521, 234 Cal.Rptr. 795, an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (*Id.,* at pp. 537–538, 234 Cal.Rptr. 795.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ—and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642, such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such a result.

> FN23. As we observed in *Kern High School Dist., supra,* 30 Cal.4th 727, 751–752, 134 Cal.Rptr.2d 237, 68 P.3d 1203, "article XIII B, section 6's 'purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are "ill equipped" to assume increased financial responsibilities.' "

In any event, we have determined that we need not address in this case the problems posed by such an application of the rule articulated in *City of Merced,* because this aspect of the present case can be resolved on an alternative basis. As we shall explain, we conclude, regarding the reimbursement claim that we face presently, that *all* hearing procedures set forth in Education Code section 48918 properly should be considered to have been adopted to implement a federal due process mandate, and hence that all such hearing costs are nonreimbursable under article XIII B, section 6, and Government Code section 17557, subdivision (c).

In this regard, we find the decision in *County of Los Angeles II, supra,* 32 Cal.App.4th 805, 38 Cal.Rptr.2d 304, to be instructive. That case concerned Penal Code section 987.9, which requires counties to provide indigent criminal defendants with defense funds for ancillary investigation services related to capital trials and certain other trials, and further provides related procedural protections—namely, the confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request. The county in that case asserted that funds expended under the statute constituted reimbursable ****607** state mandates. The Court of Appeal disagreed, finding instead that the Penal Code section merely implements the requirements of federal constitutional law, and that "even in the ***889** absence of *****487**[Penal Code] section 987.9, ... counties would be responsible for providing ancillary services under the constitutional guarantees of due process ... and under the Sixth Amendment...." (32 Cal.App.4th at p. 815, 38 Cal.Rptr.2d 304.) Moreover, the Court of Appeal concluded, the procedural protections that the Legislature had built into the statute—requirements of confidentiality of a request for funds, the right to have the request ruled upon by a judge other than

the trial judge, and the right to an in camera hearing on the request—were merely incidental to the federal rights codified by the statute, and their "financial impact" was de minimis. (*Id.,* at p. 817, fn. 7, 38 Cal.Rptr.2d 304.) Accordingly, the Court of Appeal concluded, the Penal Code section, in its entirety—that is, *even those incidental aspects of the statute that articulated specific procedures, not expressly set forth in federal law, for the filing and resolution of requests for funds*—constituted an implementation of federal law, and hence those costs were nonreimbursable under article XIII B, section 6.

We conclude that the same reasoning applies in the present setting, concerning the District's request for reimbursement for procedural hearing costs triggered by its discretionary decision to seek expulsion. As in *County of Los Angeles II, supra,* 32 Cal.App.4th 805, 38 Cal.Rptr.2d 304, the initial discretionary decision (in the former case, to file charges and prosecute a crime; in the present case, to seek expulsion) in turn triggers a federal constitutional mandate (in the former case, to provide ancillary defense services; in the present case, to provide an expulsion hearing). In both circumstances, the Legislature, in adopting specific statutory procedures to comply with the general federal mandate, reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they did not significantly increase the cost of compliance with the federal mandate. The Court of Appeal in *County of Los Angeles II* concluded that, for purposes of ruling upon a claim for reimbursement, such incidental procedural requirements, producing at most de minimis added cost, should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable under Government Code, section 17556, subdivision (c). We reach the same conclusion here.

Indeed, to proceed otherwise in the context of a reimbursement claim would produce impractical and detrimental consequences. The present case demonstrates the point. The record reveals that in the extended proceedings before the Commission, the parties spent numerous hours producing voluminous pages of analysis directed toward determining whether various provisions of Education Code section 48918 exceeded federal due process requirements. That task below was complicated by the circumstance that this area of federal due process law is not well developed. The Commission, which is not a judicial body, did as best it could and concluded that in certain ***890** respects the various provisions (as observed *ante,* footnote 11, predominantly concerning notice, right of inspection, and recording requirements) "exceeded" the requirements of federal due process.

Even for an appellate court, it would be difficult and problematic in this setting to categorize the various notice, right of inspection, and recording requirements here at issue as falling either within or without the general federal due process mandate. The difficulty results not only from the circumstance that, as noted, the case law *****488** in the area of due process procedures concerning expulsion matters is relatively undeveloped, but also from the circumstance that when such an issue is raised in an action for reimbursement, as opposed to its being raised in litigation challenging an actual expulsion on the ground of allegedly inadequate hearing procedures, the issue inevitably is presented in the abstract, without any factual context that might help frame the legal issue. In such circumstances, courts are—and should be—****608** wary of venturing pronouncements (especially concerning matters of constitutional law).

In light of these considerations, we agree with the conclusion reached by the Court of Appeal in *County of Los Angeles II, supra,* 32 Cal.App.4th 805, 38 Cal.Rptr.2d 304: for purposes of 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.

Applying that approach to the case now before us, we conclude there can be no doubt that the assertedly "excessive due process" aspects of Education Code section 48918 for which the District seeks reimbursement in connection with hearings triggered by discretionary expulsions (see *ante,* footnote 11—primarily, as noted, various notice, right of inspection, and recording rules) fall within the category of matters that are merely incidental to the underlying federal mandate, and that produce at most a de minimis cost. Accordingly, for purposes of the District's reimbursement claim, all hearing costs incurred under Education Code section 48918, triggered by the District's exercise of discretion to seek expulsion, should be treated as having been incurred pursuant to a mandate of federal law, and hence all such costs are nonreimbursable under Government Code section 17556, subdivision (c). FN24

FN24. We do not foreclose the possibility that a local government might, under appropriate facts, demonstrate that a state law, though codifying federal requirements in part, also imposes more than "incidental" or "de minimis" expenses in excess of those demanded by federal law, and thus gives rise to a reimbursable state mandate to that extent.

***891 III**

The judgment of the Court of Appeal is affirmed insofar as it provides for full reimbursement of all costs related to hearings triggered by the mandatory expulsion provision of Education Code section 48915. The judgment of the Court of Appeal is reversed insofar as it provides for reimbursement of any costs related to hearings triggered by the discretionary provision of section 48915. All parties shall bear their own costs on appeal.

WE CONCUR: KENNARD, BAXTER, WERDEGAR, CHIN, BROWN, and MORENO, JJ.

Cal.,2004.
San Diego Unified School Dist. v. Commission On State Mandates
33 Cal.4th 859, 94 P.3d 589, 16 Cal.Rptr.3d 466, 190 Ed. Law Rep. 636, 04 Cal. Daily Op. Serv. 6945, 2004 Daily Journal D.A.R. 9404

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TAB NO. 10

30 Cal.4th 727, 68 P.3d 1203, 134 Cal.Rptr.2d 237, 176 Ed. Law Rep. 894, 03 Cal. Daily Op. Serv. 4288, 2003 Daily Journal D.A.R. 5463
(Cite as: 30 Cal.4th 727)

H

Supreme Court of California
DEPARTMENT OF FINANCE, Plaintiff and Appellant,
v.
COMMISSION ON STATE MANDATES, Defendant and Respondent; KERN HIGH SCHOOL DISTRICT et al., Real Parties in Interest and Respondents.

No. S109219.
May 22, 2003.

SUMMARY

The Department of Finance brought an administrative mandate proceeding against the Commission on State Mandates, challenging its decision that two statutes-requiring school site councils and advisory committees for certain educational programs to provide notice of meetings and to post agendas for those meetings-constituted a reimbursable state mandate under Cal. Const., art. XIII B, § 6. The trial court denied the petition. (Superior Court of Sacramento County, No. 00CS00866, Ronald B. Robie, Judge.) The Court of Appeal, Third Dist., No. C037645, rejected the department's position, concluding that a state mandate is established when the local governmental entity has no reasonable alternative and no true choice but to participate in the program, and incurs the additional costs associated with an increased or higher level of service.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that the statutes do not constitute a reimbursable state mandate. Thus, the claimants (two public school districts and a county) were not entitled to reimbursement. The claimants could not show that they were legally compelled to incur notice and agenda costs, and hence entitled to reimbursement from the state, based merely upon the circumstance that the notice and agenda provisions were mandatory elements of education-related programs in which the claimants participated, without regard to whether the claimants' participation was voluntary or compelled. If a school district elects to participate in any underlying voluntary education-related funded program, the obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. In this case, the claimants were not legally compelled to participate in eight of the nine underlying funded programs. Even if the claimants were legally compelled to participate in one of the nine programs, they were nevertheless not entitled to reimbursement from the state for such expenses, because they were free at all relevant times to use funds provided by the state for that program to pay required program expenses, including notice and agenda costs. The court further held that the claimants failed to show that they were compelled to participate in the underlying programs. Moreover, the costs associated with the notice and agenda requirements were modest, and nothing in the governing statutes or regulations suggested that a school district was precluded from using a portion of the program funds obtained from the state to pay associated notice and agenda costs. (Opinion by George, C. J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) State of California § 11--Fiscal Matters--Reimbursable State Mandate-- School Programs--Statutory Requirements to Provide Notice and to Post Agenda of Meetings--Participation in Programs as Legally Compelled.

In proceedings to determine whether statutes, requiring school site councils and advisory committees for certain educational programs to provide notice of meetings and to post agendas for those meetings, were reimbursable mandates under Cal. Const., art. XIII B, § 6, the Court of Appeal erred in concluding that the claimants (two public school districts and a county) were entitled to reimburse-

ment. The claimants could not show that they were legally compelled to incur notice and agenda costs, and hence entitled to reimbursement from the state, based merely upon the circumstance that the notice and agenda provisions were mandatory elements of education-related programs in which the claimants participated, without regard to whether the claimants' participation was voluntary or compelled. If a school district elects to participate in any underlying voluntary education-related funded program, the obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. The proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves. In this case, the claimants were not legally compelled to participate in eight of the nine underlying funded programs. Even if the claimants were legally compelled to participate in one of the nine programs, they were nevertheless not entitled to reimbursement from the state for such expenses, because they were free at all relevant times to use funds provided by the state for that program to pay required program expenses, including notice and agenda costs. [See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 123A; West's Key Number Digest, States ⚷ 111.]

(2a, 2b, 2c) State of California § 11--Fiscal Matters--Reimbursable State Mandate--School Programs--Statutory Requirements to Provide Notice and to Post Agenda of Meetings--Participation in Programs as Compelled--As Practical Matter.

In proceedings to determine whether statutes, requiring school site councils and advisory committees for certain educational programs to provide notice of meetings and to post agendas for those meetings, were reimbursable mandates under Cal. Const., art. XIII B, § 6, in which claimants (two public school districts and a county) failed to show that they were legally compelled to participate in the underlying funded programs and incur notice and agenda costs, the claimants also failed to show that, as a practical matter, they were compelled to participate in the underlying programs. Although the claimants sought to show that they had no true choice other than to participate in the programs, and that the absence of a reasonable alternative to participation was a de facto mandate, they did not face penalties such as double taxation or other severe consequences for not participating, and hence they were not mandated under Cal. Const., art. XIII, § 6, to incur increased costs. Moreover, the costs associated with the notice and agenda requirements were modest, and nothing in the governing statutes or regulations suggested that a school district was precluded from using a portion of the program funds obtained from the state to pay associated notice and agenda costs. The asserted compulsion stemmed only from the circumstance that the claimants found the benefits of various funded programs too beneficial to refuse. However, the state is not prohibited from providing school districts with funds for voluntary programs, and then effectively reducing that grant by requiring the districts to incur expenses in order to meet conditions of program participation.

(3) Municipalities § 23--Powers--Relationship Between State and Local Governments.

Unlike the federal-state relationship, sovereignty is not an issue between state and local governments.

(4) State of California § 11--Fiscal Matters--Reimbursable State Mandate-- Purpose.

The purpose of Cal. Const., art. XIII B, § 6 (reimbursable state mandates), is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ill equipped to assume increased financial responsibilities.

COUNSEL

Bill Lockyer, Attorney General, Andrea Lynn Hoch, Chief Assistant Attorney General, Manuel M. Medeiros and Louis R. Mauro, Assistant Attorneys ***730** General, Catherine M. Van Aken and Leslie R. Lopez, Deputy Attorneys General, for Plaintiff and Appellant.

Paul M. Starkey, Camille Shelton and Eric D. Feller for Defendant and Respondent.

Jo Anne Sawyerknoll, Jose A. Gonzales and Arthur M. Palkowitz for Real Party in Interest and Respondent San Diego Unified School District.

No appearance by Real Parties in Interest and Respondents Kern High School District and County of Santa Clara.

Ruth Sorensen for California State Association of Counties, City of Buenaventura, City of Carlsbad, City of Dixon, City of Indian Wells, City of La Habra Heights, City of Merced, City of Monterey, City of Plymouth, City and County of San Francisco, City of San Luis Obispo, City of San Pablo, City of Tracy and City of Walnut Creek as Amici Curiae on behalf of Real Parties in Interest and Respondents.

Diana McDonough, Harold M. Freiman, Cynthia A. Schwerin and Lozano Smith for California School Boards Association, through its Education Legal Alliance as Amici Curiae on behalf of Real Parties in Interest and Respondents.

GEORGE, C. J.

Article XIII B, section 6, of the California Constitution provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service ...." (Hereafter article XIII B, section 6.)

Real parties in interest-two public school districts and a county (hereafter claimants)-participate in various education-related programs that are funded by the state and, in some instances, by the federal government. Each of these underlying funded programs in turn requires participating public school districts to establish and utilize specified school councils and advisory committees. Statutory provisions enacted in the mid-1990's require that such school councils and advisory committees provide notice of meetings, and post agendas for those meetings. (See Gov. Code, § 54952; *731Ed. Code, § 35147.) We granted review to determine whether claimants have a right to reimbursement from the state for their costs in complying with these statutory notice and agenda requirements.

We conclude, contrary to the Court of Appeal, that claimants are not entitled to reimbursement under the circumstances presented here. Our conclusion is based on the following determinations:

First, we reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that the notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, without regard to whether a claimant's participation in the underlying program is voluntary or compelled. Second, we conclude that as to *eight* of the nine underlying funded programs here at issue, claimants have not been legally compelled to participate in those programs, and hence cannot establish a reimbursable state mandate as to those programs based upon a theory of legal compulsion. Third, assuming (without deciding) that claimants have been legally compelled to participate in *one* of the nine programs, we conclude that claimants nonetheless have no entitlement to reimbursement from the state for such expenses, because they have been free at all relevant times to use funds provided by the state for that program to pay required program expenses-including the notice and agenda costs here at issue.

Finally, we reject claimants' alternative contention that even if they have not been *legally* compelled to participate in the underlying funded programs, as a *practical* matter they have been compelled to do so and hence to incur noticeand agenda-related costs. Although we do not foreclose the possibility that a reimbursable state mandate might be found in circumstances short of legal compulsion-for example, if the state were to impose

a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program-claimants here faced no such practical compulsion. Instead, although claimants argue that they have had "no true option or choice" other than to participate in the underlying funded educational programs, the asserted compulsion in this case stems only from the circumstance that claimants have found the benefits of various funded programs "too good to refuse"-even though, as a condition of program participation, they have been forced to incur some costs. On the facts presented, the cost of compliance with conditions of participation in these funded programs does not amount to a reimbursable state mandate.

Accordingly, we shall reverse the judgment of the Court of Appeal. ***732**

I.

A number of statutes establish various school-related educational programs, such as the School-Based Pupil Motivation and Maintenance Program and Dropout Recovery Act (Ed. Code, § 54720 et seq.), Programs to Encourage Parental Involvement (Ed. Code, § 11500 et seq.), and the federal Indian Education Program (20 U.S.C. § 7421 et seq. [former 25 U.S.C. § 2604 et seq.]). Under these statutes, participating school districts are granted state or federal funds to operate the program, and are required to establish school site councils or advisory committees that help administer the program. Program funding often is substantial-for example, on a statewide basis, funding provided by the state for school improvement programs (see Ed. Code, §§ 52010 et seq., 62000, 62000.2, subd. (b), 62002) for the 1998-1999 fiscal year totaled approximately $394 million. (Cal. Dept. of Ed., Rep., Budget Act of 1998 (Nov. 1998) p. 52.)

In the mid-1990's, the Legislature passed legislation designed to make the operations of the councils and advisory committees related to such programs more open and accessible to the public. First, effective April 1, 1994, the Legislature enacted Government Code section 54952, which expanded the reach of the Ralph M. Brown Act (Brown Act) (Gov. Code, § 54950.5 et seq.)-California's general open meeting law-to apply to all such official local advisory bodies. [FN1] Second, effective July 21, 1994, Education Code section 35147 superceded Government Code section 54952, with respect to the application of the Brown Act to designated councils and advisory committees. Although the earlier (Government Code) statute had made *all* local government councils and advisory committees subject to *all* provisions of the Brown Act, the later (Education Code) statute generally exempts councils and advisory committees of nine specific programs from compliance with all provisions of the Brown Act, and imposes instead its own separately described requirement that all such councils and advisory committees related to those nine programs be open to the public, provide notice of meetings, and post meeting agendas. [FN2] ***733**

FN1 Government Code section 54952, a provision of the Brown Act, provides in relevant part: "As used in this chapter, 'legislative body' means: [¶] (a) The governing body of a local agency or any other local body created by state or federal statute. [¶] (b) A commission, committee, board, or other body of a local agency, whether permanent or temporary, decision-making or advisory, created by charter, ordinance, resolution, or formal action of a legislative body...."

FN2 Education Code section 35147 provides in relevant part: "(a) Except as specified in this section, any meeting of the councils or committees specified in subdivision (b) is exempt from ... the Ralph M. Brown Act.... [¶] (b) The councils and schoolsite advisory committees established pursuant to Sections 52012, 52065, 52176, and 52852, subdivision (b) of Section 54425, Sections 54444.2, 54724, and 62002.5, and committees formed pursuant to Section 11503 or Section 2604 of Title

25 of the United States Code, are subject to this section. [¶] (c) Any meeting held by a council or committee specified in subdivision (b) shall be open to the public and any member of the public shall be able to address the council or committee during the meeting on any item within the subject matter jurisdiction of the council or committee. Notice of the meeting shall be posted at the schoolsite, or other appropriate place accessible to the public, at least 72 hours before the time set for the meeting. The notice shall specify the date, time, and location of the meeting and contain an agenda describing each item of business to be discussed or acted upon. The council or committee may not take any action on any item of business unless that item appeared on the posted agenda or unless the council or committee members present, by unanimous vote, find that there is a need to take immediate action and that the need for action came to the attention of the council or committee subsequent to the posting of the agenda...."

The nine school site councils and advisory committees specified in subdivision (b), above, were established as part of the following programs: The school improvement program (Ed. Code, § 52010 et seq.; see *id* ., §§ 62000, 62000.2, subd. (b), 62002) [a general program that disburses funds for all aspects of school operation and performance]; the American Indian Early Childhood Education Program (Ed. Code, § 52060 et seq.); the Chacon-Moscone Bilingual-Bicultural Education Act of 1976 (Ed. Code, § 52160 et seq.; see *id.*, 62000, 62000.2, subd. (d)); the School-Based Program Coordination Act (Ed. Code, § 52850 et seq. [a program designed to coordinate various categorical aid programs]); the McAteer Act (Ed. Code, § 54400 et seq. [various compensatory education programs for "disadvantaged minors"]); the Migrant Children Education Programs (Ed. Code, § 54440 et seq.); the School-Based Pupil Motivation and Maintenance Program and Dropout Recovery Act (Ed. Code, § 54720 et seq. [a program designed to address truancy and dropout issues]); the Programs to Encourage Parental Involvement (Ed. Code, § 11500 et seq.); and the federal Indian Education Program (20 U.S.C. § 7421 et seq. [former 25 U.S.C. § 2601 et seq.].)

Compliance with these notice and agenda rules in turn imposed various costs on the affected councils and committees. Claimants Kern High School District, San Diego Unified School District, and County of Santa Clara filed "test claims" (see Gov. Code, § 17521) with the Commission on State Mandates (Commission), seeking reimbursement for the costs incurred by school councils and advisory committees in complying with the new statutory notice and agenda requirements. (See generally *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-333 [285 Cal.Rptr. 66, 814 P.2d 1308] [describing legislative procedures implementing art. XIII B, § 6].) [FN3] In a statement of decision issued in mid-April 2002, the Commission found in favor of claimants. It concluded that the statutory notice and agenda requirements impose reimbursable state mandates for the costs of preparing meeting agendas, posting agendas, and providing the public an opportunity to address the respective council or committee. ***734**

FN3 In December 1994, Santa Clara County filed the first test claim, asserting that Government Code section 54952 imposed a reimbursable state mandate. In December 1995, Kern High School District filed a test claim asserting that Education Code section 35147 imposes a reimbursable state mandate. These two claims were consolidated, and San Diego Unified School District was added as a coclaimant.

Acting through the Department of Finance, the

State of California (hereafter Department of Finance or Department) thereafter brought this administrative mandate proceeding under Government Code section 17559, subdivision (b), to challenge the Commission's decision. The San Diego Unified School District took the lead role on behalf of claimants; the Kern High School District and the County of Santa Clara did not appear in the court proceedings below and have not appeared in this court.

In November 2000, the trial court, agreeing with the Commission, denied the mandate petition. FN4 The Department of Finance appealed, arguing that the school councils and advisory committees at issue serve categorical aid programs in which school districts participate "voluntarily," often as a condition of receiving state or federal program funds. The Department of Finance asserted that the state has not *compelled* school districts to participate in or accept funding for any of those underlying programs-and hence has not required the establishment of any of the councils and committees that serve the programs. Instead, the Department of Finance argued, the state merely has set out reasonable conditions and rules that must be adhered to if a local entity elects to participate in a program and receive program funding. Accordingly, the Department of Finance asserted, because local entities are not required to undertake or continue to participate in the programs, the state, by enacting Government Code section 54952 and Education Code section 35147, has not imposed a "mandate," as that term is used in article XIII B, section 6. It follows, the Department of Finance asserted, that claimants have no right to reimbursement under article XIII B, section 6.

> FN4 The trial court stated: "Two primary issues are raised in this matter. The first issue is whether the 1993 amendments to the Brown Act [that is, enactment of Government Code section 54952] and the 1994 enactment of ... [Education Code] section 35147 mandate a new program or higher level of service. The Court concludes that they do. The second issue is whether a reimbursable state mandate is created only when an advisory council or committee which is subject to the Brown Act is required by state law. The Court concludes that it is not."

In a July 2002 decision, the Court of Appeal rejected the position taken by the Department of Finance. The appellate court concluded that a state mandate is established under article XIII B, section 6, when the local governmental entity has "no reasonable alternative" and "no true choice but to participate" in the program, and incurs the additional costs associated with an increased or higher level of service. FN5

> FN5 The Court of Appeal also concluded that Government Code section 54952 and Education Code section 35147 establish a "higher level of service" under article XIII B, section 6. We need not and do not review that determination here, and express no view on the validity of that conclusion.

We granted review to consider the Court of Appeal's construction of the term "state mandate" as it appears in article XIII B, section 6. *735

II.

Article XIII A (adopted by the voters in 1978 as Proposition 13), limits the *taxing* authority of state and local government. Article XIII B (adopted by the voters in 1979 as Proposition 4) limits the *spending* authority of state and local government.

Article XIII B, section 6, provides as follows: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative man-

dates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." Article XIII B became operative on July 1, 1980. (*Id.*, § 10.)

We have observed that article XIII B, section 6, "recognizes that articles XIII A and XIII B severely restrict the taxing and spending powers of local governments. [Citation.] Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81 [61 Cal.Rptr.2d 134, 931 P.2d 312] (*County of San Diego*).) We also have observed that a reimbursable state mandate does not arise merely because a local entity finds itself bearing an "additional cost" imposed by state law. (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 55-57 [233 Cal.Rptr. 38, 729 P.2d 202].) The additional expense incurred by a local agency or school district arising as an "incidental impact of a law which applied generally to all ... entities" is not the "type of expense ... [that] the voters had in mind when they adopted section 6 of article XIII B." (*Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 [244 Cal.Rptr. 677, 750 P.2d 318]; see also *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 [280 Cal.Rptr. 92, 808 P.2d 235]; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 70 [266 Cal.Rptr. 139, 785 P.2d 522] (*City of Sacramento*). FN6)

> FN6 As we observed in *City of Sacramento, supra*, 50 Cal.3d at page 70, "extension of the subvention requirements to costs 'incidentally' imposed on local governments would require the Legislature to assess the fiscal effect on local agencies of each law of general application. Moreover, it would subject much general legislation to the supermajority vote required to pass a companion local-government revenue bill. Each such necessary appropriation would, in turn, cut into the *state's* article XIII B spending limit. ([Art. XIII B,] § 8, subd. (a).)" We reaffirmed that "nothing in the language, history, or apparent purpose of article XIII B suggested such far-reaching limitations on legitimate state power." (50 Cal.3d at p. 70.)

The focus in many of the prior cases that have addressed article XIII B, section 6, has been upon the meaning of the terms "new program" or ***736** "increased level of service." In the present case, we are concerned with the meaning of state "mandate."

III.

A.

(1) In its briefs, the Department of Finance asserts that article XIII B, section 6, reflects an intent on the part of the drafters and the electorate to limit reimbursement to costs that are forced upon local governments as a matter of legal compulsion. The Commission's briefs take a similar approach, arguing that reimbursement under the constitutional provision requires a showing that a local entity was "ordered or commanded" to incur added costs. At oral argument, both the Department and the Commission retreated somewhat from these positions, and suggested that legal compulsion may not be a necessary condition of a finding of a reimbursable state mandate in all circumstances. For the reasons explained below, although we shall analyze the legal compulsion issue, we find it unnecessary in this case to decide whether a finding of legal compulsion is *necessary* in order to establish a right to reimbursement under article XIII B, section 6, because we conclude that even if there are some circumstances in which a state mandate may be found in the absence of legal compulsion, the circum-

stances presented in this case do not constitute such a mandate.

1.

The Department of Finance and the Commission maintain that the drafters of article XIII B, section 6, borrowed that provision's basic idea and structure-and the gist of its "state mandate" language-from then existing statutes. (See generally *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1577-1581 [15 Cal.Rptr.2d 547].) At the time of the drafting and enactment of article XIII B, section 6, former Revenue and Taxation Code section 2231, subdivision (a) (currently Gov. Code, § 17561, subd. (a)) provided: "The state shall reimburse each local agency for all 'costs mandated by the state,' as defined in Section 2207...." And at that same time, former Revenue and Taxation Code section 2207 (currently Gov. Code, § 17514) provided: " 'Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the ***737** following: [¶] (a) Any law enacted after January 1, 1973, which mandates a new program or an increased level of service of an existing program ...."

As the Department of Finance observes, we frequently have looked to ballot materials in order to inform our understanding of the terms of a measure enacted by the electorate. (See, e.g., *County of Fresno v. State of California, supra,* 53 Cal.3d 482, 487 [reviewing ballot materials concerning art. XIII B].) The Department stresses that the ballot materials pertaining to article XIII B in two places suggested that a state mandate comprises something that a local government entity is required or forced to do. The Legislative Analyst stated: " 'State mandates' are *requirements imposed* on local governments by legislation or executive orders." (Ballot Pamp., Special Statewide Elec. (Nov. 6, 1979) Prop. 4, p. 16, italics added.) Similarly, the measure's proponents stated that the provision would "not allow the state governments to *force* programs on local governments without the state paying for them." (*Id.*, arguments in favor of Prop. 4, p. 18, capitalization removed, italics added.) The Department concludes that the ballot materials fail to suggest that a reimbursable state mandate might be found to exist outside the context of legal compulsion.

The Department of Finance and the Commission also assert that subsequent judicial construction of former Revenue and Taxation Code sections 2231 and 2207-upon which, as just discussed, article XIII B, section 6, apparently was based-suggests that a narrow meaning was accorded the term "state mandate" at the time article XIII B, section 6, was enacted. The Department relies primarily upon *City of Merced v. State of California* (1984) 153 Cal.App.3d 777 [200 Cal.Rptr. 642] (*City of Merced*). Claimants and amici curiae on their behalf assert that *City of Merced* either is distinguishable or was wrongly decided. We proceed to describe *City of Merced* at some length.

In *City of Merced, supra,* 153 Cal.App.3d 777, the city wished either to purchase or to condemn (under its eminent domain authority) certain privately owned real property. If the city were to elect to proceed by eminent domain, it would be required by a then recent enactment (Code Civ. Proc., § 1263.510) to compensate the property owner for loss of its "business goodwill." The city did elect to proceed by eminent domain, and in April 1980 the Merced Superior Court issued a final order in condemnation, directing the city to pay the property owner for the latter's loss of business goodwill. The city did so and then sought reimbursement from the state, arguing that the new statututory requirement that it compensate for business goodwill amounted to a reimbursable state mandate. (*City of Merced*, at p. 780.) ***738**

The constitutional reimbursement provision contained in article XIII B, section 6, did not become operative until July 1, 1980. Accordingly, the City of Merced sought reimbursement under the then existing statutory authority-Revenue and Taxation Code former sections 2231 and 2207-which, as noted, apparently had served as the model for the

constitutional provision.

The State Board of Control-which at the time exercised the authority now exercised by the Commission-agreed with the City of Merced and found a reimbursable state mandate. (*City of Merced, supra,* 153 Cal.App.3d 777, 780.) The city's approved claim for reimbursement "was included, along with other similar claims, as a [budget] line item in chapter 1090, Statutes of 1981." (*Ibid.*) The Legislature, however, refused to authorize the reimbursement, and directed the board not to accept, or submit, any future claim for reimbursement for business goodwill costs. (*Ibid.*)

The City of Merced then sought a writ of mandate commanding the Legislature to provide reimbursement. The trial court denied that request, and the Court of Appeal affirmed. The court concluded that, as a matter of law, the city's increased costs flowing from its election to condemn the property did not constitute a reimbursable state mandate. (*City of Merced, supra,* 153 Cal.App.3d 777, 781-783.) The court reasoned: "[W]hether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost." (*Id.*, at p. 783.)

The court in *City of Merced, supra,* 153 Cal.App.3d 777, found its construction of former Revenue and Taxation Code sections 2231 and 2207 - as those statutory provisions read at the time they served as the model for article XIII B, section 6-to be confirmed by the subsequent legislative action amending former Revenue and Taxation Code section 2207 (and related former section 2207.5). As the court explained: "... Senate Bill No. 90 (Russell), 1979-1980 Regular Session ... added Revenue and Taxation Code section 2207, subdivision (h): [¶] ' "Costs mandated by the state" means any increased costs which a local agency is required to incur as the result of the following: [¶] ... [¶] (h) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which *adds new requirements to an existing optional program or service* and thereby increases the cost of such program or service *if the local agencies have no reasonable alternatives other than to continue the optional program.*' " (*City of Merced, supra,* 153 Cal.App.3d 777, 783-784, italics added.) ***739**

(Of relevance here, Senate Bill No. 90 (1979-1980 Reg. Sess.) also added a substantively identical provision to former Revenue and Taxation Code section 2207.5-a specialized section that addressed reimbursable state mandates as they related to a school district.) FN7

> FN7 Revised section 2207.5 provided that " '[c]osts mandated by the state' means any increased costs which a school district is required to incur as a result of ... [¶] ... [¶] (h) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1978, which adds new requirements to an existing optional program or service and thereby increases the cost of such program or service *if the school districts have no reasonable alternatives other than to continue the optional program.*" (Stats. 1980, ch. 1256, § 5, pp. 4248-4249, eff. July 1, 1981, italics added.)

The court in *City of Merced* continued: "Senate Bill No. 90 became effective on July 1, 1981, [more than a year] after plaintiff incurred the cost of business goodwill for which it seeks reimbursement. Subdivision (h) appears to have been included in the bill to provide for reimbursement of increased costs in an optional program such as eminent domain when the local agency has no reasonable alternative to eminent domain. The legislative history of Senate Bill No. 90 supports the conclusion that subdivision (h) was added to Revenue and Taxation Code section 2207 *to extend state liability rather than to clarify existing law.*" (*City of Merced,*

supra, 153 Cal.App.3d 777, 784, italics added.)

After examining two legislative committee reports, FN8 the court in *City of Merced, supra,* 153 Cal.App.3d 777, asserted that they "characterize Senate Bill No. 90 as expanding the definition of local reimbursable costs. The Legislative Analyst's Report ... on Senate Bill No. 90 similarly includes a statement that the bill expands the definition of state-mandated costs. Such characterizations of the purpose of Senate Bill No. 90 are consistent only with the conclusion that, *until that bill was enacted, increased costs incurred in an optional program such as eminent domain were not state mandated.* Thus the cost of business goodwill for which plaintiff was required [by Code of Civil Procedure, section 1263.510] to pay in April 1980, was not a state-mandated cost. It follows that the trial court properly denied the ***740** petition for a writ of mandamus to compel payment of that cost." (*City of Merced, supra,* 153 Cal.App.3d 777, 785, italics added.)

> FN8 The court in *City of Merced* asserted: "The Report of the Assembly Revenue and Taxation Committee ... includes a statement: '*SB 90* further defines "mandated costs" in Sections 4 and 5 to include the following: [¶] ... [¶] e. Where a statute or executive order adds *new requirements to an existing optional program,* which increases costs if the local agency has no reasonable alternative than to continue that optional program.' (Rep., p. 1, italics in original.) [¶] Additionally, the Ways and Means Committee's Staff Analysis ... notes that Senate Bill No. 90: 'Expands the definition of *local* reimbursable costs mandated and paid by the state to include: [¶] ... [¶] e. Statutes or executive orders adding *new requirements to an existing optional program,* which increases costs if the local agency has no reasonable alternative than to continue that optional program.' (P. 2, italics in original.)" (*City of Merced, supra,* 153 Cal.App.3d at p. 784.)

In other words, the court in *City of Merced* concluded that former Revenue and Taxation Code sections 2231 and 2207, as they read at the time they served as the model for article XIII B, section 6, contemplated a narrow definition of reimbursable state mandate, and not the subsequently expanded definition of reimbursable state mandate found in the 1981 amendments to the Revenue and Taxation Code. FN9

> FN9 We need not, and do not, decide whether the court in *City of Merced, supra,* 153 Cal.App.3d 777, correctly characterized the statutory history of the 1981 amendments to the Revenue and Taxation Code.

A few months after the Court of Appeal filed its opinion in *City of Merced, supra,* 153 Cal.App.3d 777, the Legislature overhauled the law pertaining to state mandates and reimbursements by amending both the Revenue and Taxation Code and the Government Code. (Stats. 1984, ch. 1459, p. 5113.) The Department of Finance and the Commission assert that two aspects of the legislative overhaul are particularly relevant to the issue we address here.

First, the Department of Finance and the Commission assert that the Legislature enacted a new section of the Government Code-section 17514 -in order to implement the reimbursable-state-mandate directive of article XIII B, section 6. FN10 The Department and the Commission assert that in enacting that provision, the Legislature readopted the original, *narrow* definition of reimbursable state mandate found in the initial versions of former Revenue and Taxation Code section 2207-which, the Department and the Commission maintain, existed at the time article XIII B, section 6, was drafted and adopted, and which defined "costs mandated by the state" as those "which a local agency is *required* to incur." (See Stats. 1975, ch. 486, § 1.8, p. 997 [Rev. & Tax. Code, former § 2207]; Stats.

1977, ch. 1135, § 5, p. 3646 [Rev. & Tax. Code, former § 2207]; Stats. 1984, ch. 1459, § 1, p. 5114 [Gov. Code, § 17514], italics added.) This same statutory language also had been recently construed at that time in *City of Merced, supra*, 153 Cal.App.3d 777, as recognizing as a reimbursable state mandate only that imposed when the local entity is legally compelled to engage in the underlying practice or program. ***741**

> FN10 Government Code section 17514 reads: " 'Costs mandated by the state' means any increased costs which a local agency or school district is *required* to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution." (Italics added.)

Second, the Department of Finance and the Commission observe, in enacting Government Code section 17514, the Legislature also provided that the use of the broader definition contained in the *amended* versions of Revenue and Taxation Code former sections 2207 and 2207.5 (which became effective July 1, 1981) should be phased out, but that the definition could be used to determine claims that arose prior to 1985. (See Stats. 1984, ch. 1459, § 1, p. 5123; 68 Ops.Cal.Atty.Gen. 224 (1985).)

In other words, the Department of Finance and the Commission assert, in the Legislature's 1984 overhaul of the statutory scheme implementing article XIII B, section 6, the Legislature embraced and codified the narrow definition of reimbursable state mandate set out in former Revenue and Taxation Code section 2207 (and construed in *City of Merced*) as the appropriate test in implementing the constitutional provision. Moreover, the Department and the Commission maintain, the Legislature limited the continued use of the broader definition of a statutorily imposed reimbursable state mandate (set out in the amendments to former Revenue and Taxation Code sections 2207 and 2207.5, effective in mid-1981) to a small and ever-decreasing number of cases. Five years later, the Legislature repealed former Revenue and Taxation Code sections 2207 and 2207.5 (see Stats. 1989, ch. 589, §§ 7 & 8, p. 1978)-thereby finally discarding the broad definition of statutorily imposed reimbursable state mandate found in subdivision (h) of each of those statutes.

As noted above, the Department of Finance and the Commission assert in their briefs that based upon the language of article XIII B, section 6, and the statutory and case law history described above, the drafters and the electorate must have intended that a reimbursable state mandate arises only if a local entity is "required" or "commanded" -that is, legally compelled-to participate in a program (or to provide a service) that, in turn, leads unavoidably to increasing the costs incurred by the entity. (*City of Merced, supra*, 153 Cal.App.3d 777, 783; see also *Long Beach Unified Sch. Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174 [275 Cal.Rptr. 449] [construing the term "mandates," for purposes of art. XIII B, § 6, "in the ordinary sense of 'orders' or 'commands' "]; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1284 [101 Cal.Rptr.2d 784] (*County of Sonoma*) [Legislature's interpretation of art. XIII B, § 6, in Gov. Code, 17514, as limited to "costs which a ... school district is *required to incur* " is entitled to great weight].) [FN11] ***742**

> FN11 Although, as described immediately below (in pt. III.A.2.), the Commission attempts to defend on other grounds its determination below in favor of claimants, the Commission strongly disputes the Court of Appeal's broad interpretation of state mandate as encompassing circumstances in which a local entity is not "ordered or commanded" to perform a task

that in turn requires it to incur additional costs.

2.

Claimants and amici curiae on their behalf assert that even if "legal compulsion" is the governing standard, they meet that test because, they argue, claimants have been legally compelled to incur compliance costs under Government Code section 54952 and Education Code section 35147, subdivision (c). The Commission-but not the Department-supports claimants' proposed application of the legal compulsion test.

In so arguing, claimants focus upon the circumstance that a school district *that participates* in one of the underlying programs listed in Education Code section 35147, subdivision (b), must comply with program requirements, including the statutory notice and agenda obligations, set out in Government Code section 54952 and Education Code section 35147, subdivision (c). Claimants assert: "[O]nce [a district] participates in one of the educational programs at issue, it does not thereafter have the option of performing that activity in a manner that avoids incurring costs mandated by amended Government Code section 54952 and Education Code section 35147."

The Department of Finance, relying upon *City of Merced, supra,* 153 Cal.App.3d 777, asserts that claimants err by focusing upon a school district's legal obligation to comply with program conditions, rather than focusing upon whether the school district has a legal obligation to participate in the underlying program to which the conditions attach. As suggested above, the core point articulated by the court in *City of Merced* is that activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds-even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice. (*Id.*, at p. 783.) Claimants concede that *City of Merced* conflicts with their contrary view, but they assert that the opinion is distinguishable and ask us to decline to follow, or extend, that decision.

Claimants stress-as we acknowledged above-that *City of Merced, supra,* 153 Cal.App.3d 777, was decided in the context of an eminent domain proceeding, and that the appellate court was engaged in construing the *statutory* reimbursement scheme rather than article XIII B, section 6. Claimants also assert that although the City of Merced had discretion whether or ***743** not to exercise its power of eminent domain, and was under no compulsion to do so, in the present case "school site council and advisory committee meetings cannot be held in a manner that avoids application of [the requirements of] Government Code section 54952 and Education Code section 35147."

The points relied upon by claimants neither call into doubt nor persuasively distinguish *City of Merced, supra,* 153 Cal.App.3d 777. The truer analogy between that case and the present case is this: In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. FN12

FN12 The Commission further attempts to distinguish *City of Merced, supra,* 153 Cal.App.3d 777, by observing that the eminent domain statute at issue in that case made clear, in the *same* statute that imposed the requirement that an entity employing eminent domain also compensate for lost business goodwill, the discretion-

> ary nature of the decision whether to acquire property by purchase or instead by eminent domain. The Commission argues that no such express statement concerning local government discretion is set out in the statutes here at issue. As we explain *post*, part III.A.3.a., however, the underlying program statutes at issue in this case (with one possible exception-see *post*, pt. III.A.3.b.) make it clear that school districts retain the discretion not to participate in any given underlying program-and, as we explain *post*, footnote 22, the circumstance that the notice and agenda requirements of these elective programs were enacted *after* claimants first chose to participate in the programs does not make claimants' choice to continue to participate in those programs any less voluntary.

We therefore reject claimants' assertion that merely because they participate in one or more of the various education-related funded programs here at issue, the costs they incurred in complying with program conditions have been legally compelled and hence constitute reimbursable state mandates. We instead agree with the Department of Finance, and with *City of Merced, supra,* 153 Cal.App.3d 777, that the proper focus under a legal compulsion inquiry is upon the nature of claimants' participation in the underlying programs themselves.

3.

Turning to that question-and without deciding whether a finding of legal compulsion to participate in an underlying program is *necessary* in order to establish a right to reimbursement under article XIII B, section 6-we ***744** conclude, upon review of the applicable statutes, that claimants are, and have been, free from legal compulsion as to eight of the nine underlying funded programs here at issue. As to one of the funded programs, we shall assume, for purposes of analysis, that a district's participation in the program is in fact legally compelled.

a.

It appears to be conceded that, as to most of the nine education-related funded programs at issue, school districts are not legally compelled to participate in those programs. For example, the American Indian Early Childhood Education Program (Ed. Code, § 52060 et seq.), which implements projects designed to develop and test educational models to increase reading and math competence of students in preschool and early grades, states that school districts "may apply" to be included in the project (*id.*, § 52063) and, if accepted to participate, will receive program funding (*id.*, § 52062). Education Code section 52065 in turn states that each school district that receives funds provided by section 52062 "shall establish a districtwide American Indian advisory committee for American Indian early childhood education." Plainly, a school district's initial and continued participation in the program is voluntary, and the obligation to establish or maintain an advisory committee arises only if the district elects to participate in, or continue to participate in, the program. Although the language of most of the other implementing statutes varies, they generally follow this same approach, with the same result: Participation in most of the programs listed in Education Code section 35147 is voluntary, and the obligation to establish or maintain a site council or advisory committee arises only if a district elects to participate in, or continue to participate in, the particular program.

Although *claimants* do not assert that they have been legally compelled to participate in *any* underlying program for which they have sought reimbursement for their compliance costs-and, indeed, their briefing suggests the opposite [FN13] -the Commission and amicus curiae Education Legal Alliance assert that the school improvement program (a "sunsetted," but still funded, program that disburses funds for all aspects of school operation and performance; Ed. Code, §§ 52012 et seq., 62000, 62000.2, subd. (b), 62002) legally compels school districts to establish site councils without regard to whether the district participates in the underlying funded program to which the site councils apply.

The Commission and amici curiae rely upon Education Code section 52010, which states in relevant part: "*With the exception of* ***745** *subdivisions (a) and (b) of Section 52011*, the provisions of this chapter shall apply only to school districts and schools which participate in school improvement programs authorized by this article." (Italics added.) Section 52011, subdivision (b), in turn provides that "each school district shall: [¶] ... [¶] (b) *Adopt policies* to ensure that prior to scheduled phase-in, a school site council as described in Section 52012 is established at each school site to consider whether or not it wishes the local school to participate in the school improvement program." (Italics added.)

> FN13 Claimants at one point characterize themselves as having "*decided* to participate in the programs listed in Education Code section 35147." (Italics in added.)

The Commission and amici curiae read these provisions as requiring all schools and school districts throughout the state to "establish a school site council even if the school [or district] does not participate in the school improvement program." We disagree. Reasonably construed, the statutes require only that a school district adopt "policies" (i.e., a *plan*) "to ensure" that *if* the district elects to participate in the School Improvement Program, a school site council *will*, "prior to phase-in" of the districtwide program, exist at each school, so that each individual school will be able to decide whether it wishes to participate in the district's program. In other words, the 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. FN14

> FN14 Amicus curiae California School Boards Association suggests that provisions of two other programs-the School-Based Program Coordination Act (Ed. Code, § 52850 et seq.) and the School-Based Pupil Motivation and Maintenance Program and Dropout Recovery Act (Ed. Code, § 54720 et seq.)-require that site councils be established, whether or not the school district participates in the underlying program. In both instances, the statutes make it clear that "prior to a school beginning to develop a [program] plan," the district first must establish a local school site council that in turn will "consider whether or not it wishes the local school to participate in the" program. Amicus curiae misreads the statutes; in both instances, the statutes make it clear that these requirements apply "only to school districts and schools *which participate in*" the respective programs (see Ed. Code, §§ 52850, 54722, italics added), and each statutory scheme provides that school site councils "shall be established at each school *which participates in* " the program. (*Id.*, §§ 52852, 54722, italics added.)

We therefore conclude that, as to eight of the nine funded programs, the statutory notice and agenda obligations exist and apply to claimants only because they have *elected* to participate in, or continue to participate in, the various underlying funded programs-and hence to incur notice and agenda costs that are a condition of program participation. Accordingly, no reimbursable state mandate exists with regard to any of these programs based upon a theory that such costs were incurred under legal compulsion. FN15 ***746**

> FN15 In this case, we have no occasion to decide whether a reimbursable state mandate would arise in a situation in which a local entity voluntarily has elected to participate in a program but also has committed to continue its participation for a specified number of years, and the state imposes additional requirements at a time when the local entity is not free to end its participation.

b.

The Commission and amicus curiae Education Legal Alliance also assert that the Chacon-Moscone Bilingual-Bicultural Education Act of 1976 (another "sunsetted," but still funded, program; Ed. Code, §§ 52160 et seq., 62000, 62000.2, subd. (d), 62002) legally compels school districts to establish advisory committees, regardless whether the district participates in the underlying funded program to which the advisory committees apply. The Commission and amicus curiae rely upon Education Code section 52176's command that each school district with more than 50 pupils of limited English language proficiency, and each school within that district with more than 20 pupils of such proficiency, "*shall* establish a districtwide [or individual school site] advisory committee on bilingual education." (*Id.*, subds. (a) & (b), italics added.)

The Department of Finance responds that because the Chacon-Moscone Bilingual-Bicultural Education program sunsetted in 1987, school districts that have participated in that program since that date have done so not as a matter of legal compulsion, but by their own choice made when they applied for and were granted such program funds.

We note some support for the Department's view. Education Code section 64000 et seq., which governs the funding application process, includes the "sunsetted" Chacon-Moscone Bilingual-Bicultural Education program as one of many optional programs for which a district *may* seek funding. (*Id.*, subd. (a)(4).) But, the Commission argues, another statutory provision suggests that Chacon-Moscone Bilingual-Bicultural Education program advisory committees are mandatory in any event. The Commission notes that section 62002.5 provides that advisory committees "which are in existence pursuant to statutes or regulations as of January 1, 1979, *shall continue* subsequent to termination of funding for the programs sunsetted by this chapter." (Italics added.)

We need not, and do not, determine whether claimants have been legally compelled to participate in the Chacon-Moscone Bilingual-Bicultural Education program, or to maintain a related advisory committee. Even if we assume for purposes of analysis that claimants have been legally compelled to participate in the Chacon-Moscone Bilingual-Bicultural Education program, we nevertheless conclude that under the circumstances here presented, ***747** the costs necessarily incurred in complying with the notice and agenda requirements under that funded program do not entitle claimants to obtain reimbursement under article XIII B, section 6, because the state, in providing program funds to claimants, already has provided funds that may be used to cover the necessary noticeand agenda-related expenses.

We note that, based upon the evaluations made by the Commission, the costs associated with the notice and agenda requirements at issue in this case appear rather modest. FN16 And, even more significantly, we have found nothing to suggest that a school district is precluded from using a portion of the funds obtained from the state for the implementation of the underlying funded program to pay the associated notice and agenda costs. Indeed, the Chacon-Moscone Bilingual-Bicultural Education program explicitly authorizes school districts to do so. (See Ed. Code, § 52168, subd. (b) ["School districts may claim funds appropriated for purposes of this article for expenditures in, but not limited to, the following categories: [¶] ... [¶] (6) Reasonable district administrative expenses ...."].) We believe it is plain that the costs of complying with program-related notice and agenda requirements qualify as "[r]easonable district administrative expenses." Therefore, even if we assume for purposes of analysis that school districts have been legally compelled to participate in the funded Chacon-Moscone Bilingual-Bicultural Education program, we view the state's provision of program funding as satisfying, in advance, any reimbursement requirement.

FN16 Costs of compliance with the notice and agenda requirements have been estimated as amounting to approximately $90 per meeting for the 1994-1995 fiscal year,

> and incrementally larger amounts in subsequent years, up to $106 per meeting for the 2000-2001 fiscal year, for each committee or advisory council. (See State Controller, State Mandated Costs Claiming Instrns. No. 2001-08, School Site Councils and Brown Act Reform (June 4, 2001), Parameters and Guidelines (Mar. 29, 2001) [and implementing forms].) Under these formulae, a district that has 10 schools, each with one council or advisory committee that meets 10 times a year, would be forced to incur approximately $9,000 to $10,000 in costs to comply with statutory notice and agenda requirements. Presumably, such costs are minimal relative to the funds allocated by the state to the school district under these programs. (We hereby grant the Commission's request that we take judicial notice of these and related documents, and of the Commission's December 13, 2001 Statewide Cost Estimate for reimbursement to school districts of noticeand agenda-related expenses.)

It is conceivable, with regard to some programs, that increased compliance costs imposed by the state might become so great-or funded program grants might become so diminished-that funded program benefits would not cover the compliance costs, or that expenditure of granted program funds on administrative costs might violate a spending limitation set out in applicable regulations or statutes. In those circumstances, a compulsory program participant likely would be able to establish the existence of a reimbursable ***748** state mandate under article XIII B, section 6. But that certainly is not the situation faced by claimants in this case. At most, claimants, by being compelled to incur notice and agenda compliance costs-and pay those costs from program funds-have suffered a relatively minor diminution of program funds available to them for substantive program purposes. The circumstance that the program funds claimants may have wished to use exclusively for substantive program activities are thereby reduced, does not in itself transform the related costs into a reimbursable state mandate. (See *County of Sonoma, supra,* 84 Cal.App.4th 1264 [art. XIII B, § 6, provides no right of reimbursement when the state *reduces* revenue granted to local government].) Nor is there any reason to believe that use of granted program funds to pay the relatively modest costs here at issue would violate any applicable spending limitation. FN17

> FN17 With regard to the Chacon-Moscone Bilingual-Bicultural Education program, claimants assert that "[s]tate regulations place a ceiling on the amount of program funds that may be expended for indirect costs at three percent of the district's funding ...." (See Cal. Code Regs., tit. 5, §§ 3900, subd. (g) & 3947, subd. (a).) As the Department observes, applicable statutory provisions appear to set the limit for such expenses for the *same* program at no more than 15 percent of granted program funds. (See Ed. Code, §§ 63000, subd. (d), 63001.) Even assuming, for purposes of analysis, that the regulation, and not the statute, applies with regard to this program, it seems clear that the notice and agenda costs here at issue fall far below 3 percent of granted program funds. Indeed, claimants concede: "The notice and agenda costs at issue are administrative costs that appear to fall within [the regulatory] provisions."

We therefore conclude that because claimants are and have been free to use funds from the Chacon-Moscone Bilingual-Bicultural Education program to pay required program expenses (including the notice and agenda costs here at issue), claimants are not entitled under article XIII B, section 6, to reimbursement from the state for such expenses.

B.

(2a) Claimants contend that even if they have

not been *legally compelled* to participate in most of the programs listed in Education Code section 35147, subdivision (b), and hence have not been *legally required* to incur the related notice and agenda costs, they nevertheless have been compelled as a practical matter to participate in those programs and hence to incur such costs. Claimants assert that school districts have "had no true option or choice but to participate in these [underlying education-related] programs. *This absence of a reasonable alternative to participation is a de facto mandate.*" As explained below, on the facts of this case, we disagree. ***749**

1.

Claimants and amici curiae supporting them, relying upon this court's broad interpretation of the federal mandate provision of article XIII B, section 9, [FN18] in *City of Sacramento, supra*, 50 Cal.3d 51, 70-76, assert that we should recognize and endorse such a broader construction of section 6 of that article-a construction that does not limit the definition of a reimbursable state mandate to circumstances of *legal* compulsion.

> FN18 That provision states: " 'Appropriations subject to limitation' for each entity of government do not include: [¶] ... [¶] (b) Appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly."

In *City of Sacramento, supra*, 50 Cal.3d 51, we considered whether various federal "incentives" for states to extend unemployment insurance coverage to all public employees constituted a reimbursable state mandate under article XIII B, section 6, or a federal mandate within the meaning of article XIII B, section 9.

We concluded in *City of Sacramento, supra*, 50 Cal.3d 51, that there was no reimbursable state mandate under article XIII B, section 6, because the implementing state legislation did not impose any new or increased "program or service," or "unique" requirement, upon local entities. (*City of Sacramento,* at pp. 66-70.)

Turning to the question whether the state legislation constituted a "federal mandate" under article XIII B, section 9, we acknowledged in *City of Sacramento, supra*, 50 Cal.3d 51, that there was no legal compulsion requiring the states to participate in the federal plan to extend unemployment insurance coverage to all public employees. We nevertheless found that the costs related to the program constituted a federal mandate, for purposes of article XIII B, section 9. Our opinion concluded that because the financial consequences to the state and its residents of failing to participate in the federal plan were so onerous and punitive-we characterized the consequences as amounting to "certain and severe federal penalties" including "double ... taxation" and other "draconian" measures (*City of Sacramento*, at p. 74)-as a practical matter, for purposes of article XIII B, section 9, the state was mandated to participate in the federal plan to extend unemployment insurance coverage. ***750**

Claimants, echoing the reasoning of the Court of Appeal below, assert that because this court in *City of Sacramento, supra*, 50 Cal.3d 51, broadly construed the term "federal mandate"-to include not only the situation in which a state or local entity is itself legally compelled to participate in a program and thereby incur costs, but also the situation in which the governmental entity's participation in the federal program is the coerced result of severe penalties that would be imposed for noncompliance-consistency requires that we afford a similarly broad construction to the concept of a state mandate. In other words, claimants argue, the word "mandate," used in two separate sections of article XIII B, should not be given two different meanings.

The Department and the Commission disagree. They assert that, to begin with, a finding of a *federal mandate* under section 9 of article XIII B has a wholly different purpose and effect as compared

with a finding of a *state mandate* under section 6 of that article. The Department and the Commission argue that although a finding of a state mandate may result in reimbursement from the state to a local entity for costs incurred by the local entity, expenditures made in order to comply with a federal mandate are excluded from the constitutional spending cap imposed by article XIII B upon any affected state or local entity, because such expenditures are not considered to be an exercise of the state or local authority's discretionary spending authority.

Moreover, the Department and the Commission assert, our conclusion in *City of Sacramento, supra*, 50 Cal.3d 51, regarding the proper construction of article XIII B, *section 9*, relied upon "crucial facts" (*City of Sacramento*, at p. 73) that do not pertain to the wholly separate issue that we face here-the proper interpretation of article XIII B, *section 6*. They observe that, as we explained in *City of Sacramento*, when article XIII B was enacted: "First, the power of the federal government to impose its direct regulatory will on state and local agencies was *then* sharply in doubt. FN19 Second, in conformity with this principle, the vast bulk of cost-producing federal influence on government at the state and local levels was by inducement or incentive rather than direct [legal] compulsion. That remains so to this day. [¶] Thus, if article XIII B's reference to 'federal mandates' were limited to strict legal compulsion by the federal government, it would have been largely superfluous. It is well settled that 'constitutional ... enactments must receive a liberal, practical common-sense construction which will meet changed conditions and the growing needs of the people. [Citations.] ....' (***751** *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281].) While '[a] constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words[,] [citation] [, t]he literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers. [Citations.]' (*Ibid.*)" (*City of Sacramento, supra*, 50 Cal.3d 51, 73, fns. omitted.)

> FN19 See discussion in *City of Sacramento, supra,* 50 Cal.3d at pages 71-73.

The Department of Finance and the Commission argue that these factors have no bearing upon the proper interpretation of what constitutes a state mandate under article XIII B, section 6. (3)**(See fn. 20)** They assert that, unlike the federal government, which for a time was severely restricted in its ability to directly impose legal requirements upon the states (see *City of Sacramento, supra*, 50 Cal.3d 51, 71-73), the State of California has suffered no such restriction, vis-a-vis local government entities, except in matters involving purely local affairs. FN20 (2b) Accordingly, the Department and the Commission argue, in contrast with the situation we faced when construing article XIII B, section 9, we would not render superfluous the restriction in section 6 of that article, were we narrowly to interpret its term "mandate" to include only programs in which local entities are legally compelled to participate.

> FN20 Unlike the federal-state relationship, sovereignty is not an issue between state and local governments. Claimant school districts are agencies of the state, and not separate or distinct political entities. (See *California Teachers Assn. v. Hayes* (1992) 5 Cal.App.4th 1513, 1524 [7 Cal.Rptr.2d 699].)

We find it unnecessary to resolve whether our reasoning in *City of Sacramento, supra,* 50 Cal.3d 51, applies with regard to the proper interpretation of the term "state mandate" in section 6 of article XIII B. Even assuming, for purposes of analysis only, that our construction of the term "federal mandate" in *City of Sacramento, supra,* 50 Cal.3d 51, applies equally in the context of article XIII, section 6, for reasons set out below we conclude that, contrary to the situation we described in that case, claimants here have not faced "certain and severe ... penalties" such as "double ... taxation"

and other "draconian" consequences (*City of Sacramento, supra*, 50 Cal.3d at p. 74), and hence have not been "mandated," under article XIII, section 6, to incur increased costs.

2.

(4) As we observed in *County of San Diego, supra*, 15 Cal.4th 68, 81, article XIII B, section 6's "purpose is to preclude the state from shifting ***752** financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities." (2c) In light of that purpose, we do not foreclose the possibility that a reimbursable state mandate under article XIII B, section 6, properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional funds.

As noted, claimants argue that they have had "no true option or choice" but to participate in the various programs here at issue, and hence to incur the various costs of compliance, and that "the absence of a reasonable alternative to participation is a de facto [reimbursable state] mandate." In the same vein, amici curiae on behalf of claimants emphasize that as a practical matter, many school districts depend upon categorical funding for various programs. Amicus curiae California State Association of Counties asks us to interpret article XIII B, section 6, as providing state reimbursement for programs that are "*indirectly* state mandated." (Italics added.) Amicus curiae Education Legal Alliance goes so far as to assert that unless we recognize a right to reimbursement for costs such as those here at issue, "California schools could be forced to [forgo] participation in important categorical programs that supply necessary financial and educational support to those segments of the student population that need the most assistance. Alternatively, California schools could be forced to cut other student programs or services to fund these procedural requirements."

The record in the case before us does not support claimants' characterization of the circumstances in which they have been forced to operate, and provides no basis for resolving the accuracy of amici curiae's warnings and predictions. Indeed, we are skeptical of the assertions of claimants and amici curiae.

As observed *ante* (fn. 16), the costs associated with the notice and agenda requirements at issue in this case appear rather modest. Moreover, the parties have not cited, nor have we found, anything in the governing statutes or regulations, or in the record, to suggest that a school district is precluded from using a portion of the program funds obtained from the state to pay associated notice and agenda costs. As noted above, under the Chacon-Moscone Bilingual-Bicultural Education program (Ed. Code, § 52168, subd. (b)(6)), such authority has been granted. As to three of the remaining programs here at issue, such authority also is explicit, or at least strongly implied. (See 20 U.S.C. § 7425(d) [federal Indian Education Program]; ***753**Ed. Code, §§ 63000, subds. (c), (g), 63001 [school improvement program and McAteer Act].) We do not perceive any reason why the Legislature would contemplate a different rule for any of the other programs here at issue, and claimants have advanced no such reason. FN21

FN21 Nor is there any reason to believe that expenditure of granted program funds on the notice and agenda costs at issue would violate any spending limitation set out in applicable regulations or statutes. Claimants assert that with regard to the school improvement programs, state regulations (Cal. Code Regs., tit. 5, §§ 3900, subd. (b), 3947, subd. (a)) limit spending on administrative expenses to no more than 3 percent of granted program funds. As the Department observes, applicable statutory provisions appear to set the limit for such expenses for the *same* program at no more than 15 percent of granted program funds. (See Ed. Code, §§ 63000, subd. (c), 63001.) But even assuming, for purposes

> of analysis, that the regulations apply with regard to this program, claimants have made no showing that the notice and agenda costs here at issue exceed 3 percent of granted program funds. As noted *ante*, at page 732, statewide program grants for the school improvement programs alone amounted to approximately $394 million in fiscal year 1998-1999. According to the Commission, statewide notice and agenda costs for *all nine* of the programs here at issue amounted to only $5.2 million during that same period. (See Com. on State Mandates, Adopted Statewide Cost Estimate, Dec. 13, 2001, p. 1.)
>
> Similarly, claimants have not demonstrated that the notice and agenda costs here at issue exceed the administrative costs spending limitations set for the federal Indian Education Program (see 20 U.S.C. § 7425(d) [5 percent limitation]) and for the McAteer Act's "compensatory education programs" (see Ed. Code, §§ 63000, subd. (g), 63001 [15 percent limitation].)

As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the notice and agenda requirements, or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation-in other words, if, *on balance*, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits.

In essence, claimants assert that their participation in the education-related programs here at issue is so beneficial that, as a practical matter, they feel they must participate in the programs, accept program funds, and-by virtue of Government Code section 54952 and Education Code section 35147-incur expenses necessary to comply with the procedural conditions imposed on program participants. Although it is completely understandable that a participant in a funded program may be disappointed when additional requirements (with their attendant costs) are imposed as a condition of ***754** continued participation in the program, just as such a participant would be disappointed if the total amount of the annual funds provided for the program were reduced by legislative or gubernatorial action, the circumstance that the Legislature has determined that the requirements of an ongoing elective program should be modified does not render a local entity's decision whether to continue its participation in the modified program any less voluntary. FN22 (See *County of Sonoma, supra,* 84 Cal.App.4th 1264 [art. XIII B, § 6, provides no right of reimbursement when the state *reduces* revenue granted to local government].) We reject the suggestion, implicit in claimants' argument, that the state cannot legally provide school districts with funds for voluntary programs, and then effectively reduce that funding grant by requiring school districts to incur expenses in order to meet conditions of program participation.

> FN22 Claimants assert that the notice and agenda requirements were imposed for the first time by Government Code section 54952 and Education Code section 35147 in the mid-1990's-" *after* the school districts decided to participate in the programs listed in Education Code section 35147." Even if we assume, contrary to the opposing position of the Department of Finance, that claimants first were subjected to notice and agenda requirements only after their respective school districts elected to participate in the programs, a school district's *continued* participation in the programs would be no less voluntary. As noted above, school districts have been,

> and remain, legally free to decline to continue to participate in the eight programs here at issue.

In sum, the circumstances presented in the case before us do not constitute the type of nonlegal compulsion that reasonably could constitute, in claimants' phrasing, a "de facto" reimbursable state mandate. Contrary to the situation that we described in *City of Sacramento*, *supra*, 50 Cal.3d 51, a claimant that elects to discontinue participation in one of the programs here at issue does not face "certain and severe ... penalties" such as "double ... taxation" or other "draconian" consequences (*id.*, at p. 74), but simply must adjust to the withdrawal of grant money along with the lifting of program obligations. Such circumstances do not constitute a reimbursable state mandate for purposes of article XIII B, section 6.

IV

For the reasons stated, we conclude that claimants have failed to establish that they are entitled to reimbursement under article XIII B, section 6, of the California Constitution, with regard to any of the program costs here at issue. ***755**

The judgment of the Court of Appeal is reversed.

Kennard, J., Baxter, J., Werdegar, J., Chin, J., Brown, J., and Moreno, J., concurred. ***756**

Cal. 2003.
Department of Finance v. Commission on State Mandates
30 Cal.4th 727, 68 P.3d 1203, 134 Cal.Rptr.2d 237, 176 Ed. Law Rep. 894, 03 Cal. Daily Op. Serv. 4288, 2003 Daily Journal D.A.R. 5463

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TAB NO. 11

64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754, 63 Cal. Comp. Cases 733, 98 Cal. Daily Op. Serv. 4644, 98 Daily Journal D.A.R. 6559
(Cite as: 64 Cal.App.4th 1190)

CITY OF RICHMOND, Plaintiff and Appellant,
v.
COMMISSION ON STATE MANDATES, Defendant and Respondent; DEPARTMENT OF FINANCE, Real Party in Interest and Respondent.

No. C026835.

Court of Appeal, Third District, California.
May 28, 1998.

SUMMARY

A city filed an administrative mandamus action against the Commission on State Mandates, seeking a determination that an amendment to Lab. Code, § 4707, making local safety members of the Public Employees' Retirement System (PERS) eligible for both PERS and workers' compensation death benefits, was a state mandate to which the city was entitled to reimbursement under Cal. Const., art. XIII B, § 6, which applies when a state law establishes a new program or higher level of service payable by local governments. The amendment eliminated local safety members of PERS from the coordination provisions for death benefits payable under workers' compensation and under PERS, whereby survivors of a local safety member of PERS who are killed in the line of duty receive both a death benefit under workers' compensation and a special death benefit under PERS, instead of only the latter. The trial court denied the petition, finding that the amendment created an increased cost but not an increased level of service by local governments. (Superior Court of Sacramento County, No. 96CS03417, James Timothy Ford, Judge.)

The Court of Appeal affirmed. The court held that although the amendment increased the cost of providing services, that could not be equated with requiring an increased level of service, and did not constitute a new program. Neither did the amendment impose a unique requirement on local governments that was not applicable to all residents and entities within the state. The amendment merely made the workers' compensation death benefit requirements as applicable to local governments as they are to private employers. Local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state. Although a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate. The court also held that assembly bill analyses stating that the amendment was a reimbursable state mandate (Cal. Const., art. XIII B, § 6), were irrelevant to the issue. The Legislature has entrusted the determination of what constitutes a state mandate to the Commission on State Mandates, subject to judicial review, and has provided that the initial determination by Legislative Counsel is not binding on the commission. (Opinion by Morrison, J., with Puglia, P. J., and Nicholson, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Administrative Law § 138--Judicial Review and Relief--Appellate Court-- Standard--Decision of Commission on State Mandates.

Under Gov. Code, § 17559, a proceeding to set aside a decision of the Commission on State Mandates on a claim may be commenced on the ground that the commission's decision was not supported by substantial evidence. Where the scope of review in the trial court is whether the administrative decision is supported by substantial evidence, review on appeal is generally the same. However, the appellate court independently reviews the superior court's legal conclusions as to the meaning and effect of constitutional and statutory provisions. The question of whether a law is a state-mandated program or a higher level of service under Cal. Const., art. XIII B, § 6, is a question of law that is reviewed de novo.

(2a, 2b, 2c) State of California § 11--Fiscal Mat-

ters--Reimbursement for State Mandates--Workers' Compensation Death Benefits Payable to Local Safety Members.

An amendment to Lab. Code, § 4707, to eliminate local safety members of the Public Employees' Retirement System (PERS) from the coordination provisions for death benefits payable under workers' compensation and under PERS, whereby the survivors of a local safety member of PERS who is killed in the line of duty receive both a death benefit under workers' compensation and a special death benefit under PERS, instead of only the latter, did not mandate a new program or higher level of service on local governments, requiring a subvention of funds to reimburse the local government under Cal. Const., art. XIII B, § 6. Although the amendment increased the cost of providing services, that could not be equated with requiring an increased level of service, and did not constitute a new program. Neither did it impose a unique requirement on local governments that was not applicable to all residents and entities within the state. The amendment merely made the workers' compensation death benefit requirements as applicable to local governments as they are to private employers.

(3a, 3b) State of California § 11--Fiscal Matters--Reimbursement for State Mandates--Purpose.

Cal. Const., art. XIII B, § 6, which requires a subvention of funds to reimburse local governments when a state law mandates a new program or higher level of service on local governments, was intended to require reimbursement to local agencies 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. Although a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate.
[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 123A.]
(4) Statutes § 43--Construction--Aids--Legislative Analysis--Reimbursement for State Mandates--Legislative Intent.

Assembly bill analyses of an amendment to Lab. Code, § 4707, making local safety members of the Public Employees' Retirement System (PERS) eligible for both PERS and workers' compensation death benefits, stating that it was a reimbursable state mandate (Cal. Const., art. XIII B, § 6), were irrelevant to the issue. The Legislature has entrusted the determination of what constitutes a state mandate to the Commission on State Mandates, subject to judicial review (Gov. Code, §§ 17500, 17559) and has provided that the initial determination by legislative counsel is not binding on the commission (Gov. Code, § 17575).

COUNSEL

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Gary D. Hori and Shawn D. Silva for Defendant and Respondent.

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***1193**

MORRISON, J.

Chapter 478 of the Statutes of 1989 (chapter 478) amended Labor Code section 4707 to eliminate local safety members of the Public Employees'

64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754, 63 Cal. Comp. Cases 733, 98 Cal. Daily Op. Serv. 4644, 98 Daily Journal D.A.R. 6559
(Cite as: 64 Cal.App.4th 1190)

Retirement System (PERS) from the coordination provisions for death benefits payable under workers' compensation and under PERS. As a result, the survivors of a local safety member of PERS who is killed in the line of duty receives both a death benefit under workers' compensation and a special death benefit under PERS, instead of only the latter. This proceeding presents the question whether chapter 478 mandates a new program or higher level of service on local governments, requiring a subvention of funds to reimburse the local government under article XIII B section 6 of the California Constitution. We conclude that chapter 478 is not a state mandate requiring reimbursement and affirm the judgment.

Factual and Procedural Background

The workers' compensation system provides for death benefits payable to the deceased employee's survivors. (Lab. Code, § 4700 et seq.) There are also preretirement death benefits under PERS. (Gov. Code, § 21530 et seq.) There is a special death benefit under PERS if the death was industrial and the deceased was a patrol, state peace officer/ firefighter, state safety officer, state industrial, or local safety member. (Gov. Code, § 21537.) Labor Code section 4707 provides a coordination or offset for workers' compensation death benefits when the special death benefit under PERS is payable. In such cases, no workers' compensation death benefit, other than burial expenses, is payable, except that if the PERS special death benefit is less than the workers' compensation death benefit, the difference is paid as a workers' compensation death benefit. The total death benefit is equal to the greater of the PERS special death benefit or the workers' compensation benefit, not the combination of the two death benefits.

Prior to 1989, Labor Code section 4707 provided in part: "No benefits, except reasonable expenses of burial ... shall be awarded under this division on account of the death of an employee who is a member of the Public Employees' Retirement System unless it shall be determined that a special death benefit ... will not be paid by the Public Employees' Retirement System to the widow or children under 18 years of age, of the deceased, on account of said death, but if the total death allowance paid to said widow and children shall be less than the benefit otherwise payable under this division such widow and children shall be entitled, under this division, to the difference." (Stats. 1977, ch. 468, § 4, pp. 1528-1529.) ***1194**

Chapter 478 amended Labor Code section 4707 to make technical changes, to provide the death benefit is payable to the surviving spouse rather than to the widow, and to add subdivision (b). Subdivision (b) of Labor Code section 4707 reads: "The limitation prescribed by subdivision (a) shall not apply to local safety members of the Public Employees' Retirement System." (Stats. 1989, ch. 478, § 1, p. 1689.)

In 1992, David Haynes, a police officer for the City of Richmond (Richmond), was killed in the line of duty. Officer Haynes was a local safety member of PERS. His wife and children received the PERS special death benefit; they also received a death benefit under workers' compensation.

Richmond filed a test claim with the Commission on State Mandates (the Commission), contending chapter 478 created a state-mandated local cost.[FN1] Richmond sought reimbursement of the cost of the workers' compensation death benefit, estimated to be $295,432. As part of its test claim, Richmond included legislative history of chapter 478, purporting to show a legislative intent to create a reimbursable state mandate.

> FN1 " 'Test claim' means the first claim filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state." (Gov. Code, § 17521.)

The Commission denied the test claim. It found that chapter 478 dealt with workers' compensation benefits and case law held that workers' compensa-

tion laws are laws of general application and not subject to section 6 of article XIII B of the California Constitution. It noted the legislative history containing analyses that chapter 478 was a state mandate had been prepared before the issuance of *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 [266 Cal.Rptr. 139, 785 P.2d 522].

Richmond filed a petition for a writ of administrative mandate under Code of Civil Procedure section 1094.5, seeking to compel the Commission to approve its claim. Both the Commission and the Department of Finance, as real parties in interest, responded. The court denied the petition, finding chapter 478 created an increased cost but not an increased level of service by local governments.

Discussion

I

(1) Under Government Code section 17559, a proceeding to set aside the Commission's decision on a claim may be commenced on the ground that the Commission's decision is not supported by substantial evidence. Where ***1195** the scope of review in the trial court is whether the administrative decision is supported by substantial evidence, our review on appeal is generally the same. (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304].) However, we independently review the superior court's legal conclusions as to the meaning and effect of constitutional and statutory provisions. (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1810 [53 Cal.Rptr.2d 521].) The question of whether chapter 478 is a state-mandated program or higher level of service under article XIII B, section 6 of the California Constitution is a question of law we review de novo. (45 Cal.App.4th at p. 1810.)

With certain exceptions not relevant here, "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service ...." (Cal. Const. art. XIII B, § 6, (hereafter referred to as section 6).)

In *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 [233 Cal.Rptr. 38, 729 P.2d 202], the Supreme Court considered whether laws increasing the amount employers, including local governments, had to pay in certain workers' compensation benefits were a reimbursable "higher level of service" under section 6. The court looked to the intent of the voters in adopting the constitutional provision by initiative. (43 Cal.3d at p. 56.) Noting that the phrase "higher level of service" is meaningless alone, the court found it must be read in conjunction with the phrase "new program." The court concluded, "that the drafters and the electorate had in mind the commonly understood meanings of the term-programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*Ibid.*)

(2a) Richmond contends chapter 478 meets both tests to qualify as a program under section 6. Richmond contends increased death benefits are provided to generate a higher quality of local safety officers and thus provide the public with a higher level of service. Richmond argues that providing increased death benefits to local safety workers is analogous to providing protective clothing and equipment for fire fighters. In *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521 [234 Cal.Rptr. 795], executive orders requiring updated protective clothing and equipment for firefighters were found to be reimbursable state mandates under section 6. The executive orders applied only to fire protection, a peculiarly governmental function. The court noted that police and fire ***1196** protection are two of the most essential and basic functions of local government. (190 Cal.App.3d at p. 537.) Richmond urges that since chapter 478 applies only to local safety members, it is also a state mandate directed to a peculi-

arly local governmental function.

In *Carmel Valley Fire Protection Dist. v. State of California, supra*, 190 Cal.App.3d 521, the executive order required updated equipment for the fighting of fires. The use of this equipment would result in more effective fire protection and thus would provide a higher level of service to the public. Here chapter 478 addresses death benefits, not the equipment used by local safety members. Increasing the cost of providing services cannot be equated with requiring an increased level of service under a section 6 analysis. A higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public. (*City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484 [235 Cal.Rptr. 101] [temporary increase in PERS benefit to retired employees which resulted in higher contribution rate by local government was not a program or service under section 6].) In *County of Los Angeles v. State of California, supra*, 43 Cal.3d 46, the increase in certain workers' compensation benefits resulted in an increase in the cost to local governments of providing services. Nonetheless, the Supreme Court found no "higher level of service" under section 6. Similarly, a new requirement for mandatory unemployment insurance for local government employees, an increase in the cost of providing services, was not a "new program" or "higher level of service" in *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 66-70. Chapter 478 fails to meet the first test of a "program" under section 6.

Richmond urges chapter 478 meets the second test of a program under section 6 because it imposed a unique requirement on local governments that was not applicable to all residents and entities within the state. (*County of Los Angeles v. State of California, supra*, 43 Cal.3d 46, 56.) Richmond argues that only local governments have "local safety members" and chapter 478 required double death benefits, both PERS and workers' compensation, for this specific group of employees. By requiring double death benefits for local safety members, chapter 478 imposed a unique requirement on local government.

The Commission takes a different view of chapter 478. First, it argues that chapter 478 addresses an aspect of workers' compensation law, which, under *County of Los Angeles v. State of California, supra*, 43 Cal.3d 46, is a law of general application to which section 6 does not apply. The Commission argues chapter 478 imposes no unique requirement; it merely ***1197** eliminates the previous exemption from providing workers' compensation death benefits to local safety members. As such, chapter 478 simply puts local government employers on the same footing as all other nonexempt employers, requiring that they provide the workers' compensation death benefit. That chapter 478 affects only local government does not compel the conclusion that it imposes a unique requirement on local government. The Commission contends Richmond's view of chapter 478 is too narrow; the law must be considered in its broader context.

While Richmond's argument has surface appeal, we conclude the Commission's view is the correct one. Section 6 was designed to prevent the state from forcing programs on local government. (3a) "[T]he intent underlying section 6 was to require reimbursement to local agencies 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 passed by the Legislature to 'force' programs on localities." (*County of Los Angeles v. State of California, supra*, 43 Cal.3d at pp. 56-57.) "The goals of article XIII B, of which section 6 is a part, were to protect residents from excessive taxation and government spending. [Citation.] Section 6 had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to local agencies which had had their taxing powers restricted by the enactment of article XIII A in the

64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754, 63 Cal. Comp. Cases 733, 98 Cal. Daily Op. Serv. 4644, 98 Daily Journal D.A.R. 6559
(Cite as: 64 Cal.App.4th 1190)

preceding year and were ill equipped to take responsibility for any new programs. Neither of these goals is frustrated by requiring local agencies to provide the same protections to their employees as do private employers. Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage-costs which all employers must bear-neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services. " (*Id.* at p. 61.)

Although a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate. In *City of Sacramento v. State of California, supra*, 50 Cal.3d 51, the Legislature enacted a statute requiring local governments to participate in the state's unemployment insurance system on behalf of their employees. Local entities made a claim for reimbursement. First, the Supreme Court found that like an increase in workers' compensation benefits, a requirement to provide unemployment insurance did not compel new or increased "service to the public" at the local level. (*Id.* at pp. 66-67.) The court next addressed whether the new law imposed a unique requirement on local governments.

"Here, the issue is whether costs *unrelated* to the provision of public services are *nonetheless* reimbursable costs of government, because they are ***1198** imposed on local governments 'unique[ly],' and not merely as an incident of compliance with general laws. State and local governments, and nonprofit corporations, had previously enjoyed a special *exemption* from requirements imposed on most other employers in the state and nation. Chapter 2/78 merely eliminated the exemption and made these previously exempted entities subject to the general rule. By doing so, it may have imposed a requirement 'new' to local agencies, but that requirement was not 'unique.' [¶] The distinction proposed by plaintiffs would have an anomalous result. The state could avoid subvention under *County of Los Angeles* standards by imposing new obligations on the public and private sectors *at the same time*. However, if it chose to proceed by stages, extending such obligations first to private entities, and only later to local governments, it would have to pay. This was not the intent of our recent decision." (*City of Sacramento v. State of California, supra*, 50 Cal.3d 51, 68-69, italics in original.)

Richmond argues that Labor Code section 4707 , prior to chapter 478, was not an exemption from workers' compensation, relying on *Jones v. Kaiser Industries Corp.* (1987) 43 Cal.3d 552 [237 Cal.Rptr. 568, 737 P.2d 771]. In *Jones,* the plaintiff, a city police officer, was killed in a traffic accident while on duty. His survivors brought suit against the city, contending it has created and maintained a dangerous condition at the intersection where the accident occurred. Plaintiffs argued their suit was not barred by the exclusivity provisions of workers' compensation because they did not receive a workers' compensation death benefit under Labor Code section 4707. The court rejected this argument. First, plaintiffs did receive a benefit under workers' compensation in the form of burial expenses. Further, Labor Code section 4707 was designed not to exclude plaintiffs from receiving workers' compensation benefits, but to assure they received the maximum benefit under either PERS or workers' compensation. (43 Cal.3d at p. 558.)

Under *Jones* v. *Kaiser Industries Corp.*, *supra*, 43 Cal.3d 552, one receiving a special death benefit under PERS rather than the workers' compensation death benefit is not considered exempt from workers' compensation for purposes of its exclusivity provisions, precluding a suit against the employer for negligence. This conclusion does not affect the analysis that chapter 478, by removing the offset provisions for employers of local safety members, merely makes local governments "indistinguishable in this respect from private employers." (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 58.)

(2b) Richmond's error is in viewing chapter 478 from the perspective of what the final result is,

rather than from the perspective of what the law mandates. (3b) "We recognize that, as is made indisputably clear from ***1199** the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state." (*Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 [244 Cal.Rptr. 677, 750 P.2d 318].) (2c) While the result of chapter 478 is that local safety members of PERS now are eligible for two death benefits and local governments will have to fund the workers' compensation benefit, chapter 478 does not mandate double death benefits. Instead, it merely eliminates the offset provisions of Labor Code section 4707. In this regard, the law makes the workers' compensation death benefit requirements as applicable to local governments as they are to private employers. It imposes no "unique requirement" on local governments.

Further, the view that the Legislature was proceeding by stages in enacting chapter 478 finds support in the history of the nearly identical predecessor to chapter 478, Assembly Bill No. 1097 (1987-1988 Reg. Sess.). Assembly Bill No. 1097 was passed in 1988, but was vetoed by the Governor. While the final version of Assembly Bill No. 1097 was virtually identical to chapter 478 in adding subdivision (b) to Labor Code section 4707 (Assem. Bill No. 1097 (1987-1988 Reg. Sess.) as amended Mar. 22, 1988), the bill was very different when it began. The initial version of Assembly Bill No. 1097 repealed Labor Code section 4707 in its entirety. (Assem. Bill No. 1097 (1987-1988 Reg. Sess.) introduced Mar. 2, 1987.) The next version made Labor Code section 4707 applicable only to state members of PERS. (Assem. Bill No. 1097 (1987-1988 Reg. Sess.) as amended June 15, 1987.) The final version left Labor Code section 4707 applicable to all but local safety members of PERS.

II

(4) As part of its test claim, Richmond included portions of the legislative history of chapter 478 to show the Legislature intended to create a state mandate. This history includes numerous bill analyses by legislative committees that state the bill creates a state-mandated local program.

Government Code section 17575 requires the Legislative Counsel to determine if a bill mandates a new program or higher level of service under section 6. If the Legislative Counsel determines the bill will mandate a new program or higher level of service under section 6, the bill must contain a section specifying that reimbursement shall be made from the state mandate fund, that there is no mandate, or that the mandate is being disclaimed. (Gov. Code, § 17579.) The Legislative Counsel found that chapter 478 imposed ***1200** a state-mandated local program. The enacted statute provided: "Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund." (Stats. 1989, ch. 478, § 2, p. 1689.)

One analysis concluded this language was technically deficient because it does not contain a specific acknowledgment that the bill is a state mandate. Reimbursement could not be made until the Commission held a hearing on a test claim. The analysis concluded it "should not be a serious problem because the information provided in this analysis could also be provided to the Commission on State Mandates if any local agency submits a claim for reimbursement to that Commission."

Another analysis suggested including an appropriation to avoid the necessity of the Commission having to determine that the bill was a mandate.

64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754, 63 Cal. Comp. Cases 733, 98 Cal. Daily Op. Serv. 4644, 98 Daily Journal D.A.R. 6559
(Cite as: 64 Cal.App.4th 1190)

Richmond argues this legislative history shows the Legislature intended chapter 478 to be a state mandate and that it should be considered in making that determination. Amici curiae submitted a brief urging that case law holding that legislative history is irrelevant to the issue of whether there is a state-mandated new program or higher level of service under section 6 is wrongly decided. FN2 Amici curiae argue that the intent of the Legislature should control. They further note that the legislative history of chapter 478 shows that the initial opposition of the League of California Cities was dropped after the bill was amended to ensure reimbursement, and that the Governor signed the bill after he had vetoed a similar one that was not considered a state mandate. Amici curiae argue that to ignore the widespread understanding that the bill created a state mandate would undermine the legislative process.

FN2 The California State Association of Counties, and the Cities of Carlsbad, Cudahy, Montebello, Monterey, Redlands, San Luis Obispo and San Pablo filed an amici curiae brief in support of Richmond.

In *County of Los Angeles v. Commission on State Mandates, supra,* 32 Cal.App.4th 805, plaintiff sought reimbursement for costs incurred under Penal Code section 987.9 for providing certain services to indigent criminal defendants. Plaintiff argued the Legislature's initial appropriation of funds to cover the costs incurred under Penal Code section 987.9 was a final and ***1201** unchallengeable determination that section 987.9 constituted a state mandate. The court rejected this argument. "The findings of the Legislature as to whether section 987.9 constitutes a state mandate are irrelevant." (32 Cal.App.4th at p. 818.)

The court, relying on *Kinlaw v. State of California* (1991) 54 Cal.3d 326 [285 Cal.Rptr. 66, 814 P.2d 1308], found the Legislature had created a comprehensive and exclusive procedure for implementing and enforcing section 6. (*County of Los Angeles v. Commission on State Mandates, supra,* 32 Cal.App.4th at pp. 818-819.) This procedure is set forth in Government Code section 17500 et seq. "[T]he statutory scheme contemplates that the Commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. Thus, any legislative findings are irrelevant to the issue of whether a state mandate exists, and the Commission properly determined that no state mandate existed." (32 Cal.App.4th at p. 819.)

In *City of San Jose v. State of California, supra,* 45 Cal.App.4th 1802, 1817-1818, the court relied upon *County of Los Angeles v. Commission on State Mandates, supra,* 32 Cal.App.4th 805, in rejecting the argument that the determination by Legislative Counsel that a bill imposed a state mandate was entitled to deference.

Amici curiae contend these cases are wrong because they ignore the cardinal rules of statutory construction that courts must construe statutes to conform to the purpose and intent of lawmakers and that the intent of the Legislature should be ascertained to effectuate the purpose of the law.

Amici curiae are correct that " 'the objective of statutory interpretation is to ascertain and effectuate legislative intent.' [Citation.]" (*Trope v. Katz* (1995) 11 Cal.4th 274, 280 [45 Cal.Rptr.2d 241, 902 P.2d 259].) Where such intent is not clear from the language of the statute, we may resort to extrinsic aids, including legislative history. (*People v. Coronado* (1995) 12 Cal.4th 145, 151 [48 Cal.Rptr.2d 77, 906 P.2d 1232].) Here, however, the issue is not the interpretation of Labor Code section 4707. The parties agree it requires that the survivors of local safety members killed due to an industrial injury receive both the special death benefit under PERS and the workers' compensation death benefit. Rather, the issue is whether section 6 requires reimbursement for the costs incurred by local governments under chapter 478. The Legislature has entrusted that determination to the Commission, subject to judicial review. (Gov. Code, §§ 17500, 17559.) It has provided that the initial de-

termination by Legislative Counsel is not binding on the Commission. (*Id.*, § 17575.) Indeed, the language of chapter 478 recognizes that the determination of whether the bill is a state mandate lies with *1202 the Commission. It reads, "*if* the Commission on State Mandates determines that this act contains costs mandated by the state, ..." (Stats. 1989, ch. 478, § 2, p. 1689, italics added.) While the legislative history of chapter 478 may evince the understanding or belief of the Legislature that chapter 478 created a state mandate, such understanding or belief is irrelevant to the issue of whether a state mandate exists. (*County of Los Angeles v. Commission on State Mandates, supra*, 32 Cal.App.4th 805, 819.)

Disposition

The judgment is affirmed.

Puglia, P. J., and Nicholson, J., concurred.

Appellant's petition for review by the Supreme Court was denied August 19, 1998. *1203

Cal.App.1.Dist.
City of Richmond v. Commission on State Mandates
64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754, 63 Cal. Comp. Cases 733, 98 Cal. Daily Op. Serv. 4644, 98 Daily Journal D.A.R. 6559

END OF DOCUMENT

TAB NO. 12

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

THOMAS WILLIAM HAYES, as Director, etc., Plaintiff and Respondent,
v.
COMMISSION ON STATE MANDATES, Defendant, Cross-defendant, and Respondent; DALE S. HOLMES, as Superintendent, etc., Real Party in Interest, Cross- complainant and Appellant; WILLIAM CIRONE, as Superintendent, etc., Real Party in Interest and Respondent; STATE OF CALIFORNIA et al., Cross- defendants and Respondents.

No. C009519.

Court of Appeal, Third District, California.
Dec 30, 1992.

SUMMARY

Two school districts filed claims with the State Board of Control for state reimbursement of alleged state-mandated costs incurred in connection with special education programs. The board determined that the costs were state mandated and subject to reimbursement by the state. In a mandamus proceeding, the trial court entered a judgment by which it issued a writ of administrative mandate directing the Commission on State Mandates (the successor to the board) to set aside the board's administrative decision and to reconsider the matter in light of an intervening decision by the California Supreme Court, and by which it denied the petition of one of the school districts for a writ of mandate that would have directed the State Controller to issue a warrant in payment of the district's claim. (Superior Court of Sacramento County, No. 352795, Eugene T. Gualco, Judge.)

The Court of Appeal affirmed. It held that the 1975 amendments to the federal Education of the Handicapped Act (20 U.S.C. § 1401 et seq.) constituted a federal mandate with respect to the state. However, even though the state had no real choice in deciding whether to comply with the act, the act did not necessarily require the state to impose all of the costs of implementation upon local school districts. The court held that to the extent the state implemented the act by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state-mandated and subject to subvention under Cal. Const., art. XIII B, § 6. Thus, on remand to the commission, the court held, the commission was required to focus on the costs incurred by local school districts and on whether those costs were imposed by federal mandate or by the state's voluntary choice in its implementation of the federal program. (Opinion by Sparks, Acting P. J., with Davis and Scotland, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) State of California § 11--Fiscal Matters--Reimbursement to Local Governments--State-mandated Costs:Words, Phrases, and Maxims--Subvention.

"Subvention" generally means a grant of financial aid or assistance, or a subsidy. The constitutional rule of state subvention provides that the state is required to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. This does not mean that the state is required to reimburse local agencies for any incidental cost that may result from the enactment of a state law; rather, the subvention requirement is restricted to governmental services that the local agency is required by state law to provide to its residents. The subvention requirement is intended to prevent the state from transferring the costs of government from itself to local agencies. Reimbursement is required when the state freely chooses to impose on local agencies any peculiarly governmental cost which they were not previously required to absorb.

[See **Cal.Jur.3d,** State of California, § 78; 9 **Witkin,** Summary of Cal. Law (9th ed. 1989) Taxation, §§ 123, 124.]

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

(2) Schools § 4--School Districts--Relationship to State.

A school district's relationship to the state is different from that of local governmental entities such as cities, counties, and special districts. Education and the operation of the public school system are matters of statewide rather than local or municipal concern. Local school districts are agencies of the state and have been described as quasi-municipal corporations. They are not distinct and independent bodies politic. The Legislature's power over the public school system is exclusive, plenary, absolute, entire, and comprehensive, subject only to constitutional constraints. The Legislature has the power to create, abolish, divide, merge, or alter the boundaries of school districts. The state is the beneficial owner of all school properties, and local districts hold title as trustee for the state. School moneys belong to the state, and the apportionment of funds to a school district does not give the district a proprietary interest in the funds. While the Legislature has chosen to encourage local responsibility for control of public education through local school districts, that is a matter of legislative choice rather than constitutional compulsion, and the authority that the Legislature has given to local districts remains subject to the ultimate and nondelegable responsibility of the Legislature.

(3) Property Taxes § 7.8--Real Property Tax Limitation--Exemptions and Special Taxes--Federally Mandated Costs.

Pursuant to Rev. & Tax. Code, § 2271 (local agency may levy rate in addition to maximum property tax rate to pay costs mandated by federal government that are not funded by federal or state government), costs mandated by the federal government are exempt from an agency's taxing and spending limits.

(4) State of California § 11--Fiscal Matters--Reimbursement to Local Governments--State-mandated Costs--Costs Incurred Before Effective Date of Constitutional Provision.

Since Cal. Const., art. XIII B, requiring subvention for state mandates enacted after Jan. 1, 1975, had an effective date of July 1, 1980, a local agency may seek subvention for costs imposed by legislation after Jan. 1, 1975, but reimbursement is limited to costs incurred after July 1, 1980. Reimbursement for costs incurred before July 1, 1980, must be obtained, if at all, under controlling statutory law.

(5) Schools § 53--Parents and Students--Right or Duty to Attend-- Handicapped Children--Federal Rehabilitation Act--Obligations Imposed on Districts.

Section 504 of the federal Rehabilitation Act of 1973 (29 U.S.C. § 794) does not only obligate local school districts to prevent handicapped children from being excluded from school. States typically purport to guarantee all of their children the opportunity for a basic education. In California, basic education is regarded as a fundamental right. All basic educational programs are essentially affirmative action activities in the sense that educational agencies are required to evaluate and accommodate the educational needs of the children in their districts. Section 504 does not permit local agencies to accommodate the educational needs of some children while ignoring the needs of others due to their handicapped condition. The statute imposes an obligation upon local school districts to take affirmative steps to accommodate the needs of handicapped children.

(6) Schools § 53--Parents and Students--Right or Duty to Attend-- Handicapped Children--Education of the Handicapped Act.

The federal Education of the Handicapped Act (20 U.S.C. § 1401 et seq.), which since its 1975 amendment has required recipient states to demonstrate a policy that assures all handicapped children the right to a free appropriate education, is not merely a funding statute; rather, it establishes an enforceable substantive right to a free appropriate public education in recipient states. Congress intended the act to establish a basic floor of opportunity that would bring into compliance all school districts

with the constitutional right to equal protection with respect to handicapped children. It is also apparent that Congress intended to achieve nationwide application.

(7) Civil Rights § 6--Education--Handicapped--Scope of Federal Statute.

Congress intended the Education of the Handicapped Act (20 U.S.C. § 1401 et seq.) to serve as a means by which state and local educational agencies could fulfill their obligations under the equal protection and due process provisions of the Constitution and under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794). Accordingly, where it is applicable, the act supersedes claims under the Civil Rights Act (42 U.S.C. § 1983) and section 504, and the administrative remedies provided by the act constitute the exclusive remedy of handicapped children and their parents or other representatives. As a result of the exclusive nature of the Education of the Handicapped Act, dissatisfied parties in recipient states must exhaust their administrative remedies under the act before resorting to judicial intervention.

(8a, 8b) State of California § 11--Fiscal Matters--Reimbursement to Local Governments--State-mandated Costs--Special Education:Schools § 4--School Districts; Financing; Funds--Special Education Costs--Reimbursement by State.

The 1975 amendments to the federal Education of the Handicapped Act (20 U.S.C. § 1401 et seq.) constituted a federal mandate with respect to the state. However, even though the state had no real choice in deciding whether to comply with the act, the act did not necessarily require the state to impose all of the costs of implementation upon local school districts. To the extent the state implemented the act by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to subvention under Cal. Const., art. XIII B, § 6. Thus, on remand of a proceeding by school districts to the Commission on State Mandates for consideration of whether special education programs constituted new programs or higher levels of service mandated by the state entitling the districts to reimbursement, the commission was required to focus on the costs incurred by local school districts and whether those costs were imposed by federal mandate or by the state's voluntary choice in its implementation of the federal program.

(9) State of California § 11--Fiscal Matters--Reimbursement to Local Governments--Federally Mandated Costs.

The constitutional subvention provision (Cal. Const., art. XIII B, § 6) and the statutory provisions which preceded it do not expressly say that the state is not required to provide a subvention for costs imposed by a federal mandate. Rather, that conclusion follows from the plain language of the subvention provisions themselves. The constitutional provision requires state subvention when "the Legislature or any State agency mandates a new program or higher level of service" on local agencies. Likewise, the earlier statutory provisions required subvention for new programs or higher levels of service mandated by legislative act or executive regulation. 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 implementing 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.

(10) Statutes § 28--Construction--Language--Consistency of Meaning Throughout Statute.

As a general rule and unless the context clearly requires otherwise, it must be assumed that the meaning of a term or phrase is consistent throughout the entire act or constitutional article of which it is a part.

(11) State of California § 11--Fiscal Matters-

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

-Reimbursement to Local Governments--Federally Mandated Costs--Subvention.

Subvention principles are part of a more comprehensive political scheme. The basic purpose of the scheme as a whole was to limit the taxing and spending powers of government. The taxing and spending powers of local agencies were to be "frozen" at existing levels with adjustments only for inflation and population growth. Since local agencies are subject to having costs imposed upon them by other governmental entities, the scheme provides relief in that event. If the costs are imposed by the federal government or the courts, then the costs are not included in the local government's taxing and spending limitations. If the costs are imposed by the state, then the state must provide a subvention to reimburse the local agency. Nothing in the scheme suggests that the concept of a federal mandate should have different meanings depending upon whether one is considering subvention or taxing and spending limitations. Thus, the criteria set forth in a California Supreme Court case concerning whether costs mandated by the federal government are exempt from an agency's taxing and spending limits are applicable when subvention is the issue.

(12) State of California § 11--Fiscal Matters--Reimbursement to Local Governments--State-mandated Costs--Special Education--Applicable Criteria in Determining Whether Subvention Required.

In a proceeding for a writ of mandate to direct the Commission on State Mandates to set aside an administrative decision by the State Board of Control (the commission's predecessor), in which the board found that all local special education costs were state mandated and thus subject to state reimbursement, the trial court did not err in determining that the board failed to consider the issues under the appropriate criteria as set forth in a California Supreme Court case concerning whether costs mandated by the federal government are exempt from an agency's taxing and spending limits. The board relied upon the "cooperative federalism" nature of the Education of the Handicapped Act (20 U.S.C. § 1401 et seq.) without any consideration of whether the act left the state any actual choice in the matter. It also relied on litigation involving another state. However, under the criteria set forth in the Supreme Court's case, the litigation in the other state did not support the board's decision but in fact strongly supported a contrary result.

(13) Courts § 34--Decisions and Orders--Prospective and Retroactive Decisions--Opinion Elucidating Existing Law.

In a California Supreme Court case concerning whether costs mandated by the federal government are exempt from an agency's taxing and spending limits, the court elucidated and enforced existing law. Under such circumstances, the rule of retrospective operation controls. Thus, in a proceeding for a writ of mandate to direct the Commission on State Mandates to set aside an administrative decision by the State Board of Control (the commission's predecessor), in which the board found that all local special education costs were state mandated and thus subject to state reimbursement, the trial court correctly applied the Supreme Court decision to the litigation pending before it.

COUNSEL

Biddle & Hamilton, W. Craig Biddle, Christian M. Keiner and F. Richard Ruderman for Real Party in Interest, Cross-complainant and Appellant. ***1570**

Breon, O'Donnell, Miller, Brown & Dannis and Emi R. Uyehara as Amici Curiae on behalf of Real Party in Interest, Cross-complainant and Appellant.

No appearance for Real Party in Interest and Respondent.

Daniel E. Lungren, Attorney General, N. Eugene Hill, Assistant Attorney General, Cathy Christian and Marsha A. Bedwell, Deputy Attorneys General, and Daniel G. Stone for Plaintiff and Respondent.

Gary D. Hori for Defendant, Cross-defendant and Respondent.

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

Richard J. Chivaro and Patricia A. Cruz for Cross-defendants and Respondents.

SPARKS, Acting P. J.

This appeal involves a decade-long battle over claims for subvention by two county superintendents of schools for reimbursement for mandated special education programs. Section 6 of article XIII B of the California Constitution directs, with exceptions not relevant here, that "[w]henever the Legislature or any State agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, ..." The issue on appeal is whether the special education programs in question constituted new programs or higher levels of service mandated by the state entitling the school districts to reimbursement under section 6 of article XIII B of the California Constitution and related statutes for the cost of implementing them or whether these programs were instead mandated by the federal government for which no reimbursement is due.

The Santa Barbara County Superintendent of Schools and the Riverside County Superintendent of Schools each filed claims with the Board of Control for state reimbursement for alleged state-mandated costs incurred in connection with special education programs. After a lengthy administrative process, the Board of Control rendered a decision finding that all local special education costs were state mandated and subject to state reimbursement. That decision was then successfully challenged in the Sacramento County Superior Court. The superior court entered a judgment by which it: (1) issued a writ of administrative mandate (Code Civ. Proc., § 1094.5), directing the Commission on State Mandates (the successor to the Board of ***1571** Control) to set aside the administrative decision and to reconsider the matter in light of the California Supreme Court's intervening decision in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 [266 Cal.Rptr. 139, 785 P.2d 522]; and (2) denied the Riverside County Superintendent of School's petition for a writ of mandate (Code Civ. Proc., § 1085), which would have directed the State Controller to issue a warrant in payment of the claim. The Riverside County Superintendent of Public Schools appeals. We shall clarify the criteria to be applied by the Commission on State Mandates on remand and affirm the judgment.

I. *The Parties*

This action was commenced in July 1987 by Jesse R. Huff, then the Director of the California Department of Finance. Huff petitioned for a writ of administrative mandate to set aside the administrative decision which found all the special education costs to be state mandated. On appeal Huff appears as a respondent urging that we affirm the judgment.

The Commission on State Mandates (the Commission) is the administrative agency which now has jurisdiction over local agency claims for reimbursement for state-mandated costs. (Gov. Code, § 17525.) In this respect the Commission is the successor to the Board of Control. The Board of Control rendered the administrative decision which is at issue here. Since an appropriation for payment of these claims was not included in a local government claims bill before January 1, 1985, administrative jurisdiction over the claims has been transferred from the Board of Control to the Commission. (Gov. Code, § 17630.) The Commission is the named defendant in the petition for a writ of administrative mandate. In the trial court and on appeal the Commission has appeared as the agency having administrative jurisdiction over the claims, but has not expressed a position on the merits of the litigation.

The Santa Barbara County Superintendent of Schools (hereafter Santa Barbara) is a claimant for state reimbursement of special education costs incurred in the 1979-1980 fiscal year. Santa Barbara is a real party in interest in the proceeding for administrative mandate. Santa Barbara has not appealed from the judgment of the superior court and,

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

although a nominal respondent on appeal, has not filed a brief in this court.

The Riverside County Superintendent of Schools (hereafter Riverside) represents a consortium of school districts which joined together to provide special education programs to handicapped students. Riverside seeks reimbursement for special education costs incurred in the 1980-1981 fiscal year. ***1572** Riverside is a real party in interest in the proceeding for writ of administrative mandate. It filed a cross-petition for a writ of mandate directing the Controller to pay its claim. Riverside is the appellant in this appeal.

The State of California and the State Treasurer are named cross- defendants in Riverside's cross-petition for a writ of mandate. They joined with Huff in this litigation. The State Controller is the officer charged with drawing warrants for the payment of moneys from the State Treasury upon a lawful appropriation. (Cal. Const., art. XVI, § 7.) The State Controller is a named defendant in Riverside's petition for a writ of mandate. In the trial court and on appeal the State Controller expresses no opinion on the merits of Riverside's reimbursement claim, but asserts that the courts lack authority to compel him to issue a warrant for payment of the claim in the absence of an appropriation for payment of the claim.

In addition to the briefing by the parties on appeal, we have permitted a joint amici curiae brief to be filed in support of Riverside by the Monterey County Office of Education, the Monterey County Office of Education Special Education Local Planning Area, and 21 local school districts.

II. *Factual and Procedural Background*

The Legislature has provided an administrative remedy for the resolution of local agency claims for reimbursement for state mandates. In *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62 [222 Cal.Rptr. 750], at pages 71 and 72, we described these procedures as follows (with footnotes deleted): "Section 2250 [Revenue & Taxation Code] and those following it provide a hearing procedure for the determination of claims by local governments. The State Board of Control is required to hear and determine such claims. (§ 2250.) For purposes of such hearings the board consists of the members of the Board of Control provided for in part 4 (commencing with § 13900) of division 3 of title 2 of the Government Code, together with two local government officials appointed by the Governor. (§ 2251.) The board was required to adopt procedures for receiving and hearing such claims. (§ 2252.) The first claim filed with respect to a statute or regulation is considered a 'test claim' or a 'claim of first impression.' (§ 2218, subd. (a).) The procedure requires an evidentiary hearing where the claimant, the Department of Finance, and any affected department or agency can present evidence. (§ 2252.) If the board determines that costs are mandated, then it must adopt parameters and guidelines for the reimbursement of such claims. (§ 2253.2.) The claimant or the state is entitled to commence an action in administrative mandate pursuant to Code of Civil Procedure section 1094.5 to set aside a decision of the board on the grounds that the board's decision is not supported by substantial evidence. (§ 2253.5.) ***1573**

"At least twice each calendar year the board is required to report to the Legislature on the number of mandates it has found and the estimated statewide costs of these mandates. (§ 2255, subd. (a).) In addition to the estimate of the statewide costs for each mandate, the report must also contain the reasons for recommending reimbursement. (§ 2255, subd. (a).) Immediately upon receipt of the report a local government claims bill shall be introduced in the Legislature which, when introduced, must contain an appropriation sufficient to pay for the estimated costs of the mandates. (§ 2255, subd. (a).) In the event the Legislature deletes funding for a mandate from the local government claims bill, then it may take one of the following courses of action: (1) include a finding that the legislation or regulation does not contain a mandate; (2) include a finding that the mandate is not reimbursable; (3)

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

find that a regulation contains a mandate and direct that the Office of Administrative Law repeal the regulation; (4) include a finding that the legislation or regulation contains a reimbursable mandate and direct that the legislation or regulation not be enforced against local entities until funds become available; (5) include a finding that the Legislature cannot determine whether there is a mandate and direct that the legislation or regulation shall remain in effect and be enforceable unless a court determines that the legislation or regulation contains a reimbursable mandate in which case the effectiveness of the legislation or regulation shall be suspended and it shall not be enforced against a local entity until funding becomes available; or (6) include a finding that the Legislature cannot determine whether there is a reimbursable mandate and that the legislation or regulation shall be suspended and shall not be enforced against a local entity until a court determines whether there is a reimbursable mandate. (§ 2255, subd. (b).) If the Legislature deletes funding for a mandate from a local government claims bill but does not follow one of the above courses of action or if a local entity believes that the action is not consistent with article XIII B of the Constitution, then the local entity may commence a declaratory relief action in the Superior Court of the County of Sacramento to declare the mandate void and enjoin its enforcement. (§ 2255, subd. (c).)

"Effective January 1, 1985, the Legislature has established a new commission to consider and determine claims based upon state mandates. This is known as the Commission on State Mandates and it consists of the Controller, the Treasurer, the Director of Finance, the Director of the Office of Planning and Research, and a public member with experience in public finance, appointed by the Governor and approved by the Senate. (Gov. Code, § 17525.) 'Costs mandated by the state' are defined as 'any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which ***1574** mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.' (Gov. Code, § 17514.) The procedures before the Commission are similar to those which were followed before the Board of Control. (Gov. Code, § 17500 et seq.) Any claims which had not been included in a local government claims bill prior to January 1, 1985, were to be transferred to and considered by the commission. (Gov. Code, § 17630; [Rev. & Tax. Code,] § 2239.)"

On October 31, 1980, Santa Barbara filed a test claim with the Board of Control seeking reimbursement for costs incurred in the 1979-1980 fiscal year in connection with the provision of special education services as required by Statutes 1977, chapter 1247, and Statutes 1980, chapter 797. Santa Barbara asserted that these acts should be considered an ongoing requirement of increased levels of service.

Santa Barbara's initial claim was based upon the "mandate contained in the two bills specified above [which require] school districts and county offices to provide full and formal due process procedures and hearings to pupils and parents regarding the special education assessment, placement and the appropriate education of the child." Santa Barbara asserted that state requirements exceeded those of federal law as reflected in section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794). FN1 Santa Barbara's initial claim was for $10,500 in state-mandated costs for the 1979-1980 fiscal year.

> FN1 Section 794 of title 29 of the United States Code will of necessity play an important part in our discussion of the issues presented in this case. That provision was enacted as section 504 of the Rehabilitation Act of 1973. (Pub.L. No. 93-112, tit. V, § 504 (Sept. 26, 1973) 87 Stat. 394.) It has been amended several times. (Pub.L. No. 95-602, tit. I, §§ 119, 122(d)(2) (Nov.

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

6, 1978) 92 Stat. 2982, 2987 [Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978]; Pub.L. No. 99- 506, tit. I, § 103(d)(2)(B), tit. X, § 1002(e)(4) (Oct. 21, 1986) 100 Stat. 1810, 1844; Pub.L. No. 100-259, § 4 (Mar. 22, 1988) 102 Stat. 29; Pub.L. No. 100-630, tit. II, § 206(d) (Nov. 7, 1988) 102 Stat. 3312.) The decisional authorities universally refer to the statute as "section 504." We will adhere to this nomenclature and subsequent references to section 504 will refer to title 29, United States Code, section 794.

During the administrative proceedings Santa Barbara amended its claim to reflect the following state-mandated activities alleged to be in excess of federal requirements: (1) the extension of eligibility to children younger and older than required by federal law; (2) the establishment of procedures to search for and identify children with special needs; (3) assessment and evaluation; (4) the preparation of "Individual Education Plans" (IEP's); (5) due process hearings in placement determinations; (6) substitute teachers; and (7) staff development programs. Santa Barbara was claiming reimbursement in excess of $520,000 for the cost of these services during the 1979- 1980 fiscal year. ***1575**

Also, during the administrative proceedings the focus of federally mandated requirements shifted from section 504 of the Rehabilitation Act to federal Public Law No. 94-142, which amended the Education of the Handicapped Act. (20 U.S.C. § 1401 et seq.) FN2

FN2 The Education of the Handicapped Act was enacted in 1970. (Pub.L. No. 91-230, tit. VI (Apr. 13, 1970) 84 Stat. 175.) It has been amended many times. The amendment of primary interest here was enacted as the Education for All Handicapped Children Act of 1975. (Pub.L. No. 94-142 (Nov. 29, 1975) 89 Stat. 774.) The 1975 legislation significantly amended the Education of the Handicapped Act, but did not change its short title. The Education of the Handicapped Act has now been renamed the Individuals with Disabilities Education Act. (Pub.L. No. 101-476, tit. IX, § 901(b)(21) (Oct. 30, 1990) 104 Stat. 1143; Pub.L. No. 101-476, tit. IX, § 901b; Pub.L. No. 102-119, § 25(b) (Oct. 7, 1991) 105 Stat. 607.) Since at all times relevant here the federal act was known as the Education of the Handicapped Act, we will adhere to that nomenclature.

The Board of Control adopted a decision denying Santa Barbara's claim. The board concluded that the Education of the Handicapped Act resulted in costs mandated by the federal government, that state special education requirements exceed those of federal law, but that "the resulting mandate is not reimbursable because the Legislature already provides funding for all Special Education Services through an appropriation in the annual Budget Act."

Santa Barbara sought judicial review by petition for a writ of administrative mandate. The superior court found the administrative record and the Board of Control's findings to be inadequate. Judgment was rendered requiring the Board of Control to set aside its decision and to rehear the matter to establish a proper record, including findings. That judgment was not appealed.

On October 30, 1981, Riverside filed a test claim for reimbursement of $474,477 in special education costs incurred in the 1980-1981 fiscal year. Riverside alleged that the costs were state mandated by chapter 797 of Statutes 1980. The basis of Riverside's claim was Education Code section 56760, a part of the state special education funding formula which, according to Riverside, "mandates a 10% cap on ratio of students served by special education and within that 10% mandates the ratio of students to be served by certain services." Riverside explained that chapter 797 of Statutes 1980 was enacted as urgency legislation effective

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

July 28, 1980, and that at that time it was already "locked into" providing special education services to more than 13 percent of its students in accordance with prior state law and funding formulae. FN3

FN3 The 1980 legislation required that a local agency adopt an annual budget plan for special education services. (Ed. Code, § 56200.) Education Code section 56760 provided that in the local budget plan the ratio of students to be served should not exceed 10 percent of total enrollment. However, those proportions could be waived for undue hardship by the Superintendent of Public Instruction. (Ed. Code, §§ 56760, 56761.) In addition, the 1980 legislation included provisions for a gradual transition to the new requirements. (Ed. Code, § 56195 et seq.) The transitional provisions included a guarantee of state funding for 1980-1981 at prior student levels with an inflationary adjustment of 9 percent. (Ed. Code, § 56195.8.) The record indicates that Riverside applied for a waiver of the requirements of Education Code section 56760, but that the waiver request was denied due to a shortage of state funding. It also appears that Riverside did not receive all of the 109 percent funding guarantee under Education Code section 56195.8. In light of the current posture of this appeal we need not and do not consider whether the failure of the state to appropriate sufficient funds to satisfy its obligations under the 1980 legislation can be addressed in a proceeding for the reimbursement of state-mandated costs or must be addressed in some other manner.

The Riverside claim, like Santa Barbara's, evolved over time with increases in the amount of reimbursement sought. Eventually the Board of *1576 Control denied Riverside's claim for the same reasons the Santa Barbara claim was denied. Riverside sought review by petition for a writ of administrative mandate. In its decision the superior court accepted the board's conclusions that the Education of the Handicapped Act constitutes a federal mandate and that state requirements exceed those of the federal mandate. However, the court disagreed with the board that any appropriation in the state act necessarily satisfies the state's subvention obligation. The court concluded that the Board of Control had failed to consider whether the state had fully reimbursed local districts for the state-mandated costs which were in excess of the federal mandate, and the matter was remanded for consideration of that question. That judgment was not appealed.

On return to the Board of Control, the Santa Barbara claim and the Riverside claim were consolidated. The Board of Control adopted a decision holding that all special education costs under Statutes 1977, chapter 1247, and Statutes 1980, chapter 797, are state-mandated costs subject to subvention. The board reasoned that the federal Education of the Handicapped Act is a discretionary program and that section 504 of the Rehabilitation Act does not require school districts to implement any programs in response to federal law, and therefore special education programs are optional in the absence of a state mandate.

The claimants were directed to draft, and the Board of Control adopted, parameters and guidelines for reimbursement of special education costs. The board submitted a report to the Legislature estimating that the total statewide cost of reimbursement for the 1980-1981 through 1985-1986 fiscal years would be in excess of $2 billion. Riverside's claim for reimbursement for the 1980-1981 fiscal year was now in excess of $7 million. Proposed legislation which would have appropriated funds for reimbursement of special education costs during the 1980-1981 through 1985- 1986 fiscal years failed to pass in the Legislature. (Sen. Bill No. 1082 (1985-1986 Reg. Sess.).) A separate bill which would have appropriated funds to reimburse

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

Riverside ***1577** for its 1980-1981 claim also failed to pass. (Sen. Bill No. 238 (1987-1988 Reg. Sess.).)

At this point Huff, as Director of the Department of Finance, brought an action in administrative mandate seeking to set aside the decision of the Board of Control. Riverside cross-petitioned for a writ of mandate directing the state, the Controller and the Treasurer to issue a warrant in payment of its claim for the 1980-1981 fiscal year.

The superior court concluded that the Board of Control did not apply the appropriate standard in determining whether any portion of local special education costs are incurred pursuant to a federal mandate. The court found that the definition of a federal mandate set forth by the *Supreme Court in City of Sacramento v. State of California, supra,* 50 Cal.3d 51, "marked a departure from the narrower 'no discretion' test" of this court's earlier decision in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258]. It further found that the standard set forth in the high court's decision in *City of Sacramento* "is to be applied retroactively." Accordingly, the superior court issued a peremptory writ of mandate directing the Commission on State Mandates to set aside the decision of the Board of Control, to reconsider the claims in light of the decision in *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, and "to ascertain whether certain costs arising from Chapter 797/80 and Chapter 1247/77 are federally mandated, and if so, the extent, if any, to which the state-mandated costs exceed the federal mandate." Riverside's cross-petition for a writ of mandate was denied. This appeal followed.

III. *Principles of Subvention*

(1) "Subvention" generally means a grant of financial aid or assistance, or a subsidy. (See Webster's Third New Internat. Dict. (1971) p. 2281.) As used in connection with state-mandated costs, the basic legal requirements of subvention can be easily stated; it is in the application of the rule that difficulties arise.

Essentially, the constitutional rule of state subvention provides that the state is required to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 [233 Cal.Rptr. 38, 729 P.2d 202].) This does not mean that the state is required to reimburse local agencies for any incidental cost that may result from the enactment of a state law; rather, the subvention requirement is restricted to governmental services which the local agency is required by ***1578** state law to provide to its residents. (*City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 70.) The subvention requirement is intended to prevent the state from transferring the costs of government from itself to local agencies. (*Id.* at p. 68.) Reimbursement is required when the state "freely chooses to impose on local agencies *any* peculiarly 'governmental' cost which they were not previously required to absorb." (*Id.* at p. 70, italics in original.)

The requirement of subvention for state-mandated costs had its genesis in the "Property Tax Relief Act of 1972" which is also known as "SB 90" (Senate Bill No. 90). (*City of Sacramento v. State of California, supra,* 156 Cal.App.3d at p. 188 .) That act established limitations upon the power of local governments to levy taxes and concomitantly prevented the state from imposing the cost of new programs or higher levels of service upon local governments. (*Ibid.*) The Legislature declared: "It is the intent in establishing the tax rate limits in this chapter to establish limits that will be flexible enough to allow local governments to continue to provide existing programs, that will be firm enough to insure that the property tax relief provided by the Legislature will be long lasting and that will afford the voters in each local government jurisdiction a more active role in the fiscal affairs of such jurisdictions." (Rev. & Tax. Code, former § 2162, Stats. 1972, ch. 1406, § 14.7, p. 2961.) [FN4] The act provided that the state would pay each county, city and county, city, and special district the sums

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

which were sufficient to cover the total cost of new state-mandated costs. (See Rev. & Tax. Code, former § 2164.3, Stats. 1972, ch. 1406, § 14.7, pp. 2962-2963.) New state-mandated costs would arise from legislative action or executive regulation after January 1, 1973, which mandated a new program or higher level of service under an existing mandated program. (*Ibid.*)

> FN4 In addition to requiring subventions for new state programs and higher levels of service, Senate Bill No. 90 required the state to reimburse local governments for revenues lost by the repeal or reduction of property taxes on certain classes of property. In this connection the Legislature said: "It is the purpose of this part to provide property tax relief to the citizens of this state, as undue reliance on the property tax to finance various functions of government has resulted in serious detriment to one segment of the taxpaying public. The subventions from the State General Fund required under this part will serve to partially equalize tax burdens among all citizens, and the state as a whole will benefit." (Gov. Code, § 16101, Stats. 1972, ch. 1406, § 5, p. 2953.)

(2)**(See fn. 5.)** Senate Bill No. 90 did not specifically include school districts in the group of agencies entitled to reimbursement for state-mandated costs.[FN5] (Rev. & Tax. Code, former § 2164.3, Stats. 1972, ch. 1406. § 14.7, pp. 2962-2963.) In fact, at that time methods of financing education in this state were ***1579** undergoing fundamental reformation as the result of the litigation in *Serrano v. Priest* (1971) 5 Cal.3d 584 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187]. At the time of the *Serrano* decision local property taxes were the primary source of school revenue. (*Id.* at p. 592.) In *Serrano,* the California Supreme Court held that education is a fundamental interest, that wealth is a suspect classification, and that an educational system which produces disparities of opportunity based upon district wealth would violate principles of equal protection. (*Id.* at pp. 614-615, 619.) A major portion of Senate Bill No. 90 constituted new formulae for state and local contributions to education in a legislative response to the decision in *Serrano.* (Stats. 1972, ch. 1406, §§ 1.5-2.74, pp. 2931-2953. See *Serrano v. Priest* (1976) 18 Cal.3d 728, 736- 737 [135 Cal.Rptr. 345, 557 P.2d 929].)[FN6]

> FN5 A school district's relationship to the state is different from that of local governmental entities such as cities, counties, and special districts. Education and the operation of the public school system are matters of statewide rather than local or municipal concern. (*California Teachers Assn. v. Huff* (1992) 5 Cal.App.4th 1513, 1524 [7 Cal.Rptr.2d 699].) Local school districts are agencies of the state and have been described as quasi-municipal corporations. (*Ibid.*) They are not distinct and independent bodies politic. (*Ibid.*) The Legislature's power over the public school system has been described as exclusive, plenary, absolute, entire, and comprehensive, subject only to constitutional constraints. (*Ibid.*) The Legislature has the power to create, abolish, divide, merge, or alter the boundaries of school districts. (*Id.* at p. 1525.) The state is the beneficial owner of all school properties and local districts hold title as trustee for the state. (*Ibid.*) School moneys belong to the state and the apportionment of funds to a school district does not give the district a proprietary interest in the funds. (*Ibid.*) While the Legislature has chosen to encourage local responsibility for control of public education through local school districts, that is a matter of legislative choice rather than constitutional compulsion and the authority that the Legislature has given to local districts remains subject to the ultimate and nondelegable responsibility of the Legis-

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

lature. (*Id.* at pp. 1523-1524.)

FN6 After the first *Serrano* decision, the United States Supreme Court held that equal protection does not require dollar-for-dollar equality between school districts. (*San Antonio School District v. Rodriguez* (1973) 411 U.S. 1, 33-34 48-56, 61-62 [36 L.Ed.2d 16, 42-43, 51-56, 59-60, 93 S.Ct. 1278].) In the second *Serrano* decision, the California Supreme Court adhered to the first *Serrano* decision on independent state grounds. (*Serrano v. Priest, supra,* 18 Cal.3d at pp. 761-766.) The court concluded that Senate Bill No. 90 and Assembly Bill No. 1267, enacted the following year (Stats. 1973, ch. 208, p. 529 et seq.), did not satisfy equal protection principles. (*Serrano v. Priest, supra,* 18 Cal.3d at pp. 776-777.) Additional complications in educational financing arose as the result of the enactment of article XIII A of the California Constitution at the June 1978 Primary Election (Proposition 13), which limited the taxes which can be imposed on real property and forced the state to assume greater responsibility for financing education (see Ed. Code, § 41060), and the enactment of Propositions 98 and 111 in 1988 and 1990, respectively, which provide formulae for minimum state funding for education. (See generally *California Teachers Assn. v. Huff, supra,* 5 Cal.App.4th 1513.)

The provisions of Senate Bill No. 90 were amended and refined in legislation enacted the following year. (Stats. 1973, ch. 358.) Revenue and Taxation Code section 2231, subdivision (a), was enacted to require the state to reimburse local agencies, including school districts, for the full costs of new programs or increased levels of service mandated by the Legislature after January 1, 1973. Local agencies except school districts were also entitled to reimbursement for costs mandated by executive regulation after January 1, 1973. (Rev. & Tax. Code, § 2231, subd. (d), added by Stats. 1973, ch. 358, § 3, p. 783 ***1580** and repealed by Stats. 1986, ch. 879, § 23, p. 3045.) In subsequent years legislation was enacted to entitle school districts to subvention for state-mandated costs imposed by legislative acts after January 1, 1973, or by executive regulation after January 1, 1978. (Rev. & Tax. Code, former § 2207.5, added by Stats. 1977, ch. 1135, § 5, p. 3646 and amended by Stats. 1980, ch. 1256, § 5, pp. 4248-4249.)

In the 1973 legislation, Revenue and Taxation Code section 2271 was enacted to provide, among other things: "A local agency may levy, or have levied on its behalf, a rate in addition to the maximum property tax rate established pursuant to this chapter (commencing with Section 2201) to pay costs mandated by the federal government or costs mandated by the courts or costs mandated by initiative enactment, which are not funded by federal or state government." (3) In this respect costs mandated by the federal government are exempt from an agency's taxing and spending limits. (*City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 71, fn. 17.)

At the November 6, 1979, General Election, the voters added article XIII B to the state Constitution by enacting Proposition 4. That article imposes spending limits on the state and all local governments. For purposes of article XIII B the term "local government" includes school districts. (Cal. Const., art. XIII B, § 8, subd. (d).) The measure accomplishes its purpose by limiting a governmental entity's annual appropriations to the prior year's appropriations limit adjusted for changes in the cost of living and population growth, except as otherwise provided in the article. (Cal. Const., art. XIII B, § 1.) FN7 The appropriations subject to limitation do not include, among other things: "Appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the pro-

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

vision of existing services more costly." (Cal. Const., art. XIII B, § 9, subd. (b).)

> FN7 As it was originally enacted, article XIII B required that all governmental entities return revenues in excess of their appropriations limits to the taxpayers through tax rate or fee schedule revisions. In Proposition 98, adopted at the November 1988 General Election, article XIII B was amended to provide that half of state excess revenues would be transferred to the state school fund for the support of school districts and community college districts. (See Cal. Const., art. XVI, § 8.5; *California Teachers Assn. v. Huff, supra,* 5 Cal.App.4th 1513.)

Like its statutory predecessor, the constitutional initiative measure includes a provision designed "to preclude the state from shifting to local agencies the financial responsibility for providing public services in view of these restrictions on the taxing and spending power of the local entities." (*Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835-836 [244 Cal.Rptr. 677, 750 P.2d 318].) Section 6 of article XIII B of the state Constitution provides: "Whenever the Legislature or any State agency mandates a new program or higher level of service on any local government, the ***1581** State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

Although article XIII B of the state Constitution requires subvention for state mandates enacted after January 1, 1975, the article had an effective date of July 1, 1980. (Cal. Const., art. XIII B, § 10.) (4) Accordingly, under the constitutional provision, a local agency may seek subvention for costs imposed by legislation after January 1, 1975, but reimbursement is limited to costs incurred after July 1, 1980. (*City of Sacramento v. State of California, supra,* 156 Cal.App.3d at pp. 190-193.) Reimbursement for costs incurred before July 1, 1980, must be obtained, if at all, under controlling statutory law. (See 68 Ops.Cal.Atty.Gen. 244 (1985).)

The constitutional subvention provision, like the statutory scheme before it, requires state reimbursement whenever "the Legislature or any State agency" mandates a new program or higher level of service. (Cal. Const., art. XIII B, § 6.) Accordingly, it has been held that state subvention is not required when the federal government imposes new costs on local governments. (*City of Sacramento v. State of California, supra,* 156 Cal.App.3d at p. 188; see also *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 543 [234 Cal.Rptr. 795].) In our *City of Sacramento* decision this court held that a federal program in which the state participates is not a federal mandate, regardless of the incentives for participation, unless the program leaves state or local government with no discretion as to alternatives. (156 Cal.App.3d at p. 198.)

In its *City of Sacramento* opinion, FN8 the California Supreme Court rejected this court's earlier formulation. In doing so the high court noted that the vast bulk of cost-producing federal influence on state and local government is by inducement or incentive rather than direct compulsion. (50 Cal.3d at p. 73.) However, "certain regulatory standards imposed by the federal government ***1582** under 'cooperative federalism' schemes are coercive on the states and localities in every practical sense." (*Id.* at pp. 73-74.) The test for determining whether there is a federal mandate is whether compliance with federal standards "is a matter of true choice," that is, whether participation in the federal program "is truly voluntary." (*Id.* at p. 76.) The court went on to

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

say: "Given the variety of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." (*Ibid.*)

> FN8 The Supreme Court's decision in *City of Sacramento* was not a result of direct review of this court's decision. The Supreme Court denied a petition for review of this court's *City of Sacramento* decision. After the Board of Control had adopted parameters and guidelines for reimbursement under this court's decision, the Legislature failed to appropriate the funds necessary for such reimbursement. The litigation which resulted in the Supreme Court's *City of Sacramento* decision was commenced as an action to enforce the result on remand from this court's *City of Sacramento* decision. (See 50 Cal.3d at p. 60.)

IV. *Special Education*

The issues in this case cannot be resolved by consideration of a particular federal act in isolation. Rather, reference must be made to the historical and legal setting of which the particular act is a part. Our consideration begins in the early 1970's.

In considering the 1975 amendments to the Education of the Handicapped Act, Congress referred to a series of "landmark court cases" emanating from 36 jurisdictions which had established the right to an equal educational opportunity for handicapped children. (See *Smith v. Robinson* (1984) 468 U.S. 992, 1010 [82 L.Ed.2d 746, 763, 104 S.Ct. 3457].) Two federal district court cases, *Pennsylvania Ass'n, Ret'd Child. v. Commonwealth of Pa.* (E.D.Pa. 1972) 343 F.Supp. 279 (see also *Pennsylvania Ass'n, Retard. Child. v. Commonwealth of Pa.* (E.D.Pa. 1971) 334 F.Supp. 1257), and *Mills v. Board of Education of District of Columbia* (D.D.C. 1972) 348 F.Supp. 866, were the most prominent of these judicial decisions. (See *Hendrick Hudson Dist. Bd. of Ed. v. Rowley* (1982) 458 U.S. 176, 180, fn. 2 [73 L.Ed.2d 690, 695, 102 S.Ct. 3034].)

In the Pennsylvania case, an association and the parents of certain retarded children brought a class action against the commonwealth and local school districts in the commonwealth, challenging the exclusion of retarded children from programs of education and training in the public schools. (*Pennsylvania Ass'n, Ret'd. Child. v. Commonwealth of Pa., supra,* 343 F.Supp. at p. 282.) The matter was assigned to a three- judge panel which heard evidence on the plaintiffs' due process and equal protection claims. (*Id.* at p. 285.) The parties then agreed to resolve the litigation by means of a consent ***1583** judgment. (*Ibid.*) The consent agreement required the defendants to locate and evaluate all children in need of special education services, to reevaluate placement decisions periodically, and to accord due process hearings to parents who are dissatisfied with placement decisions. (*Id.* at pp. 303-306.) It required the defendants to provide "a free public program of education and training appropriate to the child's capacity." (*Id.* at p. 285, italics deleted.)

In view of the consent agreement the district court was not required to resolve the plaintiffs' equal protection and due process contentions. Rather, it was sufficient for the court to find that the suit was not collusive and that the plaintiffs' claims were colorable. The court found: "Far from an indication of collusion, however, the Commonwealth's willingness to settle this dispute reflects an intelligent response to overwhelming evidence against [its] position." (*Pennsylvania Ass'n, Ret'd. Child. v. Commonwealth of Pa., supra,* 343 F.Supp. at p. 291.) The court said that it was convinced the due process and equal protection claims were colorable. (*Id.* at pp. 295-296.)

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

In the *Mills* case, an action was brought on behalf of a number of school-age children with exceptional needs who were excluded from the Washington, D.C., public school system. (*Mills v. Board of Education of District of Columbia, supra,* 348 F.Supp. at p. 868.) The district court concluded that equal protection entitled the children to a public-supported education appropriate to their needs and that due process required a hearing with respect to classification decisions. (*Id.* at pp. 874-875.) The court said: "If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child." (*Id.* at p. 876.)

In the usual course of events, the development of principles of equal protection and due process as applied to special education, which had just commenced in the early 1970's with the authorities represented by the *Pennsylvania* and *Mills* cases, would have been fully expounded through appellate processes. However, the necessity of judicial development was truncated by congressional action. In the Rehabilitation Act of 1973, section 504, Congress provided: "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) [now 706(8)] of this title, ***1584** shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...." (29 U.S.C. § 794, Pub.L. No. 93-112, tit. V, § 504 (Sept. 26, 1973) 87 Stat. 394.) [FN9] Since federal assistance to education is pervasive (see, e.g., Ed. Code, §§ 12000-12405, 49540 et seq., 92140 et seq.), section 504 was applicable to virtually all public educational programs in this and other states.

> FN9 In section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, the application of section 504 was extended to federal executive agencies and the United States Postal Service. (Pub.L. No. 95-602, tit. I, § 119 (Nov. 6, 1978) 92 Stat. 2982.) The section is now subdivided and includes subdivision (b), which provides that the section applies to all of the operations of a state or local governmental agency, including local educational agencies, if the agency is extended federal funding for any part of its operations. (29 U.S.C. § 794.) This latter amendment was in response to judicial decisions which had limited the application of section 504 to the particular activity for which federal funding is received. (See *Consolidated Rail Corporation v. Darrone* (1984) 465 U.S. 624,635-636 [79 L.Ed.2d 568, 577-578, 104 S.Ct. 1248].)

The Department of Health, Education and Welfare (HEW) promulgated regulations to ensure compliance with section 504 by educational agencies. [FN10] The regulations required local educational agencies to locate and evaluate handicapped children in order to provide appropriate educational opportunities and to provide administrative hearing procedures in order to resolve disputes. The federal courts concluded that section 504 was essentially a codification of the equal protection rights of citizens with disabilities. (See *Halderman v. Pennhurst State School & Hospital* (E.D.Pa. 1978) 446 F.Supp. 1295, 1323.) Courts also held that section 504 embraced a private cause of action to enforce its requirements. (*Sherry v. New York State Ed. Dept.* (W.D.N.Y. 1979) 479 F.Supp. 1328, 1334; *Doe v. Marshall* (S.D.Tex. 1978) 459 F.Supp. 1190, 1192.) It was further held that section 504 imposed upon school districts and other public educational

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

agencies "the duty of analyzing individually the needs of each handicapped student and devising a program which will enable each individual handicapped student to receive an appropriate, free public education. The failure to perform this analysis and structure a program suited to the needs of each handicapped child, constitutes discrimination against that child and a failure to provide an appropriate, free ***1585** public education for the handicapped child." (*Doe v. Marshall, supra,* 459 F.Supp. at p. 1191. See also *David H. v. Spring Branch Independent School Dist.* (S.D.Tex. 1983) 569 F.Supp. 1324, 1334; *Halderman v. Pennhurst State School & Hospital, supra,* 446 F.Supp. at p. 1323.)

> FN10 HEW was later dissolved and its responsibilities are now shared by the federal Department of Education and the Department of Health and Human Services. The promulgation of regulations to enforce section 504 had a somewhat checkered history. Initially HEW determined that Congress did not intend to require it to promulgate regulations. The Senate Public Welfare Committee then declared that regulations were intended. By executive order and by judicial decree in *Cherry v. Mathews* (D.D.C. 1976) 419 F.Supp. 922, HEW was required to promulgate regulations. The ensuing regulations were embodied in title 45 Code of Federal Regulations part 84, and are now located in title 34 Code of Federal Regulations part 104. (See *Southeastern Community College v. Davis* (1979) 442 U.S. 397, 404, fn. 4 [60 L.Ed.2d 980, 987, 99 S.Ct. 2361]; *N. M. Ass'n for Retarded Citizens v. State of N. M.* (10th Cir. 1982) 678 F.2d 847, 852.)

(5) Throughout these proceedings Riverside, relying upon the decision in *Southeastern Community College v. Davis, supra,* 442 U.S. 397 [60 L.Ed.2d 980], has contended that section 504 cannot be considered a federal mandate because it does not obligate local school districts to take any action to accommodate the needs of handicapped children so long as they are not excluded from school. That assertion is not correct.

In the *Southeastern Community College* case a prospective student with a serious hearing disability sought to be admitted to a postsecondary educational program to be trained as a registered nurse. As a result of her disability the student could not have completed the academic requirements of the program and could not have attended patients without full-time personal supervision. She sought to require the school to waive the academic requirements, including an essential clinical program, which she could not complete and to otherwise provide full-time personal supervision. That demand, the Supreme Court held, was beyond the scope of section 504, which did not require the school to modify its program affirmatively and substantially. (442 U.S. at pp. 409-410 [60 L.Ed.2d at pp. 990- 991].)

The *Southeastern Community College* decision is inapposite. States typically do not guarantee their citizens that they will be admitted to, and allowed to complete, specialized postsecondary educational programs. State educational institutions often impose stringent admittance and completion requirements for such programs in higher education. In the *Southeastern Community College* case the Supreme Court simply held that an institution of higher education need not lower or effect substantial modifications of its standards in order to accommodate a handicapped person. (442 U.S. at p. 413 [60 L.Ed.2d at pp. 992-993].) The court did not hold that a primary or secondary educational agency need do nothing to accommodate the needs of handicapped children. (See *Alexander v. Choate* (1985) 469 U.S. 287, 301 [83 L.Ed.2d 661, 672, 105 S.Ct. 712].)

States typically do purport to guarantee all of their children the opportunity for a basic education. In fact, in this state basic education is regarded as a fundamental right. (*Serrano v. Priest, supra,* 18

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

Cal.3d at pp. 765-766.) All basic educational programs are essentially affirmative action activities in the sense that educational agencies are required to evaluate and accommodate ***1586** the educational needs of the children in their districts. Section 504 would not appear to permit local agencies to accommodate the educational needs of some children while ignoring the needs of others due to their handicapped condition. (Compare *Lau v. Nichols* (1974) 414 U.S. 563 [39 L.Ed.2d 1, 94 S.Ct. 786], which required the San Francisco Unified School District to take affirmative steps to accommodate the needs of non-English speaking students under section 601 of the Civil Rights Act of 1964.)

Riverside's view of section 504 is inconsistent with congressional intent in enacting it. The congressional record makes it clear that section 504 was perceived to be necessary not to combat affirmative animus but to cure society's benign neglect of the handicapped. The record is replete with references to discrimination in the form of the denial of special educational assistance to handicapped children. In *Alexander v. Choate, supra,* 469 U.S. at pages 295 to 297 [83 L.Ed.2d at pages 668- 669], the Supreme Court took note of these comments in concluding that a violation of section 504 need not be proven by evidence of purposeful or intentional discrimination. With respect to the *Southeastern Community College v. Davis, supra,* 442 U.S. 397 case, the high court said: "The balance struck in *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made. ..." (*Alexander v. Choate, supra,* 469 U.S. at p. 301 [83 L.Ed.2d at p. 672], fn. omitted.)

Federal appellate courts have rejected the argument that the *Southeastern Community College* case means that pursuant to section 504 local educational agencies need do nothing affirmative to accommodate the needs of handicapped children. (*N. M. Ass'n for Retarded Citizens v. State of N. M., supra,* 678 F.2d at pp. 852-853; *Tatro v. State of Texas* (5th Cir. 1980) 625 F.2d 557, 564 [63 A.L.R. Fed. 844].) [FN11] We are satisfied that section 504 does impose an obligation upon local school districts to accommodate the needs of handicapped children. However, as was the case with constitutional principles, full judicial development of section 504 as it relates to special education in elementary and secondary school districts was truncated by congressional action. ***1587**

> FN11 Following a remand and another decision by the Court of Appeals, the *Tatro* litigation, *supra,* eventually wound up in the Supreme Court. (*Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883 [82 L.Ed.2d 664, 104 S.Ct. 3371].) However, by that time the Education of the Handicapped Act had replaced section 504 as the means for vindicating the education rights of handicapped children and the litigation was resolved, favorably for the child, under that act.

In 1974 Congress became dissatisfied with the progress under earlier efforts to stimulate the states to accommodate the educational needs of handicapped children. (*Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra,* 458 U.S. at p. 180 [73 L.Ed.2d at p. 695].) These earlier efforts had included a 1966 amendment to the Elementary and Secondary Education Act of 1965, and the 1970 version of the Education of the Handicapped Act. (*Ibid.*) The prior acts had been grant programs that did not contain specific guidelines for a state's use of grant funds. (*Ibid.*) In 1974 Congress greatly increased federal funding for education of the handicapped and simultaneously required recipient states to adopt a goal of providing full educational opportunities to all handicapped children. (*Ibid.* [73 L.Ed.2d at pp. 695-696].) The following year Congress amended

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

the Education of the Handicapped Act by enacting the Education for All Handicapped Children Act of 1975. (*Ibid.* [73 L.Ed.2d at p. 696].)

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. (20 U.S.C. § 1412(1).) (6) The act is not merely a funding statute; rather, it establishes an enforceable substantive right to a free appropriate public education in recipient states. (*Smith v. Robinson, supra,* 468 U.S. at p. 1010 [82 L.Ed.2d at p. 764].) To accomplish this purpose the act incorporates the major substantive and procedural requirements of the "right to education" cases which were so prominent in the congressional consideration of the measure. (*Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra,* 458 U.S. at p. 194 [73 L.Ed.2d at p. 704].) The substantive requirements of the act have been interpreted in a manner which is "strikingly similar" to the requirements of section 504 of the Rehabilitation Act of 1973. (*Smith v. Robinson, supra,* 468 U.S. at pp. 1016-1017 [82 L.Ed.2d at p. 768].) The Supreme Court has noted that Congress intended the act to establish " 'a basic floor of opportunity that would bring into compliance all school districts with the constitutional right to equal protection with respect to handicapped children.' " (*Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra,* 458 U.S. at p. 200 [73 L.Ed.2d at p. 708] citing the House of Representatives Report.) FN12

> FN12 Consistent with its "basic floor of opportunity" purpose, the act does not require local agencies to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Rather, the act requires that handicapped children be accorded meaningful access to a free public education, which means access that is sufficient to confer some educational benefit. (*Ibid.*)

It is demonstrably manifest that in the view of Congress the substantive requirements of the 1975 amendment to the Education of the Handicapped Act were commensurate with the constitutional obligations of state and local ***1588** educational agencies. Congress found that "State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children;" and "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law." (20 U.S.C. former § 1400(b)(8) & (9).) FN13

> FN13 That Congress intended to enforce the Fourteenth Amendment to the United States Constitution in enacting the Education of the Handicapped Act has since been made clear. In *Dellmuth v. Muth* (1989) 491 U.S. 223 at pages 231 and 232 [105 L.Ed.2d 181, 189-191, 109 S.Ct. 2397], the court noted that Congress has the power under section 5 of the Fourteenth Amendment to abrogate a state's Eleventh Amendment immunity from suit in federal court, but concluded that the Education of the Handicapped Act did not clearly evince such a congressional intent. In 1990 Congress responded by expressly abrogating state sovereign immunity under the act. (20 U.S.C. § 1403.)

It is also apparent that Congress intended the act to achieve nationwide application: "It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped chil-

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

dren, and to assess and assure the effectiveness of efforts to educate handicapped children." (20 U.S.C. former § 1400(c).)

In order to gain state and local acceptance of its substantive provisions, the Education of the Handicapped Act employs a "cooperative federalism" scheme, which has also been referred to as the "carrot and stick" approach. (See *City of Sacramento v. State of California, supra,* 50 Cal.3d at pp. 73-74; *City of Sacramento v. State of California, supra,* 156 Cal.App.3d at p. 195.) As an incentive Congress made substantial federal financial assistance available to states and local educational agencies that would agree to adhere to the substantive and procedural terms of the act. (20 U.S.C. §§ 1411 , 1412.) For example, the administrative record indicates that for fiscal year 1979-1980, the base year for Santa Barbara's claim, California received $71.2 million in federal assistance, and during fiscal year 1980-1981, the base year for Riverside's claim, California received $79.7 million. We cannot say that such assistance on an ongoing basis is trivial or insubstantial.

Contrary to Riverside's argument, federal financial assistance was not the only incentive for a state to comply with the Education of the Handicapped Act. (7) Congress intended the act to serve as a means by which state and ***1589** local educational agencies could fulfill their obligations under the equal protection and due process provisions of the Constitution and under section 504 of the Rehabilitation Act of 1973. Accordingly, where it is applicable the act supersedes claims under the Civil Rights Act (42 U.S.C. § 1983) and section 504 of the Rehabilitation Act of 1973, and the administrative remedies provided by the act constitute the exclusive remedy of handicapped children and their parents or other representatives. (*Smith v. Robinson, supra,* 468 U.S. at pp. 1009, 1013, 1019 [82 L.Ed.2d at pp. 763, 766, 769].) FN14

FN14 In *Smith v. Robinson, supra,* the court concluded that since the Education of the Handicapped Act did not include a provision for attorney fees, a successful complainant was not entitled to an award of such fees even though such fees would have been available in litigation under section 504 of the Rehabilitation Act of 1973 or section 1983 of the Civil Rights Act. Congress reacted by adding a provision for attorney fees to the Education of the Handicapped Act. (20 U.S.C. § 1415(e)(4)(B).)

As a result of the exclusive nature of the Education of the Handicapped Act, dissatisfied parties in recipient states must exhaust their administrative remedies under the act before resorting to judicial intervention. (*Smith v. Robinson, supra,* 468 U.S. at p. 1011 [82 L.Ed.2d at p. 764].) This gives local agencies the first opportunity and the primary authority to determine appropriate placement and to resolve disputes. (*Ibid.*) If a party is dissatisfied with the final result of the administrative process then he or she is entitled to seek judicial review in a state or federal court. (20 U.S.C. § 1415(e)(2).) In such a proceeding the court independently reviews the evidence but its role is restricted to that of review of the local decision and the court is not free to substitute its view of sound educational policy for that of the local authority. (*Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra,* 458 U.S. at pp. 206-207 [73 L.Ed.2d at p. 712].) And since the act provides the exclusive remedy for addressing a handicapped child's right to an appropriate education, where the act applies a party cannot pursue a cause of action for constitutional violations, either directly or under the Civil Rights Act (42 U.S.C. § 1983), nor can a party proceed under section 504 of the Rehabilitation Act of 1973. (*Smith v. Robinson, supra,* 468 U.S. at pp. 1013, 1020 [82 L.Ed.2d at pp. 766, 770].)

Congress's intention to give the Education of the Handicapped Act nationwide application was successful. By the time of the decision in *Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra,* all states except New Mexico had become recipients under the act. (458 U.S. at pp. 183-184 [73 L.Ed.2d at p.

698].) It is important at this point in our discussion to consider the experience of New Mexico, both because the Board of Control relied upon that state's failure to adopt the Education of the Handicapped Act as proof that the act is not federally mandated, and because it illustrates the consequences of a failure to adopt the act. ***1590**

In *N. M. Ass'n for Retarded Citizens v. State of N. M.* (D.N.M. 1980) 495 F.Supp. 391, a class action was brought against New Mexico and its local school districts based upon the alleged failure to provide a free appropriate public education to handicapped children. The plaintiffs' causes of action asserting constitutional violations were severed and stayed pending resolution of the federal statutory causes of action. (*Id.* at p. 393.) The district court concluded that the plaintiffs could not proceed with claims under the Education of the Handicapped Act because the state had not adopted that act and, without more, that was a governmental decision within the state's power. (*Id.* at p. 394.) FN15 The court then considered the cause of action under section 504 and found that both the state and its local school districts were in violation of that section by failing to provide a free appropriate education to handicapped children within their territories. (495 F.Supp. at pp. 398-399.)

> FN15 The plaintiffs alleged that the failure of the state to apply for federal funds under the Education of the Handicapped Act was itself an act of discrimination. The district court did not express a view on that question, leaving it for resolution in connection with the constitutional causes of action. (*Ibid.*)

After the district court entered an injunctive order designed to compel compliance with section 504, the matter was appealed. (*N. M. Ass'n for Retarded Citizens v. State of N. M., supra,* 678 F.2d 847.) The court of appeals rejected the defendants' arguments that the plaintiffs were required to exhaust state administrative remedies before bringing their action and that the district court should have applied the doctrine of primary jurisdiction to defer ruling until the Office of Civil Rights could complete its investigation into the charges. (*Id.* at pp. 850-851.) The court also rejected the defendants' arguments that section 504 does not require them to take action to accommodate the needs of handicapped children and that proof of disparate treatment is essential to a violation of section 504. (678 F.2d at p. 854.) The court found sufficient evidence in the record to establish discrimination against handicapped children within the meaning of section 504. (678 F.2d at p. 854.) However, the reviewing court concluded that the district court had applied an erroneous standard in reaching its decision, and the matter was remanded for further proceedings. (*Id.* at p. 855.)

On July 19, 1984, during the proceedings before the Board of Control, a representative of the Department of Education testified that New Mexico has since implemented a program of special education under the Education of the Handicapped Act. We have no doubt that after the litigation we have just recounted New Mexico saw the handwriting on the wall and realized that it could either establish a program of special education with federal financial assistance under the Education of the Handicapped Act, or be compelled through litigation to accommodate the educational needs of handicapped ***1591** children without federal assistance and at the risk of losing other forms of federal financial aid. In any event, with the capitulation of New Mexico the Education of the Handicapped Act achieved the nationwide application intended by Congress. (20 U.S.C. § 1400(c).)

California's experience with special education in the time period leading up to the adoption of the Education of the Handicapped Act is examined as a case study in Kirp et al., *Legal Reform of Special Education: Empirical Studies and Procedural Proposals* (1974) 62 Cal.L.Rev. 40, at pages 96 through 115. As this study reflects, during this period the state and local school districts were struggling to create a program to accommodate ad-

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

equately the educational needs of the handicapped. (*Id.* at pp. 97-110.) Individuals and organized groups, such as the California Association for the Retarded and the California Association for Neurologically Handicapped Children, were exerting pressure through political and other means at every level of the educational system. (*Ibid.*) Litigation was becoming so prevalent that the authors noted: "Fear of litigation over classification practices, prompted by the increasing number of lawsuits, is pervasive in California." (*Id.* at p. 106, fn. 295.) FN16

FN16 Lawsuits primarily fell into three types: (1) Challenges to the adequacy or even lack of available programs and services to accommodate handicapped children. (*Id.* at p. 97, fns. 255, 257.) (2) Challenges to classification practices in general, such as an overtendency to classify minority or disadvantaged children as "retarded." (*Id.* at p. 98, fns. 259, 260.) (3) Challenges to individual classification decisions. (*Id.* at p. 106.) In the absence of administrative procedures for resolving classification disputes, dissatisfied parents were relegated to self-help remedies, such as pestering school authorities, or litigation. (*Ibid.*)

In the early 1970's the state Department of Education began working with local school officials and university experts to design a "California Master Plan for Special Education." (Kirp et al., *Legal Reform of Special Education: Empirical Studies and Procedural Proposals, supra,* 62 Cal.L.Rev. at p. 111.) In 1974 the Legislature enacted legislation to give the Superintendent of Public Instruction the authority to implement and administer a pilot program pursuant to a master plan adopted by State Board of Education in order to determine whether services under such a plan would better meet the needs of children with exceptional needs. (Stats. 1974, ch. 1532, § 1, p. 3441, enacting Ed. Code, § 7001.) In 1977 the Legislature acted to further implement the master plan. (Stats. 1977, ch. 1247, especially § 10, pp. 4236-4237, enacting Ed. Code, § 56301.) In 1980 the Legislature enacted urgency legislation revising our special education laws with the express intent of complying with the 1975 amendments to the Education of the Handicapped Act. (Stats. 1980, ch. 797, especially § 9, pp. 2411-2412, enacting Ed. Code, § 56000.)

As this history demonstrates, in determining whether to adopt the requirements of the Education of the Handicapped Act as amended in 1975, our ***1592** Legislature was faced with the following circumstances: (1) In the *Serrano* litigation, our Supreme Court had declared basic education to be a fundamental right and, without even considering special education in the equation, had found our educational system to be violative of equal protection principles. (2) Judicial decisions from other jurisdictions had established that handicapped children have an equal protection right to a free public education appropriate to their needs and due process rights with regard to placement decisions. (3) Congress had enacted section 504 of the Rehabilitation Act of 1973 to codify the equal protection rights of handicapped children in any school system that receives federal financial assistance and to threaten the state and local districts with the loss of all federal funds for failure to accommodate the needs of such children. (4) Parents and organized groups representing handicapped children were becoming increasingly litigious in their efforts to secure an appropriate education for handicapped children. (5) In enacting the 1975 amendments to the Education of the Handicapped Act, Congress did not intend to require state and local educational agencies to do anything more than the Constitution already required of them. The act was intended to provide a means by which educational agencies could fulfill their constitutional responsibilities and to provide substantial federal financial assistance for states that would agree to do so.

(8a) Under these circumstances we have no doubt that enactment of the 1975 amendments to

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

the Education of the Handicapped Act constituted a federal mandate under the criteria set forth in *City of Sacramento v. State of California, supra,* 50 Cal.3d at page 76. The remaining question is whether the state's participation in the federal program was a matter of "true choice" or was "truly voluntary." The alternatives were to participate in the federal program and obtain federal financial assistance and the procedural protections accorded by the act, or to decline to participate and face a barrage of litigation with no real defense and ultimately be compelled to accommodate the educational needs of handicapped children in any event. We conclude that so far as the state is concerned the Education of the Handicapped Act constitutes a federal mandate.

V. *Subvention for Special Education*

Our conclusion that the Education of the Handicapped Act is a federal mandate with respect to the state marks the starting point rather than the end of the consideration which will be required to resolve the Santa Barbara and Riverside test claims. In *City of Sacramento v. State of California, supra,* 50 Cal.3d at pages 66 through 70, the California Supreme Court concluded that the costs at issue in that case (unemployment insurance premiums) were not subject to state subvention because they were incidental to a law of general ***1593** application rather than a new governmental program or increased level of service under an existing program. The court addressed the federal mandate issue solely with respect to the question whether the costs were exempt from the local government's taxing and spending limitations. (*Id.* at pp. 70-71.) It observed that prior authorities had assumed that if a cost was federally mandated it could not be a state mandated cost subject to subvention, and said: "We here express no view on the question whether 'federal' and 'state' mandates are mutually exclusive for purposes of state subvention, but leave that issue for another day. ..." (*Id.* at p. 71, fn. 16.) The test claims of Santa Barbara and Riverside present that question which we address here for the guidance of the Commission on remand.

(9) The constitutional subvention provision and the statutory provisions which preceded it do not expressly say that the state is not required to provide a subvention for costs imposed by a federal mandate. Rather, that conclusion follows from the plain language of the subvention provisions themselves. The constitutional provision requires state subvention when "the Legislature or any State agency mandates a new program or higher level of service" on local agencies. (Cal. Const., art. XIII B, § 6.) Likewise, the earlier statutory provisions required subvention for new programs or higher levels of service mandated by legislative act or executive regulation. (See Rev. & Tax. Code, former §§ 2164.3 [Stats. 1972, ch. 1406, § 14.7, pp. 2962-2963], 2231 [Stats. 1973, ch. 358, § 3, pp. 783-784], 2207 [Stat. 1975, ch. 486, § 1.8, pp. 997-998], 2207.5 [Stats. 1977, ch. 1135, § 5, pp. 3646-3647].) 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 implementing 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. (See *City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 76.)

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 the cost of government from itself to local agencies. (*City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 68.) 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

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

***1594** is ultimately forced to bear the costs and how those costs came to be imposed upon that agency. If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.

The Education of the Handicapped Act is a comprehensive measure designed to provide all handicapped children with basic educational opportunities. While the act includes certain substantive and procedural requirements which must be included in a state's plan for implementation of the act, it leaves primary responsibility for implementation to the state. (20 U.S.C. §§ 1412, 1413.) (8b) In short, even though the state had no real choice in deciding whether to comply with the federal act, the act did not necessarily require the state to impose all of the costs of implementation upon local school districts. To the extent the state implemented the act by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to subvention.

We can illustrate this point with a hypothetical situation. Subvention principles are intended to prevent the state from shifting the cost of state governmental services to local agencies and thus subvention is required where the state imposes the cost of such services upon local agencies even if the state continues to perform the services. (*Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d at pp. 835-836.) The Education of the Handicapped Act requires the state to provide an impartial, state-level review of the administrative decisions of local or intermediate educational agencies. (20 U.S.C. § 1415(c), (d).) Obviously, the state could not shift the actual performance of these new administrative reviews to local districts, but it could attempt to shift the costs to local districts by requiring local districts to pay the expenses of reviews in which they are involved. An attempt to do so would trigger subvention requirements. In such a hypothetical case, the state could not avoid its subvention responsibility by pleading "federal mandate" because the federal statute does not require the state to impose the costs of such hearings upon local agencies. Thus, as far as the local agency is concerned, the burden is imposed by a state rather than a federal mandate.

In the administrative proceedings the Board of Control did not address the "federal mandate" question under the appropriate standard and with proper focus on local school districts. In its initial determination the board concluded that the Education of the Handicapped Act constituted a federal mandate and that the state-imposed costs on local school districts in excess of the federally imposed costs. However, the board did not consider the ***1595** extent of the state-mandated costs because it concluded that any appropriation by the state satisfied its obligation. On Riverside's petition for a writ of administrative mandate the superior court remanded to the Board of Control to consider whether the state appropriation was sufficient to reimburse local school districts fully for the state-mandated costs. On remand the board clearly applied the now-discredited criteria set forth in this court's decision in *City of Sacramento v. State of California, supra,* 156 Cal.App.3d 182, and concluded that the Education of the Handicapped Act is not a federal mandate at any level of government. Under these circumstances we agree with the trial court that the matter must be remanded to the Commission for consideration in light of the criteria set forth in the Supreme Court's *City of Sacramento* decision. We add that on remand the Commission must focus upon the costs incurred by local school districts and whether those costs were imposed *on local districts* by federal mandate or by the state's voluntary choice in its implementation of the federal program.

VI. *Riverside's Objections*

In light of this discussion we may now consider Riverside's objections to the trial court's decision to remand the matter to the Commission for reconsid-

11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924
(Cite as: 11 Cal.App.4th 1564)

eration.

Riverside asserts that the California Supreme Court opinion in *City of Sacramento* is not on point because the court did not address the federal mandate question with respect to state subvention principles. Riverside implies that the definition of a federal mandate may be different with respect to state subvention than with respect to taxing and spending limitations. (10) As a general rule and unless the context clearly requires otherwise, we must assume that the meaning of a term or phrase is consistent throughout the entire act or constitutional article of which it is a part. (*Lungren v. Davis* (1991) 234 Cal.App.3d 806, 823 [285 Cal.Rptr. 777].) (11) Subvention principles are part of a more comprehensive political scheme. The basic purpose of the scheme as a whole was to limit the taxing and spending powers of government. The taxing and spending powers of local agencies were to be "frozen" at existing levels with adjustments only for inflation and population growth. Since local agencies are subject to having costs imposed upon them by other governmental entities, the scheme provides relief in that event. If the costs are imposed by the federal government or the courts, then the costs are not included in the local government's taxing and spending limitations. If the costs are imposed by the state then the state must provide a subvention to reimburse the local agency. Nothing in this scheme suggests that the concept of a federal mandate should have different meanings depending upon whether one is considering subvention or taxing and spending limitations. Accordingly, we reject the claim that the criteria set forth in ***1596** the Supreme Court's *City of Sacramento* decision do not apply when subvention is the issue.

(12) Riverside asserts that the trial court erred in concluding that the Board of Control did not consider the issues under the appropriate criteria and that the board did in fact consider the factors set forth in the Supreme Court's *City of Sacramento* decision. From our discussion above it is clear that we must reject these assertions. In its decision the board relied upon the "cooperative federalism" nature of the Education of the Handicapped Act without any consideration whether the act left the state any actual choice in the matter. In support of its conclusion the board relied upon the New Mexico litigation which we have also discussed. However, as we have pointed out, under the criteria set forth in the Supreme Court's *City of Sacramento* decision, the New Mexico litigation does not support the board's decision but in fact strongly supports a contrary result. We are satisfied that the trial court correctly concluded that the board did not apply the appropriate criteria in reaching its decision.

Riverside asserts that the Supreme Court's *City of Sacramento* decision elucidated and enforced prior law and thus no question of retroactivity arises. (See *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 37 [196 Cal.Rptr. 704, 672 P.2d 110].) (13) We agree that in *City of Sacramento* the Supreme Court elucidated and enforced existing law. Under such circumstances the rule of retrospective operation controls. (*Ibid.* See also *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, 953- 954 [148 Cal.Rptr. 379, 582 P.2d 970]; *County of Los Angeles v. Faus* (1957) 48 Cal.2d 672, 680-681 [312 P.2d 680].) Pursuant to that rule the trial court correctly applied the *City of Sacramento* decision to the litigation pending before it. As we have seen, that decision supports the trial court's determination to remand the matter to the Commission for reconsideration.

Riverside asserts that if further consideration under the criteria of the Supreme Court's *City of Sacramento* decision is necessary then the trial court should have, and this court must, engage in such consideration to reach a final conclusion on the question. To a limited extent we agree. In our previous discussion we have concluded that under the criteria set forth in *City of Sacramento,* the Education of the Handicapped Act constitutes a federal mandate as far as the state is concerned. We are satisfied that is the only conclusion which may be drawn and we so hold as a matter of law. However,

that conclusion does not resolve the question whether new special education costs were imposed upon local school districts by federal mandate or by state choice in the implementation of the federal program. The issues were not addressed by the parties or the Board of Control in this light. The ***1597** Commission on State Mandates is the entity with the responsibility for considering the issues in the first instance and which has the expertise to do so. We agree with the trial court that it is appropriate to remand the matter to the Commission for reconsideration in light of the appropriate criteria which we have set forth in this appeal.

In view of the result we have reached we need not and do not consider whether it would be appropriate otherwise to fashion some judicial remedy to avoid the rule, based upon the separation of powers doctrine, that a court cannot compel the State Controller to make a disbursement in the absence of an appropriation. (See *Carmel Valley Fire Protection Dist. v. State of California, supra,* 190 Cal.App.3d at pp. 538- 541.)

Disposition

The judgment is affirmed.

Davis, J., and Scotland, J., concurred.

The petition of plaintiff and respondent for review by the Supreme Court was denied April 1, 1993. Lucas, C.J., Kennard, J., and Arabian, J., were of the opinion that the petition should be granted. ***1598**

Cal.App.3.Dist.
Hayes v. Commission on State Mandates
11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, 79 Ed. Law Rep. 924

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TAB NO. 13

FARMERS INSURANCE EXCHANGE et al., Petitioners,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE, Real Party in Interest.

No. S016912.

Supreme Court of California
Apr 6, 1992.

SUMMARY

The People filed a two-count complaint alleging several insurers violated Ins. Code, §§ 1861.02, 1861.05, enacted by the voters in November 1988 as part of Prop. 103, by refusing to offer a "Good Driver Discount policy" to all eligible applicants. The first cause of action was premised on several provisions of the Insurance Code, and the second cause of action asserted that the violations of Ins. Code, §§ 1861.02, 1861.05, constituted unlawful and unfair business practices, in violation of Bus. & Prof. Code, § 17200. The trial court sustained defendants' demurrer to the first cause of action on the ground that the suit was precluded by the People's failure to pursue and exhaust administrative remedies available under the Insurance Code. However, the court overruled defendants' demurrer to the second cause of action and concluded that the People could proceed on this cause of action. (Superior Court of Los Angeles County, No. C753755, Robert M. Mallano, Judge.) The Court of Appeal, Second Dist., Div. Two, No. B051689, denied the insurers' petition for a writ of mandate challenging the trial court's ruling as to the second cause of action.

The Supreme Court reversed the judgment of the Court of Appeal with directions to issue a writ of mandate directing the superior court to stay judicial proceedings and retain the matter on the court's docket pending proceedings before the Insurance Commissioner. It held that there is nothing in the pertinent legislation demonstrating the Legislature's intent to preclude a court from exercising discretion under the primary jurisdiction doctrine. Applying the primary jurisdiction doctrine, the court held that the interest of judicial economy and concerns for uniformity in applying complex insurance regulations militated in favor of staying the action pending proceedings by the Insurance Commissioner. The People alleged specific statutory violations, and the commissioner had at his disposal a pervasive and self-contained system of administrative procedure to deal with the relevant questions. Even if recourse in the court eventually became necessary, the court would have the benefit of the commissioner's expertise. (Opinion by Lucas, C. J., with Panelli, Kennard, Arabian, Baxter and George, JJ., concurring. Separate dissenting opinion by Mosk, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Unfair Competition § 3--Unfair Practices Act.

The Unfair Practices Act is found in Bus. & Prof. Code, § 17000 et seq. Bus. & Prof. Code, § 17200, broadly defines "unfair competition" as, inter alia, any "unlawful, unfair or fraudulent business practice ...." "Unlawful business activity," proscribed under Bus. & Prof. Code, § 17200, includes anything that can properly be called a business practice and that at the same time is forbidden by law. In essence, an action based on Bus. & Prof. Code, § 17200, to redress an unlawful business practice "borrows" violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under Bus. & Prof. Code, § 17200 et seq., and subject to the distinct remedies provided thereunder.

[See 1 **Witkin,** Summary of Cal. Law (9th ed. 1987) Contracts, §§ 591, 592.]

(2) Administrative Law § 85--Judicial Review and Relief--Limitations-- Exhaustion of Remedies Doc-

trine--Distinguished From Primary Jurisdiction Doctrine.

The exhaustion of remedies doctrine and the primary jurisdiction doctrine are both essentially doctrines of comity between courts and agencies. They are two sides of the timing coin: each determines whether an action may be brought in a court or whether an agency proceeding, or further agency proceeding, is necessary. Exhaustion of remedies applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. Primary jurisdiction, on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. In this case the judicial process is suspended pending referral of such issues to the administrative body for its views.

[The doctrine of primary administrative jurisdiction as defined and applied by the Supreme Court, note, 38 **L.Ed.2d** 796.]

(3) Administrative Law § 86--Judicial Review and Relief--Limitations-- Policy Considerations Underlying Exhaustion of Remedies Doctrine and Primary Jurisdiction Doctrine.

The exhaustion of remedies doctrine and the primary jurisdiction are used to determine when a court may entertain an administrative law matter. The policy reasons behind the two doctrines are similar and overlapping. The exhaustion doctrine is principally grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary). The primary jurisdiction doctrine advances two related policies: it enhances court decisionmaking and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws. No rigid formula exists for applying the primary jurisdiction doctrine. Instead, resolution generally hinges on a court's determination of the extent to which the policies noted above are implicated in a given case.

(4) Administrative Law § 79--Judicial Review and Relief--Limitations-- Primary Jurisdiction Doctrine--As Dependent on Legislative Scheme.

If the Legislature establishes a scheme under which a court is prohibited from exercising discretion under the doctrine of primary jurisdiction, a court must honor the legislative scheme, and may not decline to adjudicate a suit on the basis that available administrative processes should first be invoked and completed. If, however, the Legislature does not preclude a court from exercising its discretion under the primary jurisdiction doctrine, a court may do so and, in appropriate cases, may decline to adjudicate a suit until the administrative process has been invoked and completed.

(5a, 5b) Unfair Competition § 8--Actions--Insurance Code Violations as Unfair Practices--Application of Primary Jurisdiction Doctrine:Insurance Companies § 12--Actions Against Insurance Companies--Insurance Code Violations as Unfair Practices--Application of Primary Jurisdiction Doctrine.

In an action in which the People alleged that defendant insurers' refusal to offer a "Good Driver Discount policy" to all eligible applicants (Ins. Code, §§ 1861.02, 1861.05) constituted unlawful and unfair business practices in violation of Bus. & Prof. Code, § 17200 et seq., the trial court erred in overruling defendants' demurrer which was based on the People's failure to pursue administrative remedies under the Insurance Code. There is nothing in the pertinent legislation demonstrating the Legislature's intent to preclude a court from exercising discretion under the primary jurisdiction doctrine. Applying the primary jurisdiction doctrine, the interests of judicial economy, and concerns for uniformity in applying the complex insurance regulations involved, strongly militated in favor of staying the action pending proceedings by the Insurance

Commissioner. The People alleged specific statutory violations, thus demonstrating a paramount need for specialized agency factfinding expertise. The commissioner had at his disposal a pervasive and self-contained system of administrative procedure to deal with the relevant questions. Even if recourse in the court eventually became necessary, the court would have the benefit of the commissioner's expertise.

[See **Cal.Jur.3d,** Unfair Competition, §§ 29, 30.]

(6) Administrative Law § 79--Judicial Review and Relief--Limitations-- Primary Jurisdiction Doctrine--Determination Whether to Stay Proceedings-- Allegations of Complaint.

In determining whether it is appropriate to issue a stay of judicial proceedings in order to permit administrative action under the primary jurisdiction doctrine, the court must confine its analysis to the complaint as written.

(7) Administrative Law § 79--Judicial Review and Relief--Limitations-- Primary Jurisdiction Doctrine--Application to State Attorney General.

The primary jurisdiction doctrine evolved for the benefit of courts and administrative agencies, and, useless precluded by the Legislature, it may be invoked whenever a court concludes there is a paramount need for specialized agency fact-finding expertise. Application of the doctrine does not depend on the civil litigant's ability to bring an administrative action; instead, the doctrine may be applied so long as the administrative agency itself has the authority to initiate administrative action. The reasons supporting the doctrine apply to private citizens and the state Attorney General equally.

COUNSEL

Barger & Wolen, Richards D. Barger, Royal F. Oakes, Larry M. Golub and Linda C. Johnson for Petitioners.

No appearance for Respondent.

John K. Van de Kamp and Daniel E. Lungren, Attorneys General, Andrea Sheridan Ordin, Chief Assistant Attorney General, Michael J. Strumwasser, Fredric D. Woocher and Herschel T. Elkins, Assistant Attorneys General, Albert Norman Sheldon, Ronald A. Reiter and M. Howard Wayne, Deputy Attorneys General, for Real Party in Interest.

Gary T. Yancey, District Attorney (Contra Costa), Gary E. Koeppel, Deputy District Attorney, Gail K. Hillebrand, Nettie Y. Hoge, Paul E. Lee and Robert Fellmeth as Amici Curiae on behalf of Real Party in Interest.

LUCAS, C. J.

The People, through the Attorney General (real party in interest), filed suit against various insurers (petitioners) under the Unfair Practices Act (Bus. & Prof. Code, § 17000 et seq.). We granted review to decide whether this judicial action should be stayed under the doctrine of "primary jurisdiction" pending administrative action by the Commissioner of the Department of Insurance (hereafter sometimes the Commissioner). (See Ins. Code, § 1858 et seq.; all further statutory references are to this code unless otherwise indicated.)

We conclude that in the absence of legislation clearly addressing whether a court may exercise discretion under the primary jurisdiction doctrine, a court may exercise such discretion and may decline to hear a suit until the administrative process has been invoked and completed. We hold that prior resort to the administrative process is required in the circumstances of this case and that the trial court abused its discretion in concluding otherwise.

I. *Facts and Procedure*

The People filed a two-count complaint alleging petitioners violated sections 1861.02 and 1861.05, enacted by the voters in November 1988 as part of Proposition 103, by refusing to offer a "Good Driver Discount policy" to all eligible applicants.

In their first cause of action, the People claim that since November 1989, petitioners have violated

the above provisions by: (i) refusing to offer and *382 sell a Good Driver Discount policy to any person who meets the standards of section 1861.025 (see § 1861.02, subd. (b)(1); (ii) refusing to charge persons who qualify for the Good Driver Discount policy a rate "at least 20% below the rate the insured would otherwise have been charged for the same coverage" (see § 1861.02, subd. (b)(2)); (iii) unlawfully using the absence of insurance as a criterion for determining eligibility for a Good Driver Discount policy, and generally, for the setting of automobile insurance rates and premiums (see § 1861.02, subd. (c)); and (iv) "unfairly discriminating in eligibility and rates for insurance for persons who qualify under the statutory criteria for a Good Driver Discount policy" (see § 1861.05, subd. (a)).

Under the first cause of action the People seek an order pursuant to Code of Civil Procedure section 526, enjoining petitioners from violating section 1861.02, subdivisions (b)(1), (b)(2), and (c), and section 1861.05, subdivision (a).

The second cause of action-which is the subject of this proceeding-incorporates the allegations of the first count, and asserts: "The violations of sections 1861.02 and 1861.05 as set forth above constitute unlawful and unfair business practices, in violation of Business and Professions Code section 17200."

Under the second cause of action the complaint seeks the injunctive relief described above pursuant to Business and Professions Code section 17204, a $2,500 civil penalty against each petitioner for each violation of law pursuant to Business and Professions Code section 17206, and "such other relief as this Court deems just and proper."

Petitioners demurred to both causes of action on the ground, inter alia, that the People's suit was precluded by their failure to pursue and exhaust administrative remedies. The trial court sustained the demurrer as to the first cause of action (the Insurance Code claim), concluding that under *County of Los Angeles v. Farmers Ins. Exchange* (1982) 132 Cal.App.3d 77, 85-87 [182 Cal.Rptr. 879], the People were barred from proceeding because they failed to exhaust administrative remedies available under the Insurance Code. The People do not contest this ruling. FN1

> FN1 This conclusion appears correct. Pursuant to the Insurance Code, the People's claims under that code are exclusively the province of the Insurance Commissioner. (§ 1860.2 ["The ... enforcement of this chapter shall be governed solely by the provisions of this chapter."]; § 1858 et seq. [setting out procedures for administrative determination of rate and rate-making issues].) Judicial review is of course available to challenge those administrative determinations (see §§ 1858.6, 1861.09), but such review may be obtained only after the available administrative procedures have been invoked and exhausted. (See *post,* pp. 392, 393, fn. 11.)

As to the second cause of action (the Business and Professions Code claim), however, the court overruled the demurrer, concluding that under *383 *People v. McKale* (1979) 25 Cal.3d 626 [159 Cal.Rptr. 811, 602 P.2d 731], the People may proceed under the Business and Professions Code "even though there is a separate statutory scheme for enforcement of [Insurance Code] section 1861.02."

Petitioners sought a writ of mandate in the Court of Appeal challenging the propriety of this latter ruling. In an unpublished opinion, the Court of Appeal agreed with the trial court. It reasoned that "exhaustion of administrative remedies" is not required before an action under section 17200 of the Business and Professions Code may be prosecuted because (i) the People's second cause of action seeks a remedy that is "merely cumulative" to administrative remedies sought in the first count, and (ii) the courts can more promptly resolve the issues in this case than can the Insurance Commissioner.

As noted, we conclude prior resort to the administrative process is appropriate in these circumstances, and we therefore reverse the decision of the Court of Appeal.

II. *The Statutory Schemes*

A. *The Unfair Practices Act*

(1) The Unfair Practices Act is found in Business and Professions Code, section 17000 et seq. Section 17200 of the Business and Professions Code broadly defines "unfair competition" as, inter alia, any "unlawful, unfair or fraudulent business practice ...." "Unlawful business activity" proscribed under section 17200 includes " 'anything that can properly be called a business practice and that at the same time is forbidden by law.' " (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 113 [101 Cal.Rptr. 745, 496 P.2d 817] [hereafter *Barquis*].) As the People observe in their brief on the merits, "[i]n essence, an action based on Business and Professions Code section 17200 to redress an unlawful business practice 'borrows' violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under section 17200 et seq. and subject to the distinct remedies provided thereunder."

Section 17205 of the Business and Professions Code states: "Unless otherwise expressly provided, *the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.*" (Italics added.) Section 17204 of the Business and Professions Code authorizes the Attorney General to prosecute an action to enjoin violations of section 17200 of the Business and Professions Code. Finally, Business and Professions Code section 17206 provides for a $2,500 civil penalty for each violation of section 17200. ***384**

The People's complaint under section 17200 of the Business and Professions Code is grounded on asserted violations of four provisions of the McBride-Grunsky Insurance Regulatory Act of 1947 (McBride Act) (Stats. 1947, ch. 805, §§ 1-7, pp. 1896-1908), which is set out in the Insurance Code, division 1, part 2, chapter 9. We will briefly outline the relevant provisions of the McBride Act before analyzing the People's action under the Business and Professions Code.

B. *The McBride Act*

As modified by the voters through the initiative process, and by the Legislature through various amendments, the McBride Act presently is found in sections 1851 through 1861.16 of the Insurance Code.

1. *Provisions for Administrative Hearings and Judicial Review*

Section 1858 establishes an administrative scheme under which "[a]ny person aggrieved by any rate charged, rating plan, rating system, or underwriting rule ... may" file a complaint with the Insurance Commissioner. (*Id.*, subd. (a).) FN2 If, after considering the insurer's response, the Commissioner finds the complaint states "probable cause" of a violation of the McBride Act, the commissioner "shall proceed as provided in Section 1858.1." (§ 1858, subd. (c).)

> FN2 It is clear that the Attorney General, on behalf of the People, may initiate or intervene in such a complaint. (§ 1861.10, subd. (a) ["Any person may initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article"].)
>
> As an alternative to the complaint procedure, section 1858.1, paragraph one, allows the Commissioner to initiate proceedings by providing the insurer with written notice of noncompliance.

Section 1858.1 sets out procedures for the Commissioner's investigation and resolution of the complaint. If the Commissioner determines there is "good cause" to believe an insurer's rating scheme

fails to comply with the requirements of the chapter, he or she "shall give notice in writing to that insurer, ... stating therein in what manner and to what extent that noncompliance is alleged to exist and specifying therein a reasonable time ... in which that noncompliance may be corrected, and specifying therein the amount of any penalty that may be due ...." (*Id.*, 1st par.) The section also sets out procedures to be followed by an insurer to contest the allegation of noncompliance, or, inter alia, to enter into a consent order. (*Id.*, 2d par.)

Section 1858.2 sets out procedures for public hearings on disputed issues and requires the Commissioner to issue a decision within 60 days after ***385** submission following a hearing. Sections 1858.3 through 1858.5 concern powers granted the Commissioner, monitoring of complaints, and suspension of an insurer's license for noncompliance with the Commissioner's orders. Sections 1858.07 and 1859.1 set out monetary penalties for an insurer's failure to comply with statutory rate-setting provisions, or the Commissioner's orders.

Finally, section 1858.6 provides for judicial review following "[a]ny finding, ... ruling or order made by the commissioner under this chapter ... in accordance with the provisions of the Code of Civil Procedure."

2. *Relevant Substantive Provisions*

Various substantive sections of the McBride Act were significantly augmented and altered by the voters in November 1988. (See *CalFarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805 [258 Cal.Rptr. 161, 771 P.2d 1247].) The following sections are relevant here:

Section 1861.02, subdivision (b)(1) (hereafter section 1861.02(b)(1)), provides, inter alia, that all persons who meet specified criteria set out in section 1861.025 "shall be qualified to purchase a Good Driver Discount policy from the insurer of his or her choice." Section 1861.02, subdivision (b)(2) (hereafter section 1861.02(b)(2)), requires that the "rate charged for a Good Driver Discount policy shall ... be at least 20% below the rate the insured would otherwise have been charged for the same coverage." Under subdivision (c) of section 1861.02 (hereafter section 1861.02(c)), "[t]he absence of prior automobile insurance coverage, in and of itself, shall not be a criterion for determining eligibility for a Good Driver Discount policy, or generally for automobile rates, premiums, or insurability." Finally, section 1861.05, subdivision (a) (hereafter section 1861.05(a)) states, "[n]o rate shall be approved or remain in effect which is ... unfairly discriminatory or otherwise in violation of this chapter." (As noted above, the People claim petitioners have violated all four provisions since November 1989.) FN3

> FN3 Effective September 1990, and operative January 1, 1991, the Legislature added section 1861.16, subdivision (b), which states: "An agent or representative representing one or more insurers having common ownership or operating in California under common management or control shall offer, and the insurer shall sell, a good driver discount policy to a good driver from an insurer within that common ownership, management, or control group, which offers the lowest rates for that coverage. This requirement applies notwithstanding the underwriting guidelines of any of those insurers or the underwriting guidelines of the common ownership, management, or control group. ..." (Stats. 1990, ch. 1185, § 2, subd. (b) [No. 6 Deering's Adv. Legis. Service, p. 4450].)

The voters in 1988 also repealed various sections that had previously exempted the business of insurance from this state's antitrust laws (see ***386** former §§ 1850-1850.3, 1853, 1853.6, 1853.7), and added section 1861.03, subdivision (a), which provides: "The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, ... the antitrust and unfair business practices laws (Parts 2

(commencing with section 16600) and 3 (commencing with Section 17500) of Division 7 of the Business and Professions Code)." Part 2 of the Business and Professions Code contains section 17200, the basis of the People's action in this case.

III. *The Primary Jurisdiction Doctrine*

A. *Development of the Doctrine*

The judicially created doctrine of "primary jurisdiction" (also referred to as the doctrine of "prior resort" [FN4] or "preliminary jurisdiction" [FN5]), originated in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.* (1907) 204 U.S. 426 [51 L.Ed. 553, 27 S.Ct. 350] (hereafter *Abilene*), and as explained below, most of the development of the doctrine has occurred in the federal courts.

FN4 See 2 Cooper, State Administrative Law (1965) pages 561-562 (hereafter Cooper).

FN5 See, e.g., *Gt. No. Ry. v. Merchants Elev. Co.* (1922) 259 U.S. 285 [66 L.Ed. 943, 42 S.Ct. 477] (hereafter *Merchants*).

1. *Abilene*

In *Abilene, supra,* 204 U.S. 426, a shipper sued a railroad in state court under the common law to recover alleged unreasonable amounts charged for transporting interstate freight. Such common law suits had been regularly entertained before enactment of the Interstate Commerce Act (Commerce Act) and creation of the Interstate Commerce Commission (ICC) in 1887. (204 U.S. at p. 436 [51 L.Ed. at p. 557].) Under the Commerce Act, Congress granted the ICC power to hear such complaints by shippers, and to order reparations to those injured. (*Id.,* at p. 438 [51 L.Ed. at p. 558].) Despite provisions of the Commerce Act allowing a litigant to elect between administrative enforcement of statutory rights and judicial enforcement of common law rights, [FN6] the high court declined to allow the common law suit in the first instance. Instead, it ruled that in order to promote uniformity and ***387** consistency of rate regulations, the shipper "must ... primarily invoke redress through the Interstate Commerce Commission ...." (*Id.,* at p. 448 [51 L.Ed. at p. 562].) The court explained that "if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, depending on the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question." (*Id.,* at p. 440 [51 L.Ed. at p. 559].)

FN6 Section 9 of the Commerce Act stated: " '[A]ny person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make a complaint to the Commission ... or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act ...; but such person shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. ...' " (204 U.S. at pp. 438-439 [51 L.Ed. at p. 558], quoting the Commerce Act.) The statute also provided in section 22, " 'Nothing in this act ... shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' " (204 U.S. at p. 446 [51 L.Ed. at p. 561], quoting the Commerce Act.)

The court concluded that the act should be construed to allow only those judicial actions that seek "redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the

character of the one here complained of." (*Abilene, supra,* 204 U.S. at p. 442 [51 L.Ed. at p. 559]; see also *id.,* at p. 446 [51 L.Ed. at p. 561].) FN7

FN7 Subsequent cases applying the primary jurisdiction doctrine have refrained from holding that courts have no power to entertain a civil suit, and have instead viewed the question as one of timing. Thus, as Professor Davis observed, "the law of primary jurisdiction almost always answers the question *when* a court may act, not the question *whether* it may act ...." (4 Davis, Administrative Law (2d ed. 1983) § 22:1, p. 82, italics in original; accord, 2 Cooper, *supra,* at p. 562 ["The doctrine does not operate to remove these issues completely from the sphere of judicial action; its operation is, rather, to determine whether the initial consideration of the matter should be by a court or by an agency. If it is held that the doctrine is applicable, and prior resort to the agency is required, the case may still (in appropriate instances) be considered by the courts subsequent to the administrative determination."]; accord, *Shernoff v. Superior Court* (1975) 44 Cal.App.3d 406, 409 [118 Cal.Rptr. 680]; see also *post,* p. 389, fn. 8 [discussing stay procedure under the primary jurisdiction doctrine].)

2. *Merchants*

The doctrine of *Abilene, supra,* 204 U.S. 426, was refined and clarified in *Merchants, supra,* 259 U.S. 285, another case in which a shipper attempted to press suit against a railway to recover asserted overcharges. Justice Brandeis, speaking for the court, allowed the state court suit to proceed because the issue presented in that case-i.e., the proper interpretation of a tariff-was one of law and neither involved disputed facts, nor required the exercise of expertise possessed by the ICC. The court explained, "Preliminary resort to the Commission [is necessary when] ... the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, ***388** that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute." (*Id.,* at p. 291 [66 L.Ed. at p. 946].)

3. *Western Pacific*

In a third railroad shipping case, *United States v. Western Pac. R. Co.* (1956) 352 U.S. 59 [1 L.Ed.2d 126, 77 S.Ct. 161] (hereafter *Western Pacific*), the shipper (the United States government) filed suit in the Court of Claims to recover alleged overcharges. The issue presented was similar to that in *Merchants, supra,* 259 U.S. 285, i.e., the construction of a railroad tariff. Specifically, the question posed was whether shipments of steel bomb cases filled with napalm gel should be classified as "incendiary bombs" (subject to a high first- class tariff rate) or merely "gasoline in steel drums" (subject to a lower, fifth-class rate).

The high court considered the factors articulated in *Abilene, supra,* 204 U.S. 426, and *Merchants, supra,* 259 U.S. 285, i.e., (i) "the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions" (*Western Pacific, supra,* 352 U.S. at p. 64 [1 L.Ed.2d at p. 132]), and (ii) the need to secure "the expert and specialized knowledge of the agencies involved." (*Ibid.*) The court asserted that the term "incendiary bomb," as used in the tariff regulations, posed a question of construction that "involves factors 'the adequate appreciation of which' presupposes an 'acquaintance with many intricate facts of transportation' " possessed by the ICC. (*Western Pacific, supra,* 352 U.S. at p. 66 [1

L.Ed.2d at p. 133], quoting *Merchants, supra,* 259 U.S. at p. 291 [66 L.Ed. at p. 946].) Accordingly, the court concluded, "in the circumstances here presented the question of tariff construction, as well as that of the reasonableness of the tariff as applied, was within the exclusive primary jurisdiction of the Interstate Commerce Commission." (*Western Pacific, supra,* 352 U.S. at p. 63 [1 L.Ed.2d at p. 132].)

4. *Nader*

A more recent high court case illustrates both procedural and substantive aspects of the primary jurisdiction doctrine. In *Nader v. Allegheny Airlines* (1976) 426 U.S. 290 [48 L.Ed.2d 643, 96 S.Ct. 1978] (hereafter *Nader*), the plaintiff filed a common law tort action for fraudulent misrepresentation ***389** against an airline that sold him a confirmed ticket on an overbooked flight, causing the plaintiff to miss his flight. Like the statute at issue in *Abilene, supra,* 204 U.S. 426, the relevant section of the Federal Aviation Act (49 U.S.C. § 1381) provided, " '[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.' " (*Nader, supra,* 426 U.S. at p. 298 [48 L.Ed.2d at p. 651], quoting that act; see *ante,* pp. 386, 387, fn. 6.)

The United States District Court entertained the suit and entered judgment for the plaintiff, but the United States Court of Appeals for the District of Columbia, applying the primary jurisdiction doctrine, reversed and remanded for administrative findings on, inter alia, the common law claim. It took judicial notice that the Civil Aeronautics Board (Board) was then considering the same challenges to carriers' overbooking practices in an ongoing rule- making proceeding, and held that before the plaintiff would be allowed to proceed with his misrepresentation action, the Board should be allowed to consider whether the challenged practices fell within its power to investigate complaints and issue cease-and-desist orders. (*Nader v. Allegheny Airlines, Inc.* (D.C.Cir. 1975) 512 F.2d 527, 546 [167 App.D.C. 350].) Accordingly, the court of appeals instructed the district court to *stay* further action on the plaintiff's misrepresentation claim pending the outcome of the rule-making proceeding. (*Id.,* at p. 552.) FN8

> FN8 The stay procedure employed by the court of appeal in *Nader* was consistent with prior high court cases involving the primary jurisdiction doctrine. In *Tank Car Corp. v. Terminal Co.* (1940) 308 U.S. 422, 433 [84 L.Ed. 361, 370, 60 S.Ct. 325], the court concluded: "When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal but ... the cause should be held pending the conclusion of an appropriate administrative proceeding." (Citation omitted; accord, *Shernoff v. Superior Court, supra,* 44 Cal.App.3d 406, 408-409.)

The high court reversed. Initially, it observed that there was no "irreconcilable conflict between the statutory scheme and the persistence of common-law remedies...," (*Nader, supra,* 426 U.S. 290, 299 [48 L.Ed.2d 643, 652]) and that "[u]nder the circumstances, the common-law action and the statute ... may coexist." (*Id.,* at p. 300 [48 L.Ed.2d at p. 652].)

The court then proceeded to apply the primary jurisdiction doctrine. It noted that under the administrative scheme at issue, individual consumers were "not even entitled" to initiate proceedings before the Board. (*Nader, supra,* 426 U.S. at p. 302 [48 L.Ed.2d at p. 654].) The fact that the plaintiff in the case before it had no authority to bring an administrative action, ***390** however, did not resolve the court's primary jurisdiction inquiry. Instead, the court relied on *Western Pacific, supra,* 352 U.S. 59,

and other primary jurisdiction cases, in determining whether "considerations of uniformity in regulation and of technical expertise ... call for prior reference to the Board." (*Nader, supra,* 426 U.S. at p. 304 [48 L.Ed.2d at p. 655].) It concluded the proposed misrepresentation action posed no challenge to uniformity of regulation (*id.,* at pp. 304-305 [48 L.Ed.2d at p. 655]), and that "[t]he standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case." (*Id.,* at pp. 305-306 [48 L.Ed.2d at p. 656].) Accordingly, the court held prior resort to the administrative process was not required, and hence the plaintiff's "tort action should not be stayed pending reference to the Board ...." (*Id.,* at p. 307 [48 L.Ed.2d at p. 657].)

B. *The Primary Jurisdiction and Exhaustion Doctrines Compared*

Petitioners assert throughout their briefs that the People should be required to "exhaust" their administrative remedies before pursuing their civil action in this case. As suggested above and explained below, the applicable principle in this case is the primary jurisdiction doctrine, not the exhaustion doctrine.

(2) Petitioners' mischaracterization is understandable because courts have often confused the two closely related concepts (see, e.g., 2 Cooper, *supra,* at pp. 572-573). "Both are essentially doctrines of comity between courts and agencies. They are two sides of the timing coin: Each determines whether an action may be brought in a court or whether an agency proceeding, or further agency proceeding, is necessary." (Schwartz, Administrative Law (1984) § 8.23, p. 485.)

In *Western Pacific, supra,* 352 U.S. 59, the high court explained: " *'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone*: judicial interference is withheld until the administrative process has run its course. *'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts,* and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." (*Id.,* at pp. 63-64 [1 L.Ed.2d at p. 132], italics added; see also Schwartz, *supra,* § 8.23 at p. 486 ["Exhaustion applies where an agency ***391** alone has exclusive jurisdiction over a case; primary jurisdiction where both a court and an agency have the legal capacity to deal with the matter."].)

As noted above, count 1 of the People's complaint presented a question of exhaustion of administrative remedies; the People attempted to litigate Insurance Code claims over which the Insurance Commissioner has been given exclusive jurisdiction without first invoking and completing the available administrative process set out in the Insurance Code. (See *ante,* p. 382, fn. 1.) By contrast, count 2 of the complaint-the only count before us now-presents a different issue. The Business and Professions Code claim in count 2 is "originally cognizable in the courts," and thus it triggers application of the primary jurisdiction doctrine.

C. *Policy Considerations Underlying the Primary Jurisdiction and Exhaustion Doctrines*

(3) The policy reasons behind the two doctrines are similar and overlapping. The exhaustion doctrine is principally grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary). (See 2 Cooper, *supra,* at p. 573; Schwartz, *supra,* § 8.30 at p. 503; Koch, Administrative Law and Practice (1985) § 10.22, p. 177.) As explained above, the primary jurisdiction doctrine advances two related policies: it enhances court decisionmaking and efficiency by allowing courts to

take advantage of administrative expertise, and it helps assure uniform application of regulatory laws. (See *Western Pacific, supra,* 352 U.S. at pp. 64-65 [1 L.Ed.2d at p. 132]; 2 Cooper, *supra,* at p. 563; Schwartz, *supra,* § 8.24 at pp. 487-488; Koch, *supra,* § 10.23 at pp. 179-180; Modjeska, Administrative Law Practice and Procedure (1982) p. 204.)

No rigid formula exists for applying the primary jurisdiction doctrine (*Western Pacific, supra,* 352 U.S. 59, 64 [1 L.Ed.2d 126, 132]). Instead, resolution generally hinges on a court's determination of the extent to which the policies noted above are implicated in a given case. (*Ibid.*; 2 Cooper, *supra,* at pp. 564-570, and cases discussed.) [FN9] This discretionary approach ***392** leaves courts with considerable flexibility to avoid application of the doctrine in appropriate situations, as required by the interests of justice. [FN10]

FN9 Although this approach focuses on the benefits to be gained by courts (e.g., efficiency and uniform application of regulatory laws) and agencies (e.g., autonomy) under the primary jurisdiction doctrine, courts have also appropriately considered the alleged "inadequacy" of administrative remedies, and other factors affecting litigants, in determining whether the interests of justice militate against application of the doctrine in a particular case. (See, e.g., 2 Cooper, *supra,* at p. 570 ["[o]ccasionally, prior resort is excused on the grounds that the administrative remedy would be plainly inadequate"]; Koch, *supra,* (1990 supp.) at p. 147 ["courts should consider the expense and delay to litigants before invoking the [primary jurisdiction] doctrine"].)

FN10 Other state courts have declined to treat the doctrine of primary jurisdiction as an "inflexible mandate." Instead, the doctrine "is predicated on an attitude of judicial self-restraint, and is applied when the court believes that considerations of policy recommend that the issue be left to the administrative agency for initial determination. ... The state courts have made it plain ... that the application of the requirement involves the exercise of judicial discretion." (2 Cooper, *supra,* at pp. 564-565.)

IV. *Whether the Legislature has Precluded Application of the Primary Jurisdiction Doctrine in Actions Filed Under Section 17200 of the Business and Professions Code*

The People suggest that the Legislature, by establishing "cumulative" administrative (§ 1858 et seq.) and civil (Bus. & Prof. Code, § 17200) "remedies" for the alleged violation of sections 1861.02 and 1861.05, has precluded courts from applying the primary jurisdiction doctrine in a case filed under the Business and Professions Code. In support, they cite *City of Susanville v. Lee C. Hess Co.* (1955) 45 Cal.2d 684 [290 P.2d 520] (hereafter *Susanville*), which states: "where a statute provides an administrative remedy and also provides an alternative judicial remedy the rule requiring exhaustion of the administrative remedy has no application if the person aggrieved and having both remedies afforded him by the same statute, elects to use the judicial one." (*Id.,* at p. 689, citing *Scripps etc. Hospital v. Cal. Emp. Com.* (1944) 24 Cal.2d 669, 673-674 [151 P.2d 109, 155 A.L.R. 360] (hereafter *Scripps*); see also *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292 [109 P.2d 942, 132 A.L.R. 715] (hereafter *Abelleira*) ["where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act"].)

Contrary to the People's suggestions, we do not view the cited cases as addressing the primary jurisdiction doctrine. All three cases applied the exhaustion of remedies doctrine, and not the primary jurisdiction doctrine. [FN11] ***393** Moreover, to the extent the People may be understood to assert that the analysis of *Scripps, supra,* 24 Cal.2d 669, and *Susanville, supra,* 45 Cal.2d 684, should control here by analogy, we find those cases inapposite.

Scripps, supra, 24 Cal.3d 669, makes it clear that the trial court properly declined to *dismiss* an employer's action for its failure to *exhaust* an available, "alternative" administrative remedy, but nowhere does it address the primary jurisdiction question, namely, whether the trial court had authority to (i) entertain a civil action, and (ii) in the exercise of its discretion under the judicially created primary jurisdiction doctrine, *stay* the judicial proceedings pending action by the administrative agency (see *ante,* p. 389, fn. 8). The same is true of *Susanville, supra.* FN12 Accordingly, we do not read the cited cases as prohibiting a court from exercising its discretion under the primary jurisdiction doctrine merely because "alternative" or "cumulative" administrative ***394** and civil remedies are made available to a plaintiff. FN13 We conclude instead as follows:

> FN11 In *Abelleira, supra,* 17 Cal.2d 280, numerous longshoremen registered for unemployment benefits, and an administrative tribunal of the California Employment Commission ruled in their favor. Before exercising their statutory right to appeal the referee's decision to the Employment Commission itself, various employers sought writ relief from the referee's decision in the courts. (*Id.,* at pp. 283-285.) We explained that before the commission had an opportunity to rule on the employers' appeal, the employers had "no right to demand an extraordinary writ from a court" (*id.,* at p. 292), and stated, "where an administrative remedy is provided by statute, *relief must be sought from the administrative body and this remedy exhausted* before the courts will act." (*Ibid.,* italics added.)
>
> *Scripps, supra,* 24 Cal.2d 669, concerned an employer's claim that it was exempt from the obligation to make unemployment insurance contributions. After receiving an unfavorable ruling from the Employment Commission, but before exercising its statutory right to have its claim reheard before the "entire commission," the employer paid the challenged taxes and filed legal actions in court to recover the amounts paid. We noted that whereas one section of the applicable statute provided for a rehearing before the entire commission, another section of the same act provided that any employer could pay the contribution, and then bring a legal action for recovery. (*Scripps, supra,* 24 Cal.2d at p. 673.) We found the Legislature did not intend the administrative rehearing remedy to be "a necessary precedent to the use of the other remedy expressly given by the statute" (*ibid.*), and reasoned that the "usual rule" of *Abelleira, supra,* 17 Cal.2d 280, did not apply when "alternative" remedies are made available by statute, because "it is not for the courts to add conditions to the exercise of that right which are not imposed by the statute." (*Scripps, supra,* 24 Cal.2d at p. 674.) We concluded, "the court correctly refused to grant the motion[] to dismiss." (*Ibid.*)
>
> *Susanville, supra,* 45 Cal.2d 684, followed *Scripps.* After the City Council of Susanville accepted a contractor's bid for public works, it rescinded the award, and accepted another bid. The applicable statute gave both the contractor and the city a right to bring a civil action to determine the " 'validity of the proceedings [before the council] and the validity of any contract entered, or to be entered, pursuant thereto.' " (*Susanville, supra,* 45 Cal.2d at p. 688.) The city initiated a proceeding under the above section, and the trial court ruled on the merits that the city had acted properly. In response to the contractor's appeal of the trial court's ruling, the city asserted the contractor " 'lost all right it might have had to object to the rescinding

action taken by the council ... because it had never appealed to the city council, that is to say, had not exercised its right to administrative remedies ....' " (45 Cal.2d at p. 689.) We rejected the point on the ground that the applicable statute granted "alternative" judicial and administrative remedies to the contractor, and accordingly, under *Scripps, supra,* " 'the rule requiring exhaustion of administrative remedies has no application.' " (*Susanville, supra,* 45 Cal.2d at p. 689.)

FN12 A more recent case, *McKee v. Bell-Carter Olive Co.* (1986) 186 Cal.App.3d 1230 [231 Cal.Rptr. 304], concerned a common law action for breach of contract. The court observed that "cumulative" administrative remedies were provided under the Food and Agricultural Code, and held, on the basis of *Susanville, supra,* 45 Cal.2d 684, 689, that "exhaustion" of the administrative remedy was unnecessary. (*McKee, supra,* 186 Cal.App.3d at pp. 1239-1246.) We do not read *McKee, supra,* as suggesting that the availability of "cumulative" administrative remedies bars application of the *primary jurisdiction doctrine* in a civil action.

FN13 Contrary to assertions of amicus curiae for the People, this conclusion is not in conflict with, but is consistent with, the high court's analysis in *Nader, supra,* 426 U.S. 290, 300-301 [48 L.Ed.2d 643, 653]. (See *ante,* pp. 388-390.)

(4) If the Legislature establishes a scheme under which a court is prohibited from exercising discretion under the doctrine of primary jurisdiction, a court must honor the legislative scheme, and may not decline to adjudicate a suit on the basis that available administrative processes should first be invoked and completed. If, however, the Legislature does not preclude a court from exercising its discretion under the primary jurisdiction doctrine, a court may do so and, in appropriate cases, may decline to adjudicate a suit until the administrative process has been invoked and completed.

(5a) Accordingly, the threshold question we must decide is whether the Legislature established a scheme that precludes a court from exercising discretion under the primary jurisdiction doctrine. For the reasons set out below, we conclude the legislative scheme at issue here does not address the primary jurisdiction issue, and a court thus is free to exercise its discretion to determine whether to stay proceedings in this suit pending action by the Insurance Commissioner.

The People assert that section 1861.03, subdivision (a) (which, as noted above, FN14 provides that the insurance industry is subject to, inter alia, Bus. & Prof. Code § 17200 et seq.) "neither restricts the use of section 17200 in insurance cases nor requires the use of administrative procedures within the Department of Insurance for the implementation of section 17200 or the adjudication of any violations. ..."

FN14 Section 1861.03, subdivision (a) is quoted, *ante,* at page 386.

We agree that section 1861.03 does not condition a suit under Business and Professions Code section 17200 on prior resort to the administrative process under the Insurance Code. Indeed, it does not speak to that issue at all. It merely modifies preexisting law, to provide, in essence, that insurers are subject to the unfair business practices laws *in addition to* preexisting regulations under the McBride Act, as amended. Section 1861.03 discloses no legislative preference for, or against, permitting a court to exercise its discretion under the primary jurisdiction doctrine to stay judicial proceedings pending action by the Insurance Commissioner.

The People advance a similar argument with respect to Business and Professions Code section 17205, which, as noted above, states: "Unless ***395**

otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state." We conclude, however, that the "unfair competition" remedy provided under Business and Professions Code section 17205 also fails to disclose legislative intent one way or the other on the question presented here, namely, whether the Legislature intended to preclude a court from exercising discretion under the primary jurisdiction doctrine in a suit filed under Business and Professions Code section 17200. Instead, section 17205 merely reflects legislative intent that the remedy under Business and Professions Code section 17200 not displace any other remedy that might exist.

We base our construction of section 17205 of the Business and Professions Code not merely on the language of that section viewed in isolation, but on the scheme of the Unfair Practices Act as a whole. As noted above, section 17200 of the Business and Professions Code defines "unfair competition" very broadly, to include " 'anything that can properly be called a business practice and that at the same time is forbidden by law.' " (*Barquis, supra,* 7 Cal.3d 94, 113.) Because it sweeps so broadly, the Unfair Practices Act applies to many situations in which no administrative process is available to address the challenged practice. Thus there is nothing from which we can conclude that the Legislature intended to preclude a court presented with a suit under the Unfair Practices Act from exercising discretion under the primary jurisdiction doctrine, in situations in which the practice challenged is one over which an administrative agency may also exercise jurisdiction. Instead, as with section 1861.03, subdivision (a), we conclude the Unfair Practices Act, and Business and Professions Code section 17205 in particular, discloses no legislative intent to preclude a court from exercising discretion under the primary jurisdiction doctrine before entertaining a civil action under section 17200 of the Business and Professions Code. It follows that we may consider whether to stay judicial proceedings pending action by the Insurance Commissioner in this case.

V. *Recent Application of the Primary Jurisdiction Doctrine*

Recently we applied primary jurisdiction principles in *Rojo v. Kliger* (1990) 52 Cal.3d 65 [276 Cal.Rptr. 130, 801 P2d 373] (*Rojo*), in which the plaintiff asserted (i) statutory violations of the Fair Employment and Housing Act (Gov. Code, § 12900 et seq., hereafter the FEHA), and (ii) common law violations (intentional infliction of emotional distress, and wrongful discharge in contravention of public policy). Instead of submitting her claims to the administrative body established under the FEHA, the plaintiff in *Rojo* filed a civil suit. ***396**

We held exhaustion of available remedies under the FEHA necessary before a plaintiff may proceed with *statutory claims* under that act (*Rojo, supra,* 52 Cal.3d at pp. 83-84), but we found prior resort FN15 unnecessary before a plaintiff may proceed with a civil suit based on *common law claims* for damages resulting from sex discrimination in employment (*id.,* at pp. 84-88). A review of the factors motivating this latter holding assists our analysis in the present case.

> FN15 As have other state and federal courts in other contexts, we referred to "exhaustion" of administrative remedies in this portion of *Rojo* although we were in fact considering a question of prior resort to administrative procedures under the primary jurisdiction doctrine.

We held prior resort to the administrative process unnecessary for two reasons. First, we explained, "the FEHA does not have a 'pervasive and self-contained system of administrative procedure' [citation] for general regulation or monitoring of employer-employee relations so as to assess or prevent discrimination or related wrongs in the employment context ...." (*Rojo, supra,* 52 Cal.3d at pp. 87-88.) Second, "the factual issues in an employment discrimination case [are not] of a com-

plex or technical nature beyond the usual competence of the judicial system." (*Id.,* at p. 88.) We concluded, "[w]ith all due respect to the efficiency and expertise the [administrative agency] bring [s] to bear in investigating and determining statutory discrimination cases, and the salutary effect [it has] on the settlement and disposition of such cases, these are not cases having such a paramount need for specialized agency fact-finding expertise as to require [prior resort to and] exhaustion of administrative remedies before permitting an aggrieved person to pursue his or her related nonstatutory claims and remedies in court." (*Ibid.*)

VI. *Application of the Primary Jurisdiction Doctrine in This Case*

Our analysis in *Rojo, supra,* 52 Cal.3d 65, informs the result in this case. First, as explained above (*ante,* pp. 384-385), the Insurance Commissioner has at his disposal a "pervasive and self-contained system of administrative procedure" (*Rojo, supra,* at p. 87) to deal with the precise questions involved herein.

Second, and more important, based on the allegations in the People's complaint, there is good reason to require that these administrative procedures be invoked here. As we explain below, we conclude that considerations of judicial economy, and concerns for uniformity in application of the complex insurance regulations here involved, strongly militate in favor of a stay to await action by the Insurance Commissioner in the present case.

In *Rojo, supra,* 52 Cal.3d 65, we reasoned that in light of the nature of the common law action involved in that case, the agency had no special expertise that would warrant prior resort to its procedures. By contrast, other ***397** courts have observed that questions involving insurance rate making pose issues for which specialized agency fact-finding and expertise is needed in order to both resolve complex factual questions and provide a record for subsequent judicial review. As noted in *Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 986 [201 Cal.Rptr. 379], "[the Insurance Commissioner's] determination with respect to controverted rates could not only be of inestimable value to a court should trial be inevitable, but might eliminate the need for a trial, or might resolve major elements of dispute." (See also *County of Los Angeles v. Farmers Ins. Exchange, supra,* 132 Cal.App.3d 77, 87 ["the Insurance Commissioner and the Department of Insurance possess sophisticated bodies of expertise in this field which make them particularly able to handle these matters"].)

The People assert the claims at issue here "involve relatively simple factual determinations which do not require the detailed examination of experts within the Department of Insurance." To support this view of their complaint, they assert, for the first time in briefs filed in this court, that their action is in reality one to preclude Farmers Insurance Exchange from referring persons who meet the criteria for a Good Driver Discount policy to Mid-Century Insurance Company, a "substandard" insurer that is part of the Farmers Group, but which charges rates "substantially higher" than Farmers for the same coverage. FN16

FN16 The People's brief reads as follows: "In the months following the November 8, 1989[,] operative date for section 1861.02, the Attorney General received reports regarding widespread violations of the good driver provisions of that section. Notably, defendant Farmers Insurance was refusing to sell good driver discount insurance policies to persons who meet the definition of a good driver. Instead, Farmers referred those persons to defendant Mid-Century Insurance Company, a substandard company that is part of the Farmers Group [and] which charged substantially higher rates than Farmers for the same coverage. In the belief that defendants were failing to comply with the statute's requirements, the Attorney General, on March 2, 1990, filed the instant complaint pursuant to Business and Professions Code section 17200."

We cannot accept the People's recharacterization of their complaint. The complaint filed in superior court makes no mention of any alleged improper referral plan between Farmers and Mid-Century, and, although it was clearly possible for the People to do so, FN17 the complaint does not on its face allege the factual claim that the People now advance. Instead, the complaint tracks ***398** the specific language of four of the numerous Insurance Code provisions that relate to Good Driver Discount policies. Taken at face value, the People's complaint alleges violations of specific statutory eligibility rules governing such policies, and violations of the statutory rules for rates under those policies.

FN17 Over four months before the People's complaint was filed in this case, the Insurance Commissioner filed a "Notice of Noncompliance Pursuant to Insurance Code Section 1858.1 " against Farmers Insurance Exchange and Mid-Century Insurance Company alleging, inter alia, that "Farmers and Mid-Century Insurance Company ... agreed that [certain applicants] who apply for insurance from Farmers would be offered and issued a policy in Mid-Century only and would not be offered or issued a policy in Farmers." The record also discloses that two days after the People's complaint was filed in this matter, the Insurance Commissioner filed another "Notice of Noncompliance" against Farmers Insurance Exchange, alleging the underwriting rules "made or used by Farmers ... do not comply with the requirements of ... section 1861.02(b)(1) and California Code of Regulations, Title 10, Chapter 5, subchapter 4.7." The notice alleges the Commissioner "is informed and believes" that Farmers has refused, and continues to refuse to issue Good Driver Discount policies to various groups of persons who otherwise qualified under the provisions of the Insurance Code.

(6) We conclude that in determining whether it is appropriate to issue a stay of judicial proceedings in order to permit administrative action under the primary jurisdiction doctrine, we must confine our analysis to the complaint as written. (5b) A review of the allegations in the People's complaint demonstrates the "paramount need for specialized agency fact-finding expertise" in this case. (*Rojo, supra,* 52 Cal.3d at p. 88.)

The gravamen of the People's action under section 17200 of the Business and Professions Code is alleged violation of three specific "Good Driver Discount policy" provisions of section 1861.02(b) and 1861.02(c), and the "unfairly discriminatory rates" provision of section 1861.05(a). In order to decide whether petitioners have violated the cited subdivisions of section 1861.02, it must be determined whether petitioners refused to offer discount policies to those who qualified for such a policy; refused to charge rates at least 20 percent below the rate that would otherwise have been charged; and used the absence of prior automobile insurance coverage, "in and of itself," to determine eligibility for a Good Driver Discount policy, or to establish rates and premiums. In order to decide whether petitioners have violated section 1861.05, it must be determined whether they employed an "unfairly discriminatory" rate. The resolution of these questions mandates exercise of expertise presumably possessed by the Insurance Commissioner, and poses a risk of inconsistent application of the regulatory statutes if courts are forced to rule on such matters without benefit of the views of the agency charged with regulating the insurance industry.

First, in determining eligibility for Good Driver Discount policies, section 1861.02(b)(1) specifies that the criteria set out in section 1861.025 are to be used. That section in turn addresses the eligibility of persons who have been involved in accidents during the prior three years, and who were "principally at fault." (§ 1861.025, subd. (b)(1), (b)(4).) The statute further provides, as to both criteria, "[t]he commissioner shall adopt regulations

setting guidelines to be used by insurers for their determination of fault for the purposes ***399** of [these] paragraph[s]." (§ 1861.025, subd. (b)(4); see Cal. Code Regs., tit. 10, ch. 5, subch, 4.7, § 2632.13.1.) It seems clear to us that the Insurance Commissioner is best suited initially to determine whether his or her own regulations pertaining to eligibility have been faithfully adhered to by an insurer.

Similarly, the determination of whether a given Good Driver Discount policy comports with the "20 percent discount" provision of the statute also calls for exercise of administrative expertise preliminary to judicial review. Inevitably, analysis of the People's claim will require "a searching inquiry into the factual complexities of [automobile] insurance ratemaking and the conditions of that market during the turbulent time here involved." (*Karlin v. Zalta, supra,* 154 Cal.App.3d 953, 983.) To address the People's claim, one must inquire into the insurer's ratemaking process in order to determine what the rate would be for a given driver without the discount. Thereafter one must discern whether the rate offered on a given Good Driver Discount policy is 20 percent below what the insured would otherwise have been charged. As we have observed, the question of insurance rate regulation has "traditionally commanded administrative expertise applied to controlled industries." (*Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 323 [70 Cal.Rptr. 849, 444 P.2d 481].)

There is no reason to conclude otherwise in the present case; we think it is plain that a court attempting to determine whether a given Good Driver Discount policy meets the statutory 20 percent discount requirements should have the benefit of the Insurance Commissioner's expert assessment of that issue. In addition, we note that section 1861.02, subdivision (e), provides, "The commissioner shall adopt regulations implementing *this section* and insurers may submit applications pursuant to this article which comply with those regulations ...." (Italics added; see Cal. Code Regs., tit. 10, ch. 5, subch. 4.7, § 2632.1 et seq.) As above, it seems clear that the Insurance Commissioner, rather than a court, is best suited initially to determine whether his or her own regulations pertaining to compliance have been faithfully adhered to by an insurer. FN18

FN18 For similar reasons, the determination of whether petitioners have used the absence of prior insurance "in and of itself" as "a criterion for determining eligibility for a Good Driver Discount policy, or generally for automobile rates, premiums, or insurability," also calls for exercise of administrative expertise preliminary to judicial review.

Finally, and for the same reasons, the determination whether petitioners employed rates that are "unfairly discriminatory" also calls for exercise of administrative expertise preliminary to judicial review. In practice, resolution of the "unfairly discriminatory rate" question will turn in many instances on determination of the above discussed rate-setting provisions of ***400** the Insurance Code. It is readily apparent that a court would benefit immensely, and uniformity of decisions would be greatly enhanced, by having an expert administrative analysis available before attempting to grapple with such a potentially broad-ranging and technical question of insurance law. FN19

FN19 Shortly before oral argument the Insurance Commissioner, in a letter to the court, expressed his views that (i) we should not require "exhaustion" of Insurance Code claims in "all" cases filed under the Business and Professions Code; and (ii) we should not require prior resort to the administrative process in the present case. As explained above, we agree that the "exhaustion" rule does not apply to the claims at issue here; but as also explained above, we conclude prior resort to the administrative process is required because the People's complaint demonstrates the "paramount need for specialized agency

fact-finding expertise" in this case. (*Rojo, supra,* 52 Cal.3d at p. 88.)

Accordingly, we reject the People's assertion that because eventual recourse to the courts is likely in this case, nothing is to be gained by requiring prior resort to the administrative process involved here. As we said in *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 476 [131 Cal.Rptr. 90, 551 P.2d 410], "even if ... ultimate resort to the courts [is] inevitable [citation], the prior administrative proceeding will still promote judicial efficiency by unearthing the relevant evidence and by providing a record which the court may review." In addition, we reject any suggestion that the interests of justice militate against a requirement of prior resort in this case. (See *ante,* pp. 391-392, fns. 9 & 10.) The People do not assert that the administrative remedies available from the Insurance Commissioner are "inadequate," and we dismiss as unsupported conjecture the suggestion that prior resort to the administrative process will unduly delay or frustrate resolution of the issues presented in the People's complaint.

The cases cited by the People (*People v. McKale, supra,* 25 Cal.3d 626; *People v. Los Angeles Palm, Inc.* (1981) 121 Cal.App.3d 25 [175 Cal.Rptr. 257]; and *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509 [206 Cal.Rptr. 164, 53 A.L.R.4th 661]) do not require a contrary result. In *McKale, supra,* 25 Cal.3d 626, we held that although a specific statutory remedy existed for a violation of the Mobilehome Park Act (Health & Saf. Code, § 18200 et seq.), a civil action for unfair competition under Business and Professions Code section 17200 et seq. was proper. *Los Angeles Palm, Inc., supra,* 121 Cal.App.3d 25, allowed an action under section 17200 et seq. of the Business and Professions Code although the Labor Code provided a remedy for the harm alleged. *Casa Blanca Convalescent Homes, Inc., supra,* 159 Cal.App.3d 509, recognized the Attorney General's right to sue under Business and Professions Code section 17200 et seq. based on conduct also regulated by the Department of Health Services under Health and Safety Code section 1417 et seq. All three cases, however, are inapposite. ***401**

Each decision focused on *whether*-not *when*-the People may bring an unfair competition action. At most, they may be read as implicitly holding that, based on the allegations involved in those matters, prior resort to available administrative processes was unnecessary on the facts of each case. None of the cases stands for the proposition that actions brought under the Business and Professions Code are, as a matter of law, outside the application of the primary jurisdiction doctrine.

(7) Finally, we reject the People's unsupported and novel claim that because the Attorney General is the chief law enforcement officer of the state, actions filed by him should not be subject to the primary jurisdiction doctrine. The reasons supporting the doctrine apply to private citizens and the Attorney General alike, and the two classes of plaintiffs should be treated equally. The primary jurisdiction doctrine evolved for the benefit of courts and administrative agencies, and unless precluded by the Legislature, it may be invoked whenever a court concludes there is a "paramount need for specialized agency fact-finding expertise." (*Rojo, supra,* 52 Cal.3d at p. 88.) FN20

FN20 Similarly, we reject the assertion of amicus curiae, the District Attorney of Contra Costa County, that district attorneys lack standing to bring administrative actions before the Insurance Commissioner, and thus a district attorney who wishes to prosecute a Business and Professions Code action against an insurer should be allowed to do so without regard to the primary jurisdiction doctrine. Application of the doctrine does not depend on the civil litigant's ability to bring an administrative action; instead, the doctrine may be applied so long as the administrative agency itself has the authority to initiate administrative action. (See *Nader, supra,* 426 U.S.

at pp. 302-304 [48 L.Ed.2d at p. 654] [undertaking primary jurisdiction analysis although plaintiff was not entitled to bring administrative action].) As observed, *ante,* page 384, footnote 2, the Insurance Commissioner has authority to initiate action under the Insurance Code.

VII. *Conclusion*

We conclude, based on the complaint as it stands, that a paramount need for specialized agency review militates in favor of imposing a requirement of prior resort to the administrative process, and as noted above we reject any suggestion that the interests of justice militate against application of a prior resort requirement in this case.

Accordingly, the judgment of the Court of Appeal is reversed with directions to issue a writ of mandate directing the superior court to stay judicial proceedings in this case and retain the matter on the court's docket pending proceedings before the Insurance Commissioner (see, e.g., *Tank Car Corp. v. Terminal Co., supra,* 308 U.S. 422, 432-433 [84 L.Ed. 361, 370]; *Shernoff v. Superior Court, supra,* 44 Cal.App.3d 406, 408-409), and to closely monitor the progress of the administrative proceedings to ensure against unreasonable delay of the People's civil action (see, e.g., ***402***Shernoff v. Superior Court, supra,* 44 Cal.App.3d 406, 408; *Red Lake Band of Chippewa Indians v. Barlow* (8th Cir. 1988) 846 F.2d. 474, 476-477; see generally *Rohr Industries v. Wash. Metro Area Transit Auth.* (D.C.Cir. 1983) 720 F.2d 1319, 1326-1327 [232 App.D.C. 92]).

Panelli, J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred.

MOSK, J.

I dissent. California has never recognized the doctrine of primary jurisdiction, and prior authority in this state is in conflict with that concept. Even if this court should decide at some time to judicially legislate that theory, the facts involved in this case, and the dilatory result, do not justify its application. Finally, there are sound reasons of policy for holding that the question whether petitioners violated the Unfair Practices Act (Bus. & Prof. Code, § 17000 et seq.) should be decided by a court initially rather than by successive determinations by the Commissioner of the Department of Insurance (Insurance Commissioner) and a court.

I

No decision in this state has ever forthrightly applied the doctrine of primary jurisdiction, and the three California cases to which the majority refer and attempt to distinguish are in direct conflict with that doctrine. (*City of Susanville v. Lee C. Hess Co.* (1955) 45 Cal.2d 684 [290 P.2d 520] (*Susanville*); *Scripps etc. Hospital v. Cal. Emp. Com.* (1944) 24 Cal.2d 669 [151 P.2d 109, 155 A.L.R. 360] (*Scripps*); *McKee v. Bell- Carter Olive Co.* (1986) 186 Cal.App.3d 1230 [231 Cal.Rptr. 304] (*McKee*).) [FN1] Each holds that in a situation like the matter before us, in which a litigant is afforded the choice whether to bring a proceeding before an administrative body or to file an action in court, the litigant may choose either remedy, and is not required to resort initially to the agency for the vindication of his or her rights. The holdings in these cases are in direct conflict with the majority's determination that a court has discretion whether or not to exercise jurisdiction under these circumstances. ***403**

FN1 The only California case cited by the majority that even mentions the primary jurisdiction theory is *Shernoff v. Superior Court* (1975) 44 Cal.App.3d 406 [118 Cal.Rptr. 680]. There, the plaintiffs filed an action against numerous insurers, alleging that they had conspired to fix rates. The trial court issued a stay "on a theory of primary jurisdiction, a theory which assumed that for reasons of comity the Insurance Commissioner should be given the first opportunity" to act on the allegations. (*Id.* at p. 408.) The Court of Appeal vacated the stay order, holding that the plaintiffs were not required to exhaust their

> administrative remedies because the Insurance Commissioner did not have the power to grant damages, the relief sought by the plaintiffs. In the course of its discussion, the court stated that the "doctrine of primary jurisdiction does not permanently foreclose judicial action but rather it provides the appropriate administrative agency with an opportunity to act if it so chooses. At most, the commissioner's jurisdiction is 'primary,' not 'exclusive,' and in this instance he has chosen not to exercise it." (*Id.* at p. 409.)

If anything, the present case is an even stronger vehicle than the cited cases for application of the well-established rule relied on therein. The statutes in those those cases (with the exception of *McKee*) merely granted the right to an administrative determination or to a court action. They did not contain language like section 17205 of the Business and Professions Code, which provides explicitly that the remedies under the Unfair Practices Act are "cumulative" to those granted under any other laws.

The majority opinion declares that the three cases cited applied "the exhaustion of remedies doctrine, and not the primary jurisdiction doctrine." I disagree with this characterization of the cases. In fact, all three cases refused to apply the exhaustion doctrine because the Legislature had given the aggrieved party a choice of remedies. As the majority opinion concedes, the exhaustion doctrine applies when the administrative agency *alone* has initial jurisdiction to hear the matter. In all three cases cited above-as well as in the present case-both the agency and a court had such power, and therefore the exhaustion doctrine did not apply. The majority simply refuse to adhere to the prevailing theory on which those cases were decided, i.e., that it is for the litigant to choose which forum to utilize in these circumstances.

The opinion attempts to distinguish *Scripps* on the ground that it did not "address the primary jurisdiction question" because it failed to decide whether a court has authority to exercise its discretion to stay judicial proceedings pending action by an administrative agency. In fact, the *Scripps* court's holding can only be read as prohibiting the exercise of such discretion. After stating the rule that a litigant may choose the forum in which to bring the action if the Legislature has provided alternative remedies, *Scripps* declares that "it is not for the courts to add conditions to the exercise of [the right to bring an action in court] which are not imposed by the statute." (24 Cal.2d at p. 674.) I cannot read this holding as anything but a determination that a court does not have the power to require a litigant to first resort to an administrative remedy when a statute provides a choice whether to do so or to bring a court action.

As for *Susanville,* which the majority attempt to distinguish on the same ground as *Scripps,* it holds that the rule requiring exhaustion of administrative remedies has "no application" if the aggrieved person is granted alternative remedies and elects to use judicial means. (45 Cal.2d at p. 689.) This amounts to a determination that a court cannot compel a litigant to resort to the process of an administrative agency if one has been granted the right to sue in court.

The majority state, regarding *McKee,* that they do not to read the opinion in that case as suggesting that the availability of cumulative remedies bars ***404** application of the primary jurisdiction doctrine. In my view, there is no other way to read the decision. The *McKee* opinion recites the general rule of *Scripps,* and then concludes that because the administrative proceeding and the court action are cumulative remedies, plaintiff is not required to exhaust administrative remedies. (186 Cal.App.3d 1230 at p. 1246.) A party who has been granted the right to bring a court action cannot be compelled to exhaust administrative remedies, if either course is open under the law.

The only case cited by the majority which they claim applied the doctrine of primary jurisdiction in California is *Rojo v. Kliger* (1990) 52 Cal.3d 65 [

276 Cal.Rptr. 130, 801 P.2d 373] (*Rojo*). However, as the majority must recognize, *Rojo* refers not to that doctrine but to exhaustion of remedies. There, the plaintiffs filed a civil action seeking damages for employment discrimination. We held that they should not be required to exhaust their remedies before the Fair Employment and Housing Commission, employing reasoning generally used to determine whether a party should be required to exhaust administrative remedies. (See e.g., *Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 983 [201 Cal.Rptr. 379].)

If it should be deemed advisable to adopt a judge-made doctrine of primary jurisdiction in this state, the majority should state forthrightly that they do so, instead of futilely attempting to distinguish cases which are incompatible with the existence of that doctrine.

II

Even if the primary jurisdiction principle should become applicable in California, it would not apply under the circumstances of this case.

The majority state several grounds for requiring the People to bring this proceeding before the Insurance Commissioner. First, relying on the reasons advanced in *Rojo,* they assert that here, unlike in that case, the administrative agency has "a 'pervasive and self-contained system of administrative procedure' to deal with the precise questions involved herein." In support of this proposition, they cite sections of the Insurance Code that prescribe the procedure for the investigation and resolution of complaints regarding allegations of unfair rates. That is, notice and hearing, proceedings to contest the allegations made by the complainant, and provisions for appeal. But the Fair Employment and Housing Commission in *Rojo* had similar powers. (52 Cal.3d at p. 72.) I dispute the majority's assertion that the administrative procedures for challenging rates before the Insurance Commissioner are "pervasive," for we have found in a case as recently decided as *Rojo* that similar procedures do not meet that description. ***405**

Nor do I agree with the second ground offered by the majority as the justification for requiring that the People resort first to a determination of the issues raised in their complaint by the Insurance Commissioner, i.e., that his expertise is required to resolve the issues. Unlike *Karlin v. Zalta, supra,* 154 Cal.App.2d 953, 983, on which the majority rely, the issues raised by the People are not "singularly within the technical competence of the Insurance Commissioner through the enlistment of agency resources." The question whether an insured is entitled to a "good driver" discount depends on whether the driver was involved in an accident during the prior three years, and was "principally at fault." The insurer makes the determination of fault under guidelines issued by the commissioner. (Ins. Code, § 1861.025, subd. (b)(4).) A court in its fact-finding role is at least as qualified as the commissioner to determine whether an insurer has followed those guidelines. (Cf. *Gt. No. Ry. v. Merchants Elev. Co.* (1922) 259 U.S. 285, 291 [66 L.Ed. 943, 946, 42 S.Ct. 477], refusing to apply the primary jurisdiction doctrine because "what construction shall be given to a railroad tariff presents ordinarily a question of law ....") This determination of facts cannot be said to be within the special "technical competence," of the Insurance Commissioner. It is significant that he makes no such claim in this case.

Once the question of fault is decided, it is necessary to ascertain whether the required discount has been afforded. The majority assert that this determination calls for a "searching inquiry into the factual complexities of [automobile] insurance rate-making." I disagree. The issue here is not whether the insurer charged a reasonable rate or one which complies with statutory requirements for such a rate, but whether the rate charged is below what the insurer would have charged without the discount. The answer to that is clear under the circumstances of this case. No determination whether the discount was afforded is required by either the Insurance Commissioner or a court because it is undisputed that the "good driver" discount provisions have not been implemented. It follows that the rate charged

is in excess of the rate which would have been charged without the discount.

The majority claim also that uniformity of decision will be enhanced by an administrative determination of the issues raised in the People's complaint before a court attempts to grapple with "such a broad-ranging and technical question of insurance law." But the question whether a driver is entitled to a "good driver" discount under the guidelines adopted by the commissioner involves the application of those guidelines to the circumstances of a particular case. I fail to see how uniformity of decision will be promoted by a preliminary determination of the issue by the commissioner since the fault of each driver depends on the facts relating to a specific ***406** driving record, and application of the guidelines thereto. Those are typical decisions made by a court rather than an administrative agency.

III

Furthermore, there are persuasive policy reasons which militate against application of the primary jurisdiction doctrine in this case.

First, it will not promote judicial economy. In *Rojo,* we reasoned that a determination by the administrative agency of the issues raised in the complaint would have no beneficial impact on the judicial system because the case must in any event still enter the "judicial pipeline." (52 Cal.3d at p. 88.) This rationale also applies here. If, as occurred in *Shernoff v. Superior Court, supra,* 44 Cal.App.3d 406, the Insurance Commissioner declines to exercise his jurisdiction to decide the issues raised in this proceeding-as he indicates he is likely to do by his support of the Attorney General herein-the courts will not receive the assistance from administrative determination of the issues which the majority claim as the justification for application of the primary jurisdiction doctrine.

Moreover, as we also observed in *Rojo,* requiring the agency to decide the matter would limit the resources available to it for resolution of cases within its jurisdiction. It is no secret that the Insurance Commissioner is understaffed and overburdened with litigation relating to Proposition 103. The Department of Insurance agrees. It supports the position of the People in this case on the ground that the Insurance Commissioner cannot reasonably be expected to respond to all allegations of violations of the Unfair Practices Act, and that requiring the exhaustion of administrative remedies would weaken or destroy the effectiveness of remedies granted thereunder.

By providing in Proposition 103 that both the Insurance Commissioner and the People should have the power to enforce the "good driver" provisions, the voters clearly intended that the People have the right to obtain an expeditious determination before a court whether an insurer is complying with those provisions. They did not contemplate dilatory proceedings and successive decisions on the same issue by the Insurance Commissioner and subsequently by the courts. The holding of the majority violates this intent.

Finally, the opinion dismisses summarily as "unsupported conjecture" the claim that prior resort to the administrative process will unduly delay or frustrate resolution of the issues presented by the People. As the majority concede, however, expense to litigants and delay are factors which militate against application of the doctrine. (See *United States v. McDonnell Douglas* ***407** *Corp.* (8th Cir. 1984) 751 F.2d 220, 224; *Miss. Power & Light Co. v. United Gas Pipe Line Co.* (5th Cir. 1976) 532 F.2d 412, 419; cf. *Rojo, supra,* 52 Cal.3d 65, 88.)

It is now three and one-half years since Proposition 103 was enacted, and the voters are still waiting for the enforcement of the discount insurers are required to afford to good drivers. The majority fail to justify the significant and unnecessary delay which their holding is certain to cause in the enforcement of this key provision of Proposition 103.

I would affirm the judgment of the Court of Appeal. ***408**

Cal. 1992.
Farmers Ins. Exchange v. Superior Court
2 Cal.4th 377, 826 P.2d 730, 6 Cal.Rptr.2d 487

END OF DOCUMENT

TAB NO. 14

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

LONG BEACH UNIFIED SCHOOL DISTRICT,
Plaintiff and Appellant,
v.
THE STATE OF CALIFORNIA et al., Defendants and Appellants; MARK H. BLOODGOOD, as Auditor-Controller, etc., et al., Defendants and Respondents.

No. B033742.

Court of Appeal, Second District, Division 5, California.
Nov. 15, 1990.

SUMMARY

A school district filed a claim with the state Board of Control asserting that its expenditures related to its efforts to alleviate racial and ethnic segregation in its schools had been mandated by the state through an executive order (in the form of regulations issued by the state Department of Education) and were reimbursable pursuant to former Rev. & Tax. Code, § 2234, and Cal. Const., art. XIII B, § 6. The board approved the claim, but the Legislature deleted the requested funding from an appropriations bill and enacted a "finding" that the executive order did not impose a state-mandated local program. The district then filed a petition to compel reimbursement pursuant to Code Civ. Proc., § 1085, and a complaint for declaratory relief. The trial court ruled that the doctrines of administrative collateral estoppel and waiver prevented the state from challenging the board's decisions. The court's judgment in favor of the district identified certain funds previously appropriated by the Legislature as "reasonably available" for reimbursement of the claimed expenditures. (Superior Court of Los Angeles County, No. C606020, Robert I. Weil, Judge.)

The Court of Appeal modified the trial court's decision by striking as sources of reimbursement the Special Fund for Economic Uncertainties "or similarly designated accounts," and by including charging orders against certain funds appropriated through subsequent budget acts. The court affirmed the judgment as so modified and remanded to the trial court to determine whether at the time of its order, there were, in the funds from which reimbursement could properly be paid, unexpended, unencumbered funds sufficient to satisfy the judgment. The court held that since the doctrines of collateral estoppel and waiver were inapplicable to the facts of the case, the trial court should have allowed the state to challenge the board's decisions. However, the court also held that the executive order required local school boards to provide a higher level of service than is required constitutionally or by case law and that the order was a reimbursable state mandate pursuant to Cal. Const., art. XIII B, § 6. The court further held that former Rev. & Tax. Code, § 2234, did not provide reimbursement of the subject claim. (Opinion by Lucas, P. J., with Ashby and Boren, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Judgments § 88--Collateral Estoppel--Finality of Judgment--Administrative Order--Where Appeal Still Possible.

In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the doctrine of administrative collateral estoppel was inapplicable and did not prevent the state from litigating whether the state Board of Control properly considered the subject claim and whether the claim was reimbursable. The board had approved the claim but the Legislature had deleted the requested funding from an appropriations bill. The board's decisions were administratively final, for collateral estoppel purposes, since no party requested reconsideration within the applicable 10-day period, and no statute or regulation provided for further consideration of the matter by the board. However, a decision will not be given

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

collateral estoppel effect if an appeal has been taken or if the time for such appeal has not lapsed. The applicable statute of limitations for review of the board's decisions was three years, and the school district's action was filed before this period lapsed.

(2) Judgments § 88--Collateral Estoppel--Finality of Judgment.

Collateral estoppel precludes a party from relitigating in a subsequent action matters previously litigated and determined. The traditional elements of collateral estoppel include the requirement that the prior judgment be "final."

(3a, 3b) Administrative Law § 81--Judicial Review and Relief--Finality of Administrative Action--For Collateral Estoppel Purposes.

Finality for the purposes of administrative collateral estoppel may be understood as a two-step process: the decision must be final with respect to action by the administrative agency, and the decision must have conclusive effect. A decision attains the requisite administrative finality when the agency has exhausted its jurisdiction and possesses no further power to reconsider or rehear the claim. To have conclusive effect, the decision must be free from direct attack.

(4) Limitation of Actions § 30--Commencement of Period.

A statute of limitations commences to run at the point where a cause of action accrues and a suit may be maintained thereon.

(5a, 5b, 5c) Estoppel and Waiver § 23--Waiver--State's Right to Contest Board of Control's Findings as to State-mandated Costs.

In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the doctrine of waiver did not preclude the state from contesting the state Board of Control's previous findings that the subject claim was reimbursable (the Legislature subsequently deleted the requested funding from an appropriations bill). The statute of limitations applicable to an appeal by the state from the board's decisions had not run at the time the state raised its affirmative defenses in the district's action, and this assertion of defenses was inconsistent with an intent on the state's part to waive its right to contest the board's decisions.

(6) Estoppel and Waiver § 19--Waiver--Requisites.

A waiver occurs when there is an existing right, actual or constructive knowledge of its existence, and either an actual intention to relinquish it, or conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that it has been waived. Ordinarily the issue of waiver is a question of fact that is binding on the appellate court if the determination is supported by substantial evidence. However, the question is one of law when the evidence is not in conflict and is susceptible of only one reasonable inference.

(7) Estoppel and Waiver § 6--Equitable Estoppel--Challenge to State Board of Control's Findings as to State-mandated Costs--Absence of Confidential Relationship.

In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the state was not equitably estopped from challenging the state Board of Control's decisions finding that the subject claim was reimbursable as a state-mandated cost (the Legislature subsequently deleted the requested funding from an appropriations bill). In the absence of a confidential relationship, the doctrine of equitable estoppel is inapplicable where there is a mistake of law. There was no confidential relationship, and since the statute of limitations did not bar the state from litigating the mandate and reimbursability issues, the doctrine was inapplicable.

(8) Appellate Review § 145--Function of Appellate Court--Questions of Law.

On appeal by the state in an action by a school district to compel the state to reimburse the district for expenditures related to its efforts to alleviate ra-

cial and ethnic segregation, the appellate court's conclusion that the trial court erred in failing to consider the merits of the state's challenge to the state Board of Control's decisions that the subject claims were reimbursable as state-mandated costs did not require that the matter be remanded to the trial court for a full hearing, since the question of whether a cost is state-mandated is one of law.

(9a, 9b, 9c) Schools § 4--School Districts; Financing; Funds-- Reimbursement of State-mandated Costs--Desegregation Expenditures.

A school district was entitled to reimbursement pursuant to Cal. Const., art. XIII B, § 6 (reimbursement of local governments for state-mandated costs or increased levels of service), for expenditures related to its efforts to alleviate racial and ethnic segregation in its schools, since an executive order (in the form of regulations issued by the state Department of Education) required a higher level of service and constituted a state mandate. The requirements of the order went beyond constitutional and case law requirements in that they required specific actions to alleviate segregation. Although under Cal. Const., art. XIII B, § 6, subd. (c), the state has discretion whether to reimburse pre-1975 mandates that are either statutes or executive orders implementing statutes, it cannot be inferred from this exception that reimbursability is otherwise dependent on the form of the mandate. Further, the district's claim was not defeated by Gov. Code, §§ 17561 and 17514, limiting reimbursement to certain costs incurred after July 1, 1980, the effective date of Cal. Const., art. XIII B, since the limitations contained in those sections are confined to the exception contained in Cal. Const., art. XIII B, § 6, subd. (c).

(10) State of California § 11--Fiscal Matters--Reimbursement to Local Governments for State-mandated Costs.

The subvention requirement of Cal. Const., art. XIII B, § 6 (reimbursement of local governments for state-mandated costs or increased levels of service), is directed to state-mandated increases in the services provided by local agencies in existing "programs." The drafters and electorate had in mind the commonly understood meaning of the term-programs that carry out the governmental function of providing services to the public, or laws that, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. [See **Cal.Jur.3d,** State of California, § 78; 9 **Witkin,** Summary of Cal. Law (9th ed. 1989) Taxation, § 123.]

(11) Constitutional Law § 13--Construction of Constitutions--Language of Enactments.

In construing a constitutional provision enacted by the voters, a court must determine the intent of the voters by first looking to the language itself, which should be construed in accordance with the natural and ordinary meaning of its words.

(12) State of California § 11--Fiscal Matters--Reimbursement to Local Governments for State-mandate Costs--Executive Order as Mandate.

In Cal. Const., art. XIII B, § 6 (reimbursement of local governments for state-mandated costs or increased levels of service), "mandates" means "orders" or "commands," concepts broad enough to include executive orders as well as statutes. The concern that prompted the inclusion of § 6 in art. XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services that the state believed should be extended to the public. It is clear that the primary concern of the voters was the increased financial burdens being shifted to local government, not the form in which those burdens appeared.

(13) Administrative Law § 88--Judicial Review and Relief--Exhaustion of Administrative Remedies--Claim by School District for Reimbursement of State-mandated Costs.

A school district did not fail to exhaust its administrative remedies in seeking reimbursement for

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

expenditures related to its efforts to alleviate racial and ethnic segregation, based on its claim that the expenditures were mandated by a state executive order, where the state Board of Control approved the district's reimbursement claim, even though the state Commission on State Mandates subsequently succeeded to the functions of the board and the district never made a claim to the commission. The board's decisions in favor of the district became administratively final before the commission was in place, and there was no evidence that the commission did not consider these decisions by the board to be final. Although the commission was given jurisdiction over all claims that had not been included in a local government claims bill enacted before January 1, 1985, the subject claim was included in such a bill (which was signed into law only after the recommended appropriation was deleted). Under the statutory scheme, the district pursued the only relief that a disappointed claimant at such a juncture could pursue-an action in declaratory relief to declare an executive order void or unenforceable and to enjoin its enforcement. There was no requirement to seek further administrative review.

(14) Courts § 20--Subject Matter Jurisdiction--When Issue May Be Raised.

Lack of subject matter jurisdiction may be raised at any time.

(15a, 15b) Schools § 4--School Districts; Financing; Funds-- Reimbursement of State-mandated Costs--Desegregation Expenditures-- Applicability of Statute Requiring Reimbursement of Subsequently Mandated Costs.

A school district was not entitled to reimbursement on the basis of former Rev. & Tax. Code, § 2234 (reimbursement of school district for costs it is incurring that are subsequently mandated by a state), for expenditures related to its efforts to alleviate racial and ethnic segregation in its schools, since the executive order (in the form of regulations issued by the state Department of Education) that required the district to take specific actions to alleviate segregation fell outside the purview of § 2234. The "subsequently mandated" provision of § 2234 originally was contained in sections that set forth specific date limitations, and the Legislature likewise intended to limit claims made pursuant to § 2234. The use of the language "subsequently mandated" merely describes an additional circumstance in which the state will reimburse costs. Since the executive order fell outside the January 1, 1978, limits set by Rev. & Tax. Code, § 2207.5, Rev. & Tax. Code, § 2234, did not provide reimbursement to the district.

(16) Statutes § 39--Construction--Giving Effect to Statute--Conformation of Parts.

A statute should be construed with reference to the whole system of law of which it is a part in order to ascertain the intent of the Legislature. The legislative history of the statute may be considered in ascertaining legislative design.

(17a, 17b, 17c) Constitutional Law § 40--Distribution of Governmental Powers--Judicial Power--Appropriation of Funds--Reimbursement of State-mandated Costs.

In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the trial court's award of reimbursement to the district, on the ground that the district's expenditures were mandated by an executive order, from appropriated funds and specified budgets and accounts did not constitute an invasion of the province of the Legislature or a judicial usurpation of the republican form of government guaranteed by U.S. Const., art. IV, § 4, except insofar as it designated the Special Fund for Economic Uncertainties as a source for reimbursement. The specified line item accounts for the Department of Education, the Commission on State Mandates, and the Reserve for Contingencies and Emergencies provided funds for a broad range of activities similar to those specified in the executive order and thus were reasonably available for reimbursement. However, remand to the trial court was necessary to determine whether these sources contained suffi-

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

cient unexhausted funds to cover the award.

(18) Constitutional Law § 40--Distribution of Governmental Powers--Judicial Power--Appropriation of Funds.

A court cannot compel the Legislature either to appropriate funds or to pay funds not yet appropriated. However, no violation of the separation of powers doctrine occurs when a court orders appropriate expenditures from already existing funds. The test is whether such funds are reasonably available for the expenditures in question. Funds are "reasonably available" for reimbursement of local government expenditures when the purposes for which those funds were appropriated are generally related to the nature of costs incurred. There is no requirement that the appropriation specifically refer to the particular expenditure, nor must past administrative practice sanction coverage from a particular fund.

(19) Appellate Review § 162--Modification--To Add Charge Order.

An appellate court is empowered to add a directive that a trial court order be modified to include charging orders against funds appropriated by subsequent budgets acts.

(20) Schools § 4--School Districts; Financing; Funds--Reimbursement of State-mandated Costs--Desegregation Expenditures--Effect of Legislative Finding That Costs Not State-mandated.

A school district was entitled to reimbursement pursuant to Cal. Const., art. XIII B, § 6 (reimbursement of local governments for state-mandated costs or increased levels of service), for expenditures related to its efforts to alleviate racial and ethnic segregation in its schools, notwithstanding that after the state Board of Control approved the district's reimbursement claim, the Legislature enacted a "finding" that the executive order requiring the district to undertake desegregation activities did not impose a state-mandated local program. Unsupported legislative disclaimers are insufficient to defeat reimbursement. The district had a constitutional right to reimbursement, and the Legislature could not limit that right.

(21) Schools § 4--School Districts; Financing; Funds--Reimbursement of State-mandated Costs--Desegregation Expenditures--Department of Education Budget as Source.

In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the trial court, after finding that the executive order requiring the district to undertake desegregation activities was a reimbursable state mandate, did not err in ordering reimbursement to take place in part from the state Department of Education budget. Logic dictated that department funding be the initial and primary source for reimbursement: given the fact that the executive order was issued by the department, the evidence overwhelmingly supported the trial court's finding of a general relationship between the department budget items and the reimbursable expenditures.

(22) Interest § 8--Rate--Reimbursement of School District's State-mandated Costs.

In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the trial court, after finding that the executive order requiring the district to undertake desegregation activities was a reimbursable state mandate, did not err in awarding the district interest at the legal rate (Cal. Const., art. XV, § 1, par. (2)), rather than at the rate of 6 percent per annum pursuant to Gov. Code, § 926.10. Gov. Code, § 926.10, is part of the California Tort Claims Act (Gov. Code, § 900 et seq.), which provides a statutory scheme for the filing of claims against public entities for alleged injuries. It makes no provision for claims for reimbursement for state-mandated expenditures.

(23) Schools § 4--School Districts; Financing; Funds--Reimbursement of State-mandated Costs--Desegregation Expenditures--County Fines and Forfeitures Funds as Source.

In an action by a school district against the

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the trial court, after finding that the executive order requiring the district to undertake desegregation activities was a reimbursable state mandate, did not err in determining that moneys in the Fines and Forfeiture Funds in the custody and possession of the county auditor-controller for transfer to the state treasury were not reasonably available for reimbursement purposes. There was no evidence in the record showing the use of those funds once they were transmitted to the state, nor was there any evidence indicating that those funds were then reasonably available to satisfy the district's claim. It could not be concluded as a matter of law that a general relationship existed between the funds and the nature of the costs incurred pursuant to the executive order. Further, there was no ground on which the funds could be made available to the district while in the possession of the auditor-controller.

COUNSEL

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LUCAS, P. J.

Introduction

Long Beach Unified School District (LBUSD) filed a claim with the Board of Control of the State of California (Board), asserting that certain expenditures related to its efforts to alleviate racial and ethnic segregation in its schools had been mandated by the state through regulations (Executive Order) issued by the Department of Education (DOE) and were ***164** reimbursable pursuant to former Revenue and Taxation Code section 2234 and article XIII B, section 6 of the California Constitution. The Board eventually approved the claim and reported to the Legislature its recommendation that funds be appropriated to cover the statewide estimated costs of compliance with the Executive Order. When the Legislature deleted the requested funding from an appropriations bill, LBUSD filed a petition to compel reimbursement (Code Civ. Proc., § 1085) and complaint for declaratory relief. The trial court held that the doctrines of administrative collateral estoppel and waiver prevented the state from challenging the decisions of the Board, and it gave judgment to LBUSD. It also ruled that certain funds previously appropriated by the Legislature were "reasonably available" for reimbursement of the claimed expenditures, subject to audit by the state Controller.

We conclude that the doctrines of collateral estoppel and waiver are inapplicable to the facts of this case. However, we determine as a question of law that the Executive Order requires local school boards to provide a higher level of service than is required either constitutionally or by case law and that the Executive Order is a reimbursable state mandate pursuant to article XIII B, section 6 of the California Constitution. We also decide that former Revenue and Taxation Code section 2234 does not provide for reimbursement of the claim.

Based on uncontradicted evidence, we modify the decision of the trial court regarding which budget line item account numbers provide "reasonably available" funds to reimburse LBUSD for appropriate expenditures under the claim. We further modify the decision to include charging orders against funds appropriated by subsequent budget acts. Finally, we remand the matter to the trial court to determine whether at the time of its order unexpended, unencumbered funds sufficient

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

to satisfy the judgment remained in the approved budget line item account numbers. The trial court must resolve this same issue with respect to the charging order.

Background and Procedural History

The California Property Tax Relief Act of 1972 (Stats. 1972, ch. 1406, § 1, p. 2931) limited the power of local governmental entities to levy property taxes. It also mandated that when the state requires such entities to provide a new program or higher level of service, the state must reimburse those costs. Over time, amendments to the California Constitution and numerous legislative changes impacted both the right and procedure for obtaining reimbursement. ***165**

Sometime prior to September 8, 1977, LBUSD, at its option, voluntarily began to incur substantial costs to alleviate the racial and ethnic segregation of students within its jurisdiction.

On or about the above date, DOE adopted certain regulations which added sections 90 through 101 to title 5 of the California Administrative Code, effective September 16, 1977. We refer to these regulations as the Executive Order.

The Executive Order and related guidelines for implementation required in part that school districts which identified one or more schools as either having or being in danger of having segregation of its minority students "shall, no later than January 1, 1979, and each four years thereafter, develop and adopt a reasonably feasible plan for the alleviation and prevention of racial and ethnic segregation of minority students in the district."

On or about June 4, 1982, LBUSD submitted a "test claim" (Claim) [FN1] to the Board for reimbursement of $9,050,714-the total costs which LBUSD claimed it had incurred during fiscal years 1977-1978 through 1981-1982 for activities required by the Executive Order and guidelines. LBUSD cited former Revenue and Taxation Code section 2234 as authority for the requested reimbursement, asserting that the costs had been "subsequently mandated" by the state. [FN2]

FN1 Former Revenue and Taxation Code section 2218 defines "test claim" as "the first claim filed with the State Board of Control alleging that a particular statute or executive order imposes a mandated cost on such local agency or school district." (Stats. 1980, ch. 1256, § 7, p. 4249.)

FN2 All statutory references are to the Revenue and Taxation Code unless otherwise stated.

Former section 2234 provided: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for such costs incurred after the operative date of such mandate." (Stats. 1980, ch. 1256, § 11, pp. 4251-4252.)

The Board denied the Claim on the grounds that it had no jurisdiction to accept a claim filed under section 2234. LBUSD petitioned superior court for review of the Board decision. (Code Civ. Proc., § 1094.5.) That court concluded the Board had jurisdiction to accept a section 2234 claim and ordered it to hear the matter on its merits. The Board did not appeal this decision.

On February 16, 1984, the Board conducted a hearing to consider the Claim. LBUSD presented written and oral argument that the Claim was reimbursable pursuant to section 2234 and, in addition, under article XIII B, section 6 of the California Constitution. DOE and the State Department ***166** of Finance (Finance) participated in the hearing. [FN3] The Board concluded that the Executive Order constituted a state mandate. On April 26, 1984, the Board adopted parameters and guidelines proposed by LBUSD for reimbursement of the expenditures. No state entity either sought reconsideration of the Board decisions, available pursuant to former sec-

tion 633.6 of the California Administrative Code, FN4 or petitioned for judicial review. FN5

FN3 The DOE recommended that the Claim be denied on the grounds that the requirements of the Executive Order were constitutionally mandated and court ordered and because the Executive Order was effective prior to January 1, 1978 (issues discussed *post*). However, counsel for the DOE expressed dismay that school districts which had voluntarily instituted desegregation programs had been having problems receiving funding from the Legislature, while schools which had been forced to do so had been receiving "substantial amounts of money."

A spokesman from Finance recalled there had been some doubt whether the Board had jurisdiction to hear a 2234 claim. He stated that, assuming the Board did have jurisdiction, the Executive Order contained at least one state mandate, which possibly consisted of administrative kinds of tasks related to the identification of "problem areas and the like."

FN4 Former section 633.6 of the California Administrative Code (now renamed California Code of Regulations) provided in relevant part: "(b) Request for Reconsideration. [¶] (1) A request for reconsideration of a Board determination on a specific test claim ... shall be filed, in writing, with the Board of Control, no later than ten (10) days after any determination regarding the claim by the Board ...." (Title 2, Cal. Admin. Code)

FN5 Former section 2253.5 provided: "A claimant or the state may commence a proceeding in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure to set aside a decision of the Board of Control on the grounds that the board's decision is not supported by substantial evidence. The court may order the board to hold another hearing regarding such claim and may direct the board on what basis the claim is to receive a rehearing." (Stats. 1978, ch. 794, § 8, p. 2551.)

In December 1984, pursuant to former section 2255, the Board reported to the Legislature the number of mandates it had found and the estimated statewide costs of each mandate. With respect to the Executive Order mandate, the Board adopted an estimate by Finance that reimbursement of school districts, including LBUSD, for costs expended in compliance with the Executive Order would total $95 million for fiscal years 1977-1978 through 1984-1985. The Board recommended that the Legislature appropriate that amount.

Effective January 1, 1985, the Commission on State Mandates (Commission) succeeded to the functions of the Board. (Gov. Code, §§ 17525, 17630.)

On March 4, 1985, Assembly Bill No. 1301 was introduced. It included an appropriation of $95 million to the state controller "for payment of claims of school districts seeking reimbursable state-mandated costs incurred pursuant to [the Executive Order] ...." On June 27, the Assembly amended the bill by deleting this $95 million appropriation and adding a ***167** "finding" that the Executive Order did not impose a state-mandated local program. FN6 On September 28, 1985, the Governor approved the bill as amended.

FN6 Former Section 2255 provided in part: "(b) If the Legislature deletes from a local government claims bill funding for a mandate imposed either by legislation or by a regulation ..., it may take one of the following courses of action: (1) Include a finding that the legislation or regulation does not contain a mandate ...." (Stats. 1982, ch. 1638, § 7, p. 6662.)

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

On June 26, 1986, LBUSD petitioned for writ of mandate (Code Civ. Proc., § 1085) and filed a complaint for declaratory relief against defendants State of California; Commission; Finance; DOE; holders of the offices of State Controller and State Treasurer and holder of the office of Auditor-Controller of the County of Los Angeles, and their successors in interest. LBUSD requested issuance of a writ of mandate commanding the respondents to comply with section 2234 (fn. 2, *ante*) FN7 and, in an amended petition, its successor, Government Code section 17565, and with California Constitution, article XIII B, section 6. FN8 It further requested respondents to reimburse LBUSD $24,164,593 for fiscal years 1977-1978 through 1982-1983, $3,850,276 for fiscal years 1983-1984 and 1984-1985, and accrued interest, for activities mandated by the Executive Order.

FN7 The language of Government Code section 17565 is nearly identical to that of section 2234 (fn. 2, *ante*), and provides: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate." (Stats. 1986, ch. 879, § 10, p. 3043.)

FN8 Article XIII B, section 6 provides in pertinent part: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service ...."

The trial court let stand the conclusion of the Board that the Executive Order constituted a reimbursable state mandate and ruled in favor of LBUSD. No party requested a statement of decision.

The judgment stated that the Executive Order constituted a reimbursable state mandate which state entities could not challenge because of the doctrines of administrative collateral estoppel and waiver. It provided that certain previously appropriated funds were " 'reasonably available' " to reimburse LBUSD for its claimed expenditures, applicable interest, and court costs. The judgment also stated that funds denominated the "Fines and Forfeitures Funds," under the custody of the Auditor-Controller of the County of Los Angeles, were not reasonably available. The judgment further decreed that the State Controller retained the right to audit the claims and records of LBUSD to verify the amount of the reimbursement award sum. ***168**

State respondents (State) and DOE separately filed timely notices of appeal, and LBUSD cross-appealed. FN9

FN9 Although an "Amended Notice to Prepare Clerk's Transcript" filed by DOE on April 11, 1988, requests the clerk of the superior court to incorporate in the record its notice of appeal filed April 1, 1988, this latter document does not appear in the record before us, and the original apparently is lost within the court system. Respondent LBUSD received a copy of the notice on April 4, 1988.

Discussion

State asserts that neither the doctrine of collateral estoppel nor the doctrine of waiver is applicable to this case, the costs incurred by LBUSD are not reimbursable, and the remedy authorized by the trial court is inconsistent with California law and invades the province of the Legislature, a violation of article IV, section 4 of the United States Constitution.

The thrust of the DOE appeal is that its budget is not an appropriate source of funding for the reimbursement.

LBUSD has argued in its cross-appeal that an additional source of funding, the "Fines and For-

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

feiture Funds," should be made available for reimbursement of its costs and, in supplementary briefing, requests this court to order a modification of the judgment to include as "reasonably available funding" specific line item accounts from the 1988-1989 and 1989-1990 state budgets.

I. State Not Barred From Challenging Decisions of the Board

A. Administrative Collateral Estoppel

(1a) State first contends that the doctrine of administrative collateral estoppel is not applicable to the facts of this case and does not prevent State from litigating whether the Board properly considered the subject claim and whether the claim is reimbursable.

(2) Collateral estoppel precludes a party from relitigating in a subsequent action matters previously litigated and determined. (*Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.* (1962) 58 Cal.2d 601, 604 [25 Cal.Rptr. 559, 375 P.2d 439].) The traditional elements of collateral estoppel include the requirement that the prior judgment be "final." (*Ibid.*)

(3a) Finality for the purposes of administrative collateral estoppel may be understood as a two-step process: (1) the decision must be final with ***169** respect to action by the administrative agency (see Code Civ. Proc., § 1094.5, subd. (a)); and (2) the decision must have conclusive effect (*Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 936-937 [190 Cal.Rptr. 29]).

A decision attains the requisite administrative finality when the agency has exhausted its jurisdiction and possesses "no further power to reconsider or rehear the claim. [Fn. omitted.]" (*Chas. L. Harney, Inc. v. State of California* (1963) 217 Cal.App.2d 77, 98 [31 Cal.Rptr. 524].) (1b) In the case at bar, former section 633.6 of the Administrative Code provided a 10-day period during which any party could request reconsideration of any Board determination (fn. 4, *ante*). The Board decided on February 16, 1984, that the Executive Order constituted a state mandate, and on April 26, 1984, it adopted parameters and guidelines for the reimbursement of the claimed expenditures. No party requested reconsideration, no statute or regulation provided for further consideration of the matter by the Board (see, e.g., *Olive Proration etc. Com. v. Agri. etc. Com.* (1941) 17 Cal.2d 204, 209 [109 P.2d 918]), and the decisions became administratively final on February 27, 1984, and May 7, 1984, respectively [FN10] (*Ziganto v. Taylor* (1961) 198 Cal.App.2d 603, 607 [18 Cal.Rptr. 229]).

> FN10 We take judicial notice pursuant to Evidence Code section 452, subdivision (h), that February 26, 1984, and May 6, 1984, fall on Sundays.

(3b) Next, the decision must have conclusive effect. *(Sandoval v. Superior Court, supra,* 140 Cal.App.3d 932, 936-937.) In other words, the decision must be free from direct attack. (*People v. Sims* (1982) 32 Cal.3d 468, 486 [186 Cal.Rptr. 77, 651 P.2d 321].) A direct attack on an administrative decision may be made by appeal to the superior court for review by petition for administrative mandamus. (Code Civ. Proc., § 1094.5.) (1c) A decision will not be given collateral estoppel effect if such appeal has been taken or if the time for such appeal has not lapsed. (*Sandoval v. Superior Court, supra,* 140 Cal.App.3d at pp. 936-937; *Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 911 [226 Cal.Rptr. 558, 718 P.2d 920].) The applicable statute of limitations for such review in the case at bar is three years. (*Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 534 [234 Cal.Rptr. 795]; *Green v. Obledo* (1981) 29 Cal.3d 126, 141, fn. 10 [172 Cal.Rptr. 206, 624 P.2d 256].) (4) A statute of limitations commences to run at the point where a cause of action accrues and a suit may be maintained thereon. (*Dillon v. Board of Pension Comm'rs.* (1941) 18 Cal.2d 427, 430 [116 P.2d 37, 136 A.L.R. 800].)

(1d) In the instant case, State's causes of action accrued when the Board made the two decisions ad-

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

verse to State on February 16 and April 26, 1984, ***170** as discussed. State did not request reconsideration, and the decisions became administratively final on February 27 and May 7, 1984. FN11 For purposes of discussion, we will assume the applicable three-year statute of limitations period for the two Board decisions commenced on February 28 and May 8, 1984, and ended on February 28 and May 8, 1987. FN12 LBUSD filed its petition for ordinary mandamus (Code Civ. Proc., § 1085) and complaint for declaratory relief on June 26, 1986. At that point, the limitations periods had not run against State and the Board decisions lacked the necessary finality to satisfy that requirement of the doctrine of administrative collateral estoppel. FN13

FN11 We do not address the contention of LBUSD that State failed to exhaust its administrative remedies (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292 [109 P.2d 942, 132 A.L.R. 715]; *Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 982 [88 Cal.Rptr. 533]) and therefore State cannot assert its affirmative defenses in response to the petition and complaint of the school district. Traditionally, the doctrine has been raised as a bar only with respect to the party seeking judicial relief, not against the responding party (*ibid.*); we have found no case holding otherwise.

FN12 If State had sought reconsideration and its request been denied, or if its request had been granted but the matter again decided in favor of LBUSD, the Board decision would have been final 10 days after the Board action, and at that point the statute would have commenced to run against State.

FN13 State argues that its statute of limitations did not commence until the legislation was enacted without the appropriation (Sept. 28, 1985), citing *Carmel Valley Fire Protection Dist. v. State of California, supra,* 190 Cal.App.3d at page 548. However, *Carmel Valley* held that the *claimant* does not exhaust its administrative remedies and cannot come under the court's jurisdiction until the legislative process is complete, which occurred in that case when the legislation was enacted without the subject appropriations. At that point, *Carmel Valley* reasoned, the state had breached its duty to reimburse, and the claimant's right of action in traditional mandamus accrued. (*Ibid.*) However, *Carmel Valley* decided, as do we in the case at bar, that the state's statute of limitations commenced on the date the Board made decisions adverse to its interests. (*Id.* at p. 534.)

In addition, we see no reason to permit State to rely on the fortuitous actions of the Legislature, an independent branch of government, to bail it out of obligations established in the distant past by state agents-especially given the lengthy three-year statute of limitations. (Compare, e.g., Gov. Code, § 11523 [mandatory time limit within which to petition for administrative mandamus can be 30 days after last day on which administrative reconsideration can be ordered]; Lab. Code, § 1160.8, and *Jackson & Perkins Co. v. Agricultural Labor Relations Board* (1978) 77 Cal.App.3d 830, 834 [144 Cal.Rptr. 166] [30 days from issuance of board order even if party has filed a motion to reconsider].)

B. Waiver

(5a) State also asserts that the doctrine of waiver is not applicable.

(6) A waiver occurs when there is "an existing right; actual or constructive knowledge of its existence; and either an actual intention to relinquish it, or conduct so inconsistent with an intent to enforce the right as to induce ***171** a reasonable belief that it has been waived. [Citations.]" (*Carmel Valley*

Fire Protection Dist. v. State of California, supra, 190 Cal.App.3d at p. 534.) Ordinarily, the issue of waiver is a question of fact which is binding on the appellate court if the determination is supported by substantial evidence. (*Napa Association of Public Employees v. County of Napa* (1979) 98 Cal.App.3d 263, 268 [159 Cal.Rptr. 522].) However, the question is one of law when the evidence is not in conflict and is susceptible of only one reasonable inference. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 151-152 [135 Cal.Rptr. 802].)

(5b) In the instant case, the right to contest the findings of the Board is at issue, and there is no dispute that the state was aware of the existence of this right. As discussed, the statute of limitations had not run when State raised its affirmative defenses, and during this time State could have filed a separate petition for administrative mandamus. (7)(5c) State's assertion of its affirmative defenses during this period is inconsistent with an intent to waive its right to contest the Board decisions, and therefore the doctrine of waiver is not applicable. FN14

FN14 LBUSD contends that State should be equitably estopped from challenging the Board decisions. In the absence of a confidential relationship, the doctrine of equitable estoppel is inapplicable where there is a mistake of law. (*Gilbert v. City of Martinez* (1957) 152 Cal.App.2d 374, 378 [313 P.2d 139]; *People v. Stuyvesant Ins. Co.* (1968) 261 Cal.App.2d 773, 784 [68 Cal.Rptr. 389].) There is no confidential relationship herein, and since we conclude as a matter of law and contrary to the trial court that the statute of limitations does not bar State from litigating the mandate and reimbursability issues, the doctrine is inapplicable.

II. Issue of State Mandate

(8) Ordinarily, our conclusion that the trial court erred in failing to consider the merits of the State's challenge to the decisions of the Board would require that the matter be remanded to the trial court for a full hearing. However, because the question of whether a cost is state mandated is one of law in the instant case (cf. *Carmel Valley Fire Protection Dist. v. State of California, supra,* 190 Cal.App.3d at p. 536), we now decide that the expenditures are reimbursable pursuant to article XIII B, section 6 of the California Constitution and that no relief is available under section 2234. FN15

***172**

FN15 We invited State, DOE, and LBUSD to submit additional briefing on the following issues: "1. Can it be determined as a question of law whether sections 90 through 101 of Title 5 of the California Administrative Code [Executive Order] constitute a state mandate within the meaning of article XIII B, section 6 of the California Constitution? 2. Do the above sections constitute such mandate?" State and LBUSD submitted additional argument; DOE declined the invitation.

A. Recovery Under Article XIII B, Section 6

(9a) On November 6, 1979, California voters passed initiative measure Proposition 4, which added article XIII B to the state Constitution. This measure, a corollary to the previously passed Proposition 13 (art. XIII A, which restricts governmental taxing authority), placed limits on the growth of state and local government appropriations. It also provided reimbursement to local governments for the costs of complying with certain requirements mandated by the state. LBUSD argues that section 6 of this provision is an additional ground for reimbursement.

1. The Executive Order Requires a Higher Level of Service

In relevant part article XIII B, section 6 (Section 6) provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such pro-

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

gram or increased level of service ...." (10) The subvention requirement of Section 6 "is directed to state mandated increases in the services provided by local agencies in existing 'programs.' " (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 [233 Cal.Rptr. 38, 729 P.2d 202].) "[T]he drafters and the electorate had in mind the commonly understood meanings of the term-programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*Ibid.*)

(9b) In the instant case, although numerous private schools exist, education in our society is considered to be a peculiarly governmental function. (Cf. *Carmel Valley Fire Protection Dist. v. State of California, supra,* 190 Cal.App.3d at p. 537 .) Further, public education is administered by local agencies to provide service to the public. Thus public education constitutes a "program" within the meaning of Section 6.

State argues that the Executive Order does not mandate a higher level of service-or a new program-because school districts in California have a constitutional duty to make an effort to eliminate racial segregation in the public schools. In support of its argument, State cites *Brown v. Board of Education* (1952) 347 U.S. 483, 495 [98 L.Ed. 873, 881, 74 S.Ct. 686, 38 A.L.R.2d 1180]; *Jackson v. Pasadena City School District* (1963) 59 Cal.2d 876, 881 [31 Cal.Rptr. 606, 382 P.2d 878]; *Crawford v. Board of Education* (1976) 17 Cal.3d 280 [130 Cal.Rptr. 724, 551 P.2d 28] and cases cited therein; and ***173***National Assn. for Advancement of Colored People v. San Bernardino City Unified Sch. Dist.* (1976) 17 Cal.3d 311 [130 Cal.Rptr. 744, 551 P.2d 48]. These cases show that school districts do indeed have a constitutional obligation to alleviate racial segregation, and on this ground the Executive Order does not constitute a "new program." However, although school districts are required to " 'take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause [ ]' " (*Crawford, supra,* at p. 305, italics omitted, citing *Jackson*), the courts have been wary of requiring specific steps in advance of a demonstrated need for intervention (*Crawford,* at pp. 305-306; *Jackson, supra,* at pp. 881-882; *Swann v. Board of Education* (1971) 402 U.S. 1, 18-21 [28 L.Ed.2d 554, 567-570, 91 S.Ct. 1267]). On the other hand, courts have required specific factors be considered in determining whether a school is segregated (*Keyes v. School District No. 1, Denver, Colo.* (1973) 413 U.S. 189, 202-203 [37 L.Ed.2d 548, 559-560, 93 S.Ct. 2686]; *Jackson, supra,* at p. 882).

The phrase "higher level of service" is not defined in article XIII B or in the ballot materials. (*County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 50.) A mere increase in the cost of providing a service which is the result of a requirement mandated by the state is not tantamount to a higher level of service. (*Id.,* at pp. 54-56.) 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. For example, school districts are to conduct mandatory biennial racial and ethnic surveys, develop a "reasonably feasible" plan every four years to alleviate and prevent segregation, include certain specific elements in each plan, and take mandatory steps to involve the community, including public hearings which have been advertised in a specific manner. While all these steps fit within the "reasonably feasible" description of *Jackson* and *Crawford*, the point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts. These requirements constitute a higher level of service. We are supported in our conclusion by the report of the Board to the Legislature regarding its decision that

the Claim is reimbursable: "[O]nly those costs that are above and beyond the regular level of service for like pupils in the district are reimbursable."

2. The Executive Order Constitutes a State Mandate

For the sake of clarity we quote Section 6 in full: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to ***174** reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] *(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."* (Italics added.) This amendment became effective July 1, 1980. (Art. XIII B, § 10.) Again, the Executive Order became effective September 16, 1977.

State argues there is no constitutional ground for reimbursement because (a) with reference to the language of exception (c) of Section 6, the Executive Order is neither a statute nor an executive order or regulation implementing a statute; (b) recent legislation limits reimbursement to certain costs incurred after July 1, 1980, the effective date of the constitutional amendment; and (c) LBUSD failed to exhaust administrative procedures for reimbursement of Section 6 claims (Gov. Code, § 17500 et seq.). We conclude that recovery is available under Section 6.

(a) *Form of Mandate*

State argues the Executive Order is not a state mandate because, with reference to exception (c) of Section 6, it is neither a statute nor an executive order implementing a statute.

(11) In construing the meaning of Section 6, we must determine the intent of the voters by first looking to the language itself (*County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 56), which " 'should be construed in accordance with the natural and ordinary meaning of its words.' [Citation.]" (*ITT World Communications, Inc. v. City and County of San Francisco* (1985) 37 Cal.3d 859, 865 [210 Cal.Rptr. 226, 693 P.2d 811].) The main provision of Section 6 states that whenever the Legislature or any state agency "mandates" a new program or higher level of service, the state must provide reimbursement. (12) We understand the use of "mandates" in the ordinary sense of "orders" or "commands," concepts broad enough to include executive orders as well as statutes. As has been noted, "[t]he concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation *or adopt administrative orders* creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public." (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 56.) It is clear that the primary concern of the voters was the increased financial ***175** burdens being shifted to local government, not the form in which those burdens appeared.

We derive support for our interpretation by reference to the ballot summary presented to the electorate. (Cf. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245-246 [149 Cal.Rptr. 239, 583 P.2d 1281].) The legislative analyst determined that the amendment would limit the rate of growth of governmental appropriations, require the return of taxes which exceeded amounts appropriated, and "[r]equire the state to reimburse local governments for the costs of complying with 'state mandates.' " The term "state mandates" was defined as "requirements imposed on local governments by legislation *or executive orders*." (Italics added; Ballot Pamp., Proposed Amend. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979) p. 16.)

(9c) Although exception (c) of Section 6 gives the state discretion whether to reimburse pre-1975 mandates which are either statutes or executive orders implementing statutes, we do not infer from this exception that reimbursability is otherwise dependent on the form of the mandate. We conclude that since the voters provided for mandatory reimbursement except for the three narrowly drawn exceptions found in (a), (b), and (c), there was no intent to exclude recovery for state mandates in the form of executive orders. Further, as State sets forth in its brief, the adoption of the Executive Order was "arguably prompted" by the decision in *Crawford v. Board of Education, supra,* 17 Cal.3d 280, a case decided after the 1975 cutoff date of exception (c). Since case law and statutory law are of equal force, there appears to be no basis on which to exclude executive orders which implement case law or constitutional law while permitting reimbursement for executive orders implementing statutes. We see no relationship between the proposed distinction and the described purposes of the amendment (*County Los Angeles v. State of California, supra,* 43 Cal.3d at p. 56; *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545 [263 Cal.Rptr. 351]).

(b) *Recent Legislative Limits*

State contends that LBUSD cannot claim reimbursement under Section 6 because Government Code sections 17561 (Stats. 1986, ch. 879, § 6, p. 3041) and 17514 (Stats. 1984, ch. 1459, § 1, p. 5114) limit such recovery to mandates created by statutes or executive orders implementing statutes, and only for costs incurred after July 1, 1980.

As discussed above, the voters did not intend to limit reimbursement of costs only to those incurred pursuant to statutes or executive orders implementing ***176** statutes except as set forth in exception (c) of Section 6. We presume that when the Legislature passed Government Code sections 17561 and 17514 it was aware of Section 6 as a related law and intended to maintain a consistent body of rules. (*Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [128 Cal.Rptr. 673, 547 P.2d 449].) As discussed above, the limitations suggested by State are confined to exception (c).

Further, the state must reimburse costs incurred pursuant to mandates enacted after January 1, 1975, although actual payments for reimbursement were not required to be made prior to July 1, 1980, the effective date of Section 6. (*Carmel Valley Fire Protection Dist. v. State of California, supra,* 190 Cal.App.3d at pp. 547-548; *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182, 191-194 [203 Cal.Rptr. 258], disapproved on other grounds in *County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 58, fn. 10.)

(c) *Administrative Procedures*

The Legislature passed Government Code section 17500 et seq. (Stats. 1984, ch. 1459, § 1, p. 5113), effective January 1, 1985 (Stats. 1984, ch. 1459, § 1, p. 5123), to aid the implementation of Section 6 and to consolidate the procedures for reimbursement under statutes found in the Revenue and Taxation Code. This legislation created the Commission, which replaced the Board, and instituted a number of procedural changes. (Gov. Code, §§ 17525, 17527, subd. (g), 17550 et seq.) The Legislature intended the new system to provide "the sole and exclusive procedure by which a local agency or school district" could claim reimbursement. (Gov. Code, § 17552.) (13) State argues that since LBUSD never made its claim before the Commission, it failed to exhaust its administrative remedies and cannot now receive reimbursement under section 6.

As discussed, the Board decisions favorable to LBUSD became administratively final in 1984. The Commission was not in place until January 1, 1985. There is no evidence in the record that the Commission did not consider these decisions to be final.

State argues the Commission was given jurisdiction over all claims which had not been included in a local government claims bill enacted before January 1, 1985. (Gov. Code, § 17630.) State is

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

correct. However, the subject claim was included in such a bill, but the bill was signed into law after the recommended appropriation had been deleted. Under the statutory scheme, the only relief offered a disappointed claimant at such juncture is an action in declaratory relief to declare a subject executive order void ***177** (former Rev. & Tax Code, § 2255, subd. (c); Stats. 1982, ch. 1638, § 7, pp. 6662-6663) or unenforceable (Gov. Code, § 17612, subd. (b); Stats. 1984, ch. 1459, § 1, p. 5121) and to enjoin its enforcement. LBUSD pursued this remedy and in addition petitioned for writ of mandate (Code Civ. Proc., § 1085) to compel reimbursement. There is no requirement to seek further administrative review. Indeed, to do so after the Legislature has spoken would appear to be an exercise in futility.

We conclude that Section 6 provides reimbursement to LBUSD because the Executive Order required a higher level of service and because the Executive Order constitutes a state mandate.

B. Section 2234

As set forth in the procedural history of this case, the Board originally declined to consider the Claim as a claim made under section 2234 on the ground that it lacked jurisdiction to do so. LBUSD petitioned for judicial relief, and the trial court held that the Board had jurisdiction and must consider the claim on its merits. The Board did not appeal that decision. State raised the jurisdiction issue as an affirmative defense to the second petition for writ of mandate filed by LBUSD and presents it again for our consideration. (14) Of course, lack of subject matter jurisdiction may be raised at any time. (*Stuck v. Board of Medical Examiners* (1949) 94 Cal.App.2d 751, 755 [211 P.2d 389].)

Former section 2250 provided: "The State Board of Control, pursuant to the provisions of this article, shall hear and decide upon a claim by a local agency or school district that such local agency or school district has not been reimbursed for *all costs mandated by the state as required by Section 2231 or 2234*. [¶] Notwithstanding any other provision of law, this article shall provide the sole and exclusive procedure by which the Board of Control shall hear and decide upon a claim that a local agency or school district has not been reimbursed for *all costs mandated by the state as required by Section 2231 or 2234*." (Italics added; Stats. 1978, ch. 794, § 5, p. 2549.) Given the clear, unambiguous language of the statute, there is no need for construction. (*West Covina Hospital v. Superior Court* (1986) 41 Cal.3d 846, 850 [226 Cal.Rptr. 132, 718 P.2d 119, 60 A.L.R.4th 1257].) (15a) We conclude that the Board had jurisdiction to consider a claim filed under former section 2234. However, as discussed below, the 1977 Executive Order falls outside the purview of section 2234.

Former section 2231 provided: "(a) ... The state shall reimburse each school district only for those 'costs mandated by the state', as defined in ***178** Section 2207.5." (Stats. 1982, ch. 1586, § 3, p. 6264.) In part, former section 2207.5 defines "costs mandated by the state" as increased costs which a school district is required to incur as a result of certain new programs or certain increased program levels or services mandated by an executive order issued *after* January 1, 1978. (Stats. 1980, ch. 1256, § 5, pp. 4248-4249.) As previously stated, the Executive Order in the case at bar was issued September 8, 1977.

Former section 2234, pursuant to which LBUSD initially filed its claim, does not itself contain language indicating a time limitation: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for such costs incurred after the operative date of such mandate." (Stats. 1980, ch. 1256, § 11, p. 4251.)

State asserts that the January 1, 1978, limitation of sections 2231 and 2207.5 applies to section 2234, preventing reimbursement for costs expended pursuant to the September 8, 1977, Executive Order; LBUSD argues section 2234 is self-contained and without time limitation.

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

(16) It is a fundamental rule of statutory construction that a statute should be construed with reference to the whole system of law of which it is a part in order to ascertain the intent of the Legislature. (*Moore v. Panish* (1982) 32 Cal.3d 535, 541 [186 Cal.Rptr. 475, 652 P.2d 32]; *Pitman v. City of Oakland* (1988) 197 Cal.App.3d 1037, 1042 [243 Cal.Rptr. 306].) The legislative history of a statute may be considered in ascertaining legislative design. (*Walters v. Weed* (1988) 45 Cal.3d 1, 10 [246 Cal.Rptr. 5, 752 P.2d 443].)

The earliest version of section 2234 is found in former section 2164.3, subdivision (f), which provided reimbursement to a city, county, or special district for "a service or program [provided] at its option which is subsequently mandated by the state ...." Reimbursement was limited to costs mandated by statutes or executive orders enacted or issued after January 1, 1973. (Stats. 1972, ch. 1406, § 3, pp. 2962-2963.)

In 1973, section 2164.3 was amended to provide reimbursement to school districts for costs mandated by statutes enacted after January 1, 1973 (subd. (a)), *but it expressly excluded school districts from reimbursement for costs mandated by executive orders* (subd. (d)). (Stats. 1973, ch. 208, § 51, p. 565.) Later that same year, the Legislature repealed section 2164.3 (Stats. 1973, ch. 358, § 2, p. 779) and added section 2231, which took over the pertinent ***179** reimbursement provisions of section 2164.3 virtually unchanged. (Stats. 1973, ch. 358, § 3, pp. 779, 783-784.)

In 1975, the Legislature removed the time limitation language from section 2231 and incorporated it into a new section, 2207. (Stats. 1975, ch. 486, § 1.8, pp. 997-998.) After this change, section 2231 then provided in pertinent part: "(a) The state shall reimburse each local agency for all 'costs mandated by the state', as defined in Section 2207. *The state shall reimburse each school district only for those 'costs mandated by the state' specified in subdivision (a) of Section 2207 ....*" (Italics added; Stats. 1975, ch. 486, § 7, pp. 999-1000.) Subdivision (a) of section 2207 limited reimbursement solely to costs mandated by statutes enacted after January 1, 1973.

At this same juncture, the Legislature further amended section 2231 by deleting the provision for "subsequently mandated" services or programs and incorporating that provision into a new section, 2234 (Stats. 1975, ch. 486, § 9, p. 1000), the section under which LBUSD would eventually make its claim. The substance of section 2234 (see fn. 2, *ante*) remained unchanged until its repeal in 1986. (Stats. 1977, ch. 1135, § 8.6, p. 3648; Stats. 1980, ch. 1256, § 11, pp. 4251-4252; Stats. 1986, ch. 879, § 25, p. 3045.)

Next, section 2231 was amended to show that with regard to school districts, "costs mandated by the state" were now defined by a new section, 2207.5. (Stats. 1977, ch. 1135, § 7, pp. 3647-3648.) Section 2207.5 limited reimbursement to costs mandated by statutes enacted after January 1, 1973, and *executive orders issued after January 1, 1978.* (Stats. 1977, ch. 1135, § 5, pp. 3646-3647.) (No further pertinent amendments to section 2231 occurred; see Stats. 1978, ch. 794, § 1.1, p. 2546; Stats. 1980, ch. 1256, § 8, pp. 4249-4250; Stats. 1982, ch. 734, § 3, p. 2912.) The distinction between statutes and executive orders was preserved when section 2207.5 was amended in 1980 (Stats. 1980, ch. 1256, § 5, pp. 4248-4249) and was in effect at the time of the Board hearing.

(15b) This survey teaches us that with respect to the reimbursement process, the Legislature has treated school districts differently than it has treated other local government entities. The Legislature initially did not give school districts the right to recover costs mandated by executive orders; and when this option was made available, the effective date differed from that applicable to other entities. The Legislature consistently limited reimbursement of costs by reference to the effective dates of statutes and executive orders and nothing indicates the state intended recovery of costs to be open-ended. ***180**

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

Because the "subsequently mandated" provision of section 2234 originally was contained in sections which set forth specific date limitations (former sections 2164.3 and 2231), we conclude the Legislature likewise intended to limit claims made pursuant to section 2234. The use of the language "subsequently mandated" merely describes an additional circumstance in which the state will reimburse costs, provided the claimant meets other requirements. Since the September 1977 Executive Order falls outside the January 1, 1978, limit set by section 2207.5, section 2234 does not provide for reimbursement to LBUSD.

III. The Award

The full text of the award as provided by the judgment is set forth in an appendix to this opinion. In part, the judgment states that there are appropriated funds in budgets for the DOE, the Commission, the Reserve for Contingencies or Emergencies, and the Special Fund for Economic Uncertainties, "or similarly designated accounts" which are " 'reasonably available' " to reimburse LBUSD for the state mandated costs it has incurred. (Appendix, pars. 3, 2.) The State Controller is commanded to pay the claims plus interest "at the legal rate" from the described appropriations for fiscal years 1984-1985 through 1987-1988 and "subsequently enacted State Budget Acts." (Appendix, par. 7.) The judgment declares that the deletion of funding for reimbursement of costs incurred in compliance with the Executive Order was invalid and unconstitutional. (Appendix, par. 12.) Finally, the Fines and Forfeiture Funds in the custody of the Auditor-Controller of Los Angeles County are held to be not reasonably available for reimbursement. (Appendix, par. 5.)

A. State Position

(17a) State contends the trial court's award is contrary to California law, asserting that it constitutes an invasion of the province of the Legislature and therefore a judicial usurpation of the republican form of government guaranteed by the United States Constitution, Article IV, section 4.

(18) A court cannot compel the Legislature either to appropriate funds or to pay funds not yet appropriated. (Cal. Const., art. III, § 3; art. XVI, § 7; *Mandel v. Myers* (1981) 29 Cal.3d 531, 540 [174 Cal.Rptr. 841, 629 P.2d 935]; *Carmel Valley Fire Protection Dist. v. State of California, supra,* 190 Cal.App.3d at p. 538.) However, no violation of the separation of powers doctrine occurs when a court orders appropriate expenditures from already existing funds. (*Mandel*, at p. 540; *Carmel Valley*, at pp. 539-540.) The test is whether such funds are "reasonably available for the ***181** expenditures in question ...." (*Mandel*, at p. 542; *Carmel Valley*, at pp. 540-541.) Funds are "reasonably available" for reimbursement when the purposes for which those funds were appropriated are "generally related to the nature of costs incurred ...." (*Carmel Valley*, at p. 541.) There is no requirement that the appropriation specifically refer to the particular expenditure (*Mandel* at pp. 543-544, *Carmel Valley* at pp. 540; *Committee to Defend Reproductive Rights v. Cory* (1982) 132 Cal.App.3d 852, 857-858 [183 Cal.Rptr. 475]), nor must past administrative practice sanction coverage from a particular fund (*Carmel Valley*, at p. 540).

(17b) As previously stated, the trial court found the subject funds were "reasonably available." No party requested a statement of decision, and therefore it is implied that the trial court found all facts necessary to support its judgment. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 792-793 [218 Cal.Rptr. 39, 705 P.2d 362]; *Homestead Supplies, Inc. v. Executive Life Ins. Co.* (1978) 81 Cal.App.3d 978, 984 [147 Cal.Rptr. 22].) We now examine the record to ascertain whether substantial evidence supports the decision of the trial court.

The Board having approved reimbursement under the Executive Order, reported to the Legislature that "[t]he categories of reimbursable costs include, but are not limited to: (1) voluntary pupil assignment or reassignment programs, (2) magnet schools or centers, (3) transportation of pupils to alternative schools or programs, (5) [*sic*, no item (4)] racially

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

isolated minority schools, (6) costs of planning, recruiting, administration and/or evaluation, and (7) overhead costs." The guidelines set out comprehensive steps to be taken by school districts in order to be in compliance with the Executive Order.

The peremptory writ of mandate, issued the same date as the judgment, designated funds in specific account numbers and, in addition, a special fund as available for reimbursement. We take judicial notice of the relevant budget enactments and Government Code sections 16418 and 16419 (Evid. Code, §§ 459, subd. (a), 452) and address these designations seriatim.

The line item account numbers for the DOE for fiscal years 1984-1985 through 1987-1988 set forth in the writ are as follows: 6100-001-001, 6100-001-178, 6100-015-001, 6100-101-001, 6100-114-001, 6100-115-001, 6100-121-001, 6100-156-001, 6100-171-178, 6100-206-001, 6100-226-001.

An examination of the relevant budget acts Statutes 1985, chapter 111; Statutes 1986, chapter 186; Statutes 1987, chapter 135; and final budgetary changes as published by the Department of Finance for each year, shows ***182** that appropriations in the 11 DOE line item account numbers have supported a very broad range of activities including reimbursement of costs for both mandated and voluntary integration programs, assessment programs, child nutrition, meals for needy pupils, participation in educational commissions, administration costs of various programs, proposal review, teacher recruitment, analysis of cost data, school bus driver instructor training, shipping costs for instructional materials, local assistance for school district transportation aid, summer school programs, local assistance to districts with high concentrations of limited- and non-English-speaking children, adult education, driver training, Urban Impact Aid, and cost of living increases for specific programs. Further evidence regarding the uses of these funds is found in the deposition testimony of William C. Pieper, Deputy Superintendent for Administration with the State Department of Education, who stated that local school districts were being reimbursed for the costs of desegregation programs from line item account numbers 6100-114-001 and 6100-115-001 in the 1986 State Budget Act.

Comparing the requirements of the Executive Order and guidelines with the broad range of activities supported by the DOE budget, we conclude that the subject funds, although not specifically appropriated for the reimbursement in question, were generally related to the nature of the costs incurred.

With regard to the Commission, the writ sets out three line item account numbers: 8885-001-001; 8885-101-001; and 8885-101-214. A review of the relevant budget acts shows that the first line item provides funding for support of the Commission, and line item number 8885-101-001 provides funding specifically for local assistance "in accordance with the provisions of Section 6 of Article XIII B of the California Constitution ...." (Stats. 1986, ch. 186.) Line item number 8885-101-214 also provides funds for "local assistance." Since the Commission was created specifically to effect reimbursements for qualifying claims, we conclude there is a general relationship between the purpose of the appropriations and the requirements of the Executive Order.

Line item 9840-001-001 of the Reserve for Contingencies or Emergencies defines "contingencies" as "proposed expenditures arising from unexpected conditions or losses for which no appropriation, or insufficient appropriation, has been made by law and which, in the judgment of the Director of Finance, constitute cases of actual necessity." (All relevant budget acts.) In the instant case, previous to the issuance of the Executive Order, LBUSD could not have anticipated the expenditures necessary to bring it into compliance. Further, the Legislature refused to appropriate the necessary funds ***183** to directly reimburse the district for these expenditures. The necessity exists by virtue of the writ and judgment issued by the trial court. Therefore, this line item, and three others

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

which also support the reserve (9840-001-494, 9840-001-988, 9840-011-001) are generally related to the costs. FN16

FN16 The costs do not come within past or current definitions of "emergency," which are, respectively, as follows. "[P]roposed expenditures arising from unexpected conditions or losses for which no appropriation, or insufficient appropriation, has been made by law and which in the judgment of the Director of Finance require immediate action to avert undesirable consequences or to preserve the public peace, health or safety." (Fiscal years 1984-1985, 1985-1986.) "[E]xpenditure incurred in response to conditions of disaster or extreme peril which threaten the health or safety of persons or property within the state." (Fiscal years 1986-1987 forward.)

Finally the writ lists as sources of reimbursement the Special Fund for Economic Uncertainties "or similarly designated accounts ...." An examination of Government Code sections 16418 and 16419 relating to the special fund shows only one use of this reserve: establishment of the Disaster Relief Fund "for purposes of funding disbursements made for response to and recovery from the earthquake, aftershocks, and any other related casualty." No evidence in the record indicates a general relationship between this purpose and the costs incurred by LBUSD. We conclude, therefore, that this source of funding cannot be used for reimbursement. This source is stricken from the judgment.

The description of further sources of funding as "similarly designated accounts" fails to sufficiently identify these sources and we therefore strike this part of the judgment.

In a supplemental brief, LBUSD requests this court to take judicial notice of the Budget Acts of 1988-1989 (Stats. 1988, ch. 313) and 1989-1990 (Stats. 1989, ch. 93) pursuant to the Evidence Code (Evid. Code, §§ 451, subd. (a), 452, subd. (a), 452, subd. (c), 459) and to order that the amounts set forth in the judgment and writ be satisfied from specific line item accounts in these later budgets and from the Special Fund for Economic Uncertainties. FN17

FN17 LBUSD identifies the line items accounts as follows: DOE-6110-001-001, 6110-001-178, 6110-015-001, 6110-101-001, 6110-114-001, 6110-115-001, 6110-121-001, 6110-156-001, 6110-171-178, 6110-226-001, 6110-230-001; Commission-8885-001-001, 8885-101-001, 8885-101-214; Reserve for Contingencies or Emergencies-9840-001-001, 9840-001-494, 9840-001-988, 9840-011-001.

(19) "An appellate court is empowered to add a directive that the trial court order be modified to include charging orders against funds appropriated by subsequent budget acts. [Citation.]" (*Carmel Valley, supra,* 190 Cal.App.3d at p. 557.) (17c) We have reviewed the designated budget acts and conclude that the specified line item accounts for DOE, the Commission, ***184** and the Reserve for Contingencies and Emergencies provide funds for a broad range of activities similar to those set out above and therefore are generally related to the nature of the costs incurred. However, for the reasons previously discussed, we decline to designate the Special Fund for Economic Uncertainties as a source for reimbursement.

While we have concluded that certain line item accounts are generally related to the nature of the costs incurred, there must also be evidence that at the time of the order the enumerated budget items contained sufficient funds to cover the award. (Gov. Code, § 12440; *Mandel v. Myers, supra,* 29 Cal.3d at p. 543; *Carmel Valley, supra,* 190 Cal.App.3d at p. 541; cf. *Baggett v. Dunn* (1886) 69 Cal. 75, 78 [10 P. 125]; *Marshall v. Dunn* (1886) 69 Cal. 223, 225 [10 P. 399].) The record before us contains evidence regarding balances at various points in

time for some of the line item accounts, but that evidence is primarily in the form of uninterpreted statistical data. We have not found a clear statement which would satisfy this requirement. Furthermore, not every line item was in existence every fiscal year. In addition, those which entered the budgetary process did not always survive it unscathed. Therefore, we remand the matter to the trial court to determine with regard to the line item account numbers approved above whether funds sufficient to satisfy the award were available at the time of the order. (Cf. *County of Sacramento v. Loeb* (1984) 160 Cal.App.3d 446, 454-455 [206 Cal.Rptr. 626].) If the trial court determines that the unexhausted funds remaining in the specified appropriations are insufficient, the trial court order can be further amended to reach subsequent appropriated funds. (*County of Sacramento* at p. 457; *Serrano v. Priest* (1982) 131 Cal.App.3d 188, 198 [182 Cal.Rptr. 387].)

(20) Having concluded that certain appropriations are generally available to reimburse LBUSD, we turn to an additional issue raised by State: that the "finding" by the Legislature that the Executive Order does not impose a "state-mandated local program" prevents reimbursement.

Unsupported legislative disclaimers are insufficient to defeat reimbursement. (*Carmel Valley, supra,* 190 Cal.App.3d at pp. 541-544.) As discussed, LBUSD, pursuant to Section 6, has a constitutional right to reimbursement of its costs in providing an increased service mandated by the state. The Legislature cannot limit a constitutional right. (*Hale v. Bohannon* (1952) 38 Cal.2d 458, 471 [241 P.2d 4].)

B. DOE Contentions

DOE is sympathetic to LBUSD's position. On appeal, it takes no stand on the issue whether the Executive Order constitutes a state mandate within ***185** the meaning of Section 6. (21) The thrust of its appeal is that, if there is a mandate, the DOE budget is an inappropriate source of funding in comparison with other budget line item accounts included in the order.

We conclude to the contrary because logic dictates that DOE funding be the initial and primary source for reimbursement. As discussed, the test set forth in *Mandel* and *Carmel Valley* is whether there is a general relationship between budget items and reimbursable expenditures. Since the Executive Order was issued by DOE, it is not surprising that the evidence overwhelmingly supports the finding of the trial court that this general relationship exists with regard to the DOE budget.

While we also have concluded that certain line item accounts for entities other than DOE are also appropriate sources of funding, the record does not provide the statistical data necessary to determine how far the order will reach with regard to these additional sources of support.

DOE also contends that reimbursement for expenditures in fiscal years 1977-1978, 1978-1979, and 1979-1980 cannot be awarded under Section 6 because the amendment was not effective until July 1, 1980. As discussed, this argument has been previously rejected. (*Carmel Valley Fire Protection Dist. v. State of California, supra,* 190 Cal.App.3d at pp. 547-548; *City of Sacramento v. State of California, supra,* 156 Cal.App.3d 182, 191-194, disapproved on other grounds in *County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 58, fn. 10.)

(22) Finally, DOE contends that interest should have been awarded at the rate of 6 percent per annum pursuant to Government Code section 926.10 rather than at the legal rate provided under article XV, section 1, paragraph (2) of the California Constitution.

Government Code section 926.10 is part of the California Tort Claims Act (Gov. Code, § 900 et seq.) which provides a statutory scheme for the filing of claims against public entities for alleged injuries; it makes no provision for claims for reimbursement for state mandated expenditures. In *Car-*

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

mel Valley a judgment awarding interest at the legal rate was affirmed. (*Carmel Valley Fire Protection Dist. v. State of California, supra,* 190 Cal.App.3d at p. 553.) We decline the invitation of DOE to apply another rule.

C. Cross Appeal of LBUSD

(23) LBUSD seeks reversal of that part of the judgment holding that monies in the Fines and Forfeitures Funds in the custody and possession of ***186** cross-respondent Auditor-Controller of the County of Los Angeles (County Controller) for transfer to the state treasury are not reasonably available for reimbursement of its state mandated expenditures. FN18

> FN18 In its first amended petition, LBUSD listed the following code sections as appropriate sources of reimbursement: " Penal Code Sections 1463.02, 1463.03, 1403.5A and 1464; Government Code Sections 13967, 26822.3 and 72056; Health and Safety Code Section 11502; and Vehicle Code Sections 1660.7, 42003, and 41103.5 ."

As previously stated, funds are "reasonably available" when the purposes for which those funds were appropriated are generally related to the nature of the costs incurred. (*Carmel Valley, supra,* 190 Cal.App.3d at pp. 540-541.) LBUSD does not cite, nor have we found, any evidence in the record showing the use of those funds once they are transmitted to the state and that those funds are then "reasonably available" to satisfy the Claim. We cannot conclude as a matter of law that a general relationship exists between those funds and the nature of the costs incurred pursuant to the Executive Order. LBUSD has failed to carry its burden of proof and the trial court correctly decided these funds were not "reasonably available" for reimbursement.

Nor have we concluded that there is any ground on which the funds could be made available to LBUSD while in the possession of the county Auditor-Controller. The instant case differs from *Carmel Valley* wherein we affirmed an order which authorized a county to satisfy its claims against the state by offsetting fines and forfeitures it held which were due the state. The *Carmel Valley, supra,* 190 Cal.App.3d 521, holding was based on the right of offset as "a long-established principle of equity." (*Id.* at p. 550.) That is a different standard than the standard of "generally related to the nature of costs incurred." In the case at bar there is no set-off relationship between county and LBUSD.

Disposition

We conclude that because the doctrines of collateral estoppel and waiver are inapplicable to the facts of this case, the trial court should have allowed State to challenge the decisions of the Board. However, we also determine, as a question of law, that the Executive Order requires local school boards to provide a higher level of service than is required constitutionally or by case law and that the Executive Order is a reimbursable state mandate pursuant to article XIII B, section 6 of the California Constitution. Former Revenue and Tax Code section 2234 does not provide reimbursement of the subject claim. ***187**

Based on uncontradicted evidence, we modify the decision of the trial court by striking as sources of reimbursement the Special Fund for Economic Uncertainties "or similarly designated accounts." We also modify the judgment to include charging orders against certain funds appropriated through subsequent budget acts.

We affirm the decision of the trial court that the Fines and Forfeitures Funds are not "reasonably available" to satisfy the Claim.

Finally, we remand the matter to the trial court to determine whether at the time of its order, unexpended, unencumbered funds sufficient to satisfy the judgment remained in the approved budget line item account numbers. The trial court is also directed to determine this same issue with respect to the charging order.

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

The judgment is affirmed as modified. Each party is to bear its own costs on appeal.

Ashby, J., and Boren, J., concurred.

Appellants' petitions for review by the Supreme Court were denied February 28, 1991. Lucas, C. J., did not participate therein. ***188**

Appendix

The superior court judgment provides in pertinent part: "It Is Ordered, Adjudged and Decreed That: "1. The requirements contained in Title 5, California Administrative Code, Sections 90-101 constitute a reimbursable State-mandate which cannot be challenged by State Respondents or Respondent DOE because of the doctrines of administrative collateral estoppel and waiver.

"2. There are appropriated funds from specified line items in the 1984, 1985, 1986 and 1987 budgets which are 'reasonably available' to reimburse Petitioner for State-mandated costs it has occurred [*sic*] as a result of its compliance with the requirements of Title 5, California Administrative Code, Sections 90-101.

"3. The funds appropriated by the Legislature for:

"(a) the support of the Department of Education, including, but not limited, to the Department's General Fund;

"(b) the Commission on State Mandates, including, but not limited to the State Mandates Claim Fund; and

"(c) the 'Reserve for Contingencies or Emergencies', 'Special Fund for Economic Uncertainties' or similarly designated accounts, are 'reasonably available' and may properly be and should be encumbered and expended for the reimbursement of State-mandated costs in the amount of $28,014,869.00, plus applicable interest, as incurred by Petitioner and as computed by Petitioner in compliance with Parameters and Guidelines adopted by the State Board of Control.

"4. The law in effect at the time that Petitioner's claim was processed provided for the computation of a specific claim amount for specific fiscal years based on Parameters and Guidelines, or claiming instructions, adopted in April 1984 and a Statewide Cost Estimate adopted on August 23, 1984, both of which are administrative actions of the State Board of Control which have not been challenged by State Respondents. The computations made pursuant to the Parameters and Guidelines and Statewide Cost Estimate are specific and ascertainable and subject to audit by the State Controller under Government Code section 17558.

"5. The Court decrees that State funds entitled the 'Fines and Forfeitures Funds' under the custody and control of Respondent Bloodgood, are not reasonably available for satisfaction of Petitioner's claim for reimbursement of State-mandated costs.

"6. A peremptory writ of mandamus shall issue under the seal of this Court, commanding State Respondents and Respondent Doe to comply with Article XIIIB, Section 6 of the California Constitution and Government Code Section 17565 and reimburse petitioner for:

"(a) State-mandated costs in the amount of $24,164,593.00, incurred as a result of its compliance with the requirements of Title 5, California Administrative Code, Sections 90-101 during fiscal years 1977-78 through 1982-1983, plus interest at the legal rate from September 28, 1985; and

"(b) State-mandated costs in the amount of $3,850,276.00, incurred as a result of Petitioner's compliance with the requirements of Title 5, California Administrative Code, Sections 90-101 during fiscal years 1983-84 and 1984-85, plus interest at the legal rate from September 28, 1985.

"7. Said peremptory writ shall command Respondent Gray Davis, State Controller, or his successor-in-interest, to pay the claims of Petitioner, plus interest at the legal rate from ***189** September 28, 1985 from the appropriations in the State

225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182
(Cite as: 225 Cal.App.3d 155)

Budget Acts for the 1984-85, 1985-86, 1986-87 and 1987-88 fiscal years, and the subsequently enacted State Budget Acts, which include, or will include appropriations for:

"(a) the support of the Department of Education, including, but not limited to the Department's General Fund;

"(b) the Commission on State Mandates, including, but not limited to the State Mandates Claim Fund; and

"(c) the 'Reserve for Contingencies or Emergencies', Special Fund for Economic Uncertainties' or similarly designated accounts, which are 'reasonably available' to be encumbered and expended for the reimbursement of State-mandated costs incurred by Petitioner and further shall compel Elizabeth Whitney, Acting State Treasurer, or her successor-in-interest, to make payments on the warrants drawn by Respondent Gray Davis, State Controller upon their presentation for payment by Petitioner without offset or attempt to offset against other monies due and owing Petitioner until Petitioner is reimbursed for all such costs.

"8. Said Peremptory Writ of Mandate also shall command Respondent Jesse R. Huff, Director of the State Department of Finance, to perform such actions as may be necessary to effect reimbursement required by other portions of this Judgment, including but not limited to, those actions specified in Chapter 135, Statutes of 1987, Section 2.00, pp. 549-553, or with respect to the Special Fund for Economic Uncertainties.

"9. Pending the final disposition of this proceeding, State Respondents and Respondent DOE, and each of them, their successors in office, agents, servants and employees and all persons acting in concert or participation with them, are hereby enjoined or restrained from directly or indirectly expending from the appropriations described in Paragraph No. 7 hereinabove any sums greater than that which would leave in said appropriations at the conclusion of the respective fiscal years an amount less than the reimbursement amounts claimed by Petitioner together with interest at the legal rate through payment of said reimbursement amount. Said amounts are hereinafter referred to collectively as the 'reimbursement award sum'.

"10. Pending the final disposition of this proceeding State Respondents and Respondent DOE, and each of them, their successors in office, agents, servants and employees, and all persons acting in concert or participation with them, are hereby enjoined and restrained from directly or indirectly causing to revert the reimbursement award sum from the appropriations described in Paragraph No. 7 hereinabove to the general funds of the State of California and from otherwise dissipating the reimbursement award sum in a manner that would make it unavailable to satisfy this Court's judgment.

"11. The State Respondents and Respondent Doe have a continuing obligation to reimburse Petitioner for costs incurred in compliance with the requirements contained in Title 5, California Administrative Code, Section 90-101 in the fiscal years subsequent to it's [*sic*] claims for expenditures in fiscal years 1977-78 through 1984-85 as set forth in the First Amended Petition, as amended, and the accompanying Motion For the Issuance Of A Writ Of Mandate.

"12. The deletion of funding for reimbursement of State-mandated costs incurred in compliance with Title 5, California Administrative Code, Sections 90-101 from Chapter 1175, Statutes of 1985 was invalid and unconstitutional.

"13. Respondent Gray Davis, State Controller, shall retain the right to audit the claims and records of the Petitioner pursuant to Government Code Section 17561(d) to verify the actual dollar amount of the reimbursement award sum.

"14. The Court reserves and retains jurisdiction to effect any appropriate remedy at law or equity which may be necessary to enforce its judgment or

order. *190

"15. Petitioner shall recover from State Respondents and Respondent DOE costs in this proceeding in the amount of 1,863.54.

"Dated: 3-2, 1988 "/s/ Weil

"Robert I. Weil

"Judge of The Superior Court" *191

Cal.App.2.Dist.
Long Beach Unified Sch. Dist. v. State of California
225 Cal.App.3d 155, 275 Cal.Rptr. 449, 64 Ed. Law Rep. 182

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TAB NO. 15

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

STATE OF CALIFORNIA DEPARTMENT OF FINANCE, ET AL **Petitioners**	
vs	**CASE NO. BS130730**
COUNTY OF LOS ANGELES, ET AL **Respondents**	

COURT'S RULING ON PETITION FOR WRIT OF MANDATE HEARD ON AUGUST 10, 2011

Petitioners State of California Department of Finance, the State Water Resource Control Board ("State Board") and the Los Angeles California Regional Water Quality Control Board ("Regional Board") seek to set aside a decision of the Respondent Commission of State Mandates ("Commission").

After considering the parties' briefs and relevant evidence[1], having heard argument and having taken the matter under submission, the Court rules as follows:

Statement of the Case

This case involves the efforts of the Real Parties in Interest to obtain a subvention of funds for costs resulting from an executive order mandated by a state agency and contained in a storm water permit issued in 2001 to these cities and other cities in Los Angeles County and the Los Angeles Flood Control District.

An understanding of the interplay of the varied regulatory schemes underlying these orders and permits is necessary to an evaluation of the matters before the Court.

1. Environmental Regulations Under the Clean Water Act.

In 1972, Congress passed the Clean Water Act. The Clean Water Act sought to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33

[1] In addition to the administrative record, the court takes judicial notice of the matters sought to be noticed by Petitioners and Real Parties.

Received
September 15, 2011
Commission on
State Mandates

U.S.C. § 1251(a). The Clean Water Act prohibits the discharge of pollutants from "point sources" to waters of the United States unless provided for under the national Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. § 1311, 1342; Communities for a Better Environment v. State Water Resources Control Board, 109 Cal. App. 4th 1089, 1092-93 (2003).

Either the United States Environmental Protection Agency ("EPA") or a U.S. EPA-approved state may issue NPDES permits.[2] 33 U.S.C. § 1342(a)(1) & (b). Congress concluded that the U.S. EPA could not only issue permits, but also allowed states to elect to take on that federal responsibility. Environmental Protection Agency v. California *ex rel.* State Water Resources Board, 426 U.S. 200, 219 (1976). California has the approval of the U.S. EPA to issue NPDES permits. Building Industry Association of San Diego County v. State Water Resources Control Board, 124 Cal. App. 4th 866, 875 (2004).

If a state elects to issue NPDES permits, it must ensure that the permits comply with many different federal requirements, including effluent limitations and national standards, and states must also provide for the continued inspection and monitoring of pollutants into the waters. 33 U.S.C. §§ 1342(b)(1), 1311, 1312, 1316, 1317, 1319(a)(1), (3) and 1365(a)(1). And, to ensure that the state programs comply with these federal mandates, the EPA maintains oversight and supervision of these programs. For example, the state must provide the U.S. EPA with proposed permits and notice of any action related to a discharger's permit application. 33 U.S.C. § 1342(d)(1). The EPA may object to the permit and should the federal agency find that a state program does not comply with NPDES program guidelines, it may withdrawal approval of the state program. 33 U.S.C. § 1342(c)(3).

While many types of discharge require NPDES permits under the Clean Water Act, this case deals only with one type – discharge of pollutants through municipal storm sewer systems. This type of discharge is referred to as either MS4 or storm sewer systems. Controlling municipal storm water runoff is important because it constitutes one of the most significant sources of water pollution. Environmental Defense Center, Inc. v. EPA, 344 F.3d 832, 840 (9th Cir. 2003).

The Clean Water Act requires municipal storm water discharges, such those from the County of Los Angeles, "to reduce the discharge of pollutants to the maximum extent practicable," including management practices, control techniques and system, design and

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[2] In 1973, pursuant to an amendment to the Porter Cologne Water Quality Control Act, California became the first state to be approved by the U.S. EPA to administer the NPDES permit program. County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern, 127 Cal. App. 4th 1544, 1565-66) (2005). As amended, the Porter-Cologne Act mandates that "waste discharge requirements for discharge from point sources to navigable waters shall be issued and administered in accordance with the currently applicable federal regulations for the . . . (NPDES) program." 23 Cal. Code of Regulations § 2235.2. Nine regional boards, including the Los Angeles California Regional Water Quality Control Board, administer the program, with oversight by the State Board. See Water Code §§ 13140, 13200 et seq.. While the Porter-Cologne Act requires that Chapter 5.5 be "construed to ensure consistency with the requirements for state programs," state regulators may impose restrictions in NPDES permits that go beyond the requirements of the Clean Water Act. Water Code section 13377.

engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B). The "maximum extent practicable" standard is a technology-forcing requirement designed to foster innovation. See, e.g., Chemical Mfrs. Ass'n v. Natural Resources Defense Council, 470 U.S. 116, 155-56 (1985).

But, unlike many other technology-based requirements, the U.S. EPA directed that permit writers would identify the municipal storm water requirements on a permit-by-permit basis.[3] Natural Resources Defense Council v. U.S. EPA, 966 F.2d 1292, 1308 n. 17 (9th Cir. 1992); 55 Fed. Reg. 47990, 48043 (Nov. 16, 1990). "

> "Unlike NPDES industrial wastewater permits which typically contain specific end-of-pipe effluent limits based on . . . available treatment technology, MS4 permits usually include programmatic requirements involving the implementation of best management practices (BMP) in order to reduce pollutants discharged to the maximum extent practicable (MEP).

(AR 3393). See also Natural Resources Defense Council, *supra*, 568 F. 2d at 1380. Federal regulations define these practices to mean, *inter alia*, "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of 'waters of the United States'."[4] 40 C.F.R. § 122.2. Permittees are often allowed flexibility in the types of BMP and activities implemented to meet permit requirements. (AR 3393).

Before discharging pollutants from point sources under an MS4 permit, a public entity must file an application that addresses, among other things, the management programs in place to reduce the discharge of pollution using the maximum extent practicable standard. 40 C.F.R. § 122.26 et seq. These management programs must address discharges into the storm system from both the general population and from industrial and construction activities within the jurisdiction. Id.

Starting in 1990, the Regional Board issued municipal storm water permits to the County of Los Angeles.[5] At issue in this case is Regional Order No. 01-182, NPDES permit

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[3] Regulating storm water discharges is generally considered to be more difficult than regulating traditional point resources, e.g. effluent levels discharged at factories or from santitary treatament systems. (AR 5151). These traditional point sources have engineered treatment systems and the NPDES permits for these facilities generally contain numeric effluent limitations that must be met at the end of the discharge pipe. (Id.) By contrast, municipal storm water systems require controls to reduce the discharge of pollutants to the maximum extent practicable. (Id.)

[4] The U.S. EPA issues guidance documents that discuss the types of "best management practices." At the time that the claims at issue in this case were considered by Commission, the U.S. EPA had an MS4 Program Evaluation Guide. (AR 3391-94). In that Guide, the EPA addressed inspections of businesses and refuse-related issues. (AR 3468-69, 3440).

[5] Before 1990, storm water discharges were not regulated under either state or federal law. On June 18, 1990, the first permit (90-079) was issued. This NPDES permit for the discharge of municipal storm water

number CAS004001, adopted on December 31, 2001. (AR 3495-3576). As part of that permit, the Regional Board made 66 findings concerning the permit's factual and legal basis. (AR 3505-19). For example, the Regional Board found that the proposed permit "[was] intended to develop, achieve and implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the Maximum Extent Practicable . . . ." (AR 3507).

2. Subvention and the Commission on State Mandates.

In November 1979, the voters adopted Proposition 4, which added article XIII B to the State Constitution. Hayes v. Commission on State Mandates, 11 Cal. App. 4th 1564, 1580 (1992). Article XIII B, called the "Gann limit," restricts the amounts that state and local governments may appropriate and spend each year from the proceeds of taxes. City of Sacramento v. State of California, 50 Cal. 3d 51, 58-59 (1990). Section 6 of article XIII B calls for state subvention by requiring the state to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. County of Los Angeles v. State of California, 43 Cal. 3d 46, 56 (1987).

But, constitutional subvention is not required when the costs implement federal law. Article XIII B, section 9, subdivision (b) excludes from the state or local spending limit any "appropriations required to comply with mandates of the . . . federal government." See also Sand Diego Unified School Dist. v. Commission on State Mandates, 33 Cal. 4th 859, 879-80 (2004)(the Gann limit provides for reimbursement of state-mandated costs, not federal ones). This prohibition against reimbursement for activities imposed by federal law is specifically stated in Government Code section 17556, subdivision (c). Redevelopment Agency of the City of San Marcos v. Commission on State Mandates, 55 Cal. App. 4th 976, 984 (1996). The Commission shall not find "costs mandated by the state" if "the statute or executive order "imposes a requirement that is mandated by 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 the federal law or regulation.*"[6] Gov't Code section 17556, subdivision (c) (emphasis added).

The Commission on State Mandates is a quasi-judicial agency vested with the sole and exclusive authority to adjudicate all disputes over the existence and reimbursement of state-mandated programs within the meaning of article XIII B of the California Constitution. Kinlaw v. State of California, 54 Cal. 3d 326, 342-43 (1991). Local agencies file claims with the Commission for reimbursement of state-mandated costs under article XIII B, section 6. Gov't Code §§ 17551, 17560. The first claim filed by a local agency alleging that a statute or executive order imposes a reimbursable cost is a

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was replaced on July 15, 1995 (96-054). (AR 3501). In addition, the State Board has issued two general NPDES permits for storm water discharges from industrial and construction sites. (AR 3511).

[6] "Costs mandated by the federal government" is defined as "any increased costs incurred by a local agency or school district after January 1, 1975, in order to comply with the requirements of a federal statute or regulation." Gov't Code section 17514.

"test claim." Gov't Code § 17521. A public hearing is held on the test claim at which time evidence may be presented by the claimant, the Department of Finance, or any other state agency affected by the claim, and any interested organization or individual. Gov't Code § 17555.

The Commission determines in the first instance if a state-mandated program exists. Gov't Code § 17551. If so, the Commission adopts parameters and guidelines for the reimbursement of claims submitted by eligible claimants. Gov't Code § 17557, subdivision (a). Thereafter, the Controller issues claiming instructions for each mandate that requires reimbursement. Gov't Code § 17558, subdivisions (a) and (c). Judicial review of the final Commission decision is available through a petition for writ of mandate filed pursuant to Cal. Code of Civ. P. section 1094.5. Gov't Code § 17559.

3. The Test Claims at Issue Here

The County of Los Angeles and several cities, who are the Real Parties in Interest, presented "test claims" to the Respondent Commission in September 2003. The Real Parties sought subvention of state funds for four requirements contained in the NPDES permit number CAS004001, adopted on December 31, 2001: (1) to place and maintain trace receptacles at transit stops; (2) to inspect certain commercial facilities; (3) to inspect certain industrial facilities; and (4) to inspect construction sites.[7] (AR 13-14). These parties asserted that these requirements exceeded the federal mandate under the law and regulations of the Clean Water Act.

The Commission initially rejected the claims, citing Government Code section 17516(c), exempting from the term "executive order" any orders issued by regional quality control boards or the State Board. The Commission's ruling was ultimately reversed by the Superior Court, and that decision was affirmed by the Court of Appeal. See also County of Los Angeles v. Commission on State Mandates, 150 Cal. App. 4th 898, 904 (2007).

The test claims were re-filed with the Commission. (AR 5557). On July 31, 2009, Respondent issued a Statement of Decision. (AR 5555- 5625). In relevant part, the Commission determined that the challenged permit provisions were not federal mandates. (AR 5574-5603). And, the Commission determined that the permit activities challenged here imposed new programs or higher level of services on the County of Los Angeles.[8] (AR 5603-04).

With respect to the federal mandate findings, the Commission found that these four challenged provisions exceeded the requirements of the CWA and federal regulations and

[7] None of these challenged requirements was proposed by the Real Parties when they applied for the NPDES permit at issue in this case. (AR 3663-3794). Rather, these requirements were added by the Regional Board, over the real parties' objections. (AR 3553, 3533-338, 3546-49).

[8] The Commission further found that the state was required to reimburse the real parties for the trash receptacle obligation, but not for the inspection obligations as the real parties had the ability to raise fees to pay for these inspections. This aspect of the Commission's decision necessarily fails under the analysis described below, but will not be specifically considered as the subject of this petition involves whether these inspections are state mandates in the first instance, not whether they are properly reimbursable.

Received
September 15, 2011
Commission on
State Mandates

that the state "freely chose" to impose them on the Real Parties. (AR 5578, 5582-86). The Commission analyzed the federal regulations, including 40 CFR 122.26 *et seq*, and concluded that these rules did not expressly require the installation and maintenance of receptacles, or conducting certain inspections. (AR 5578, 5584, 5590, 5591, 5595, 5601). As for the conclusion that these four permit requirements were "new programs," the Commission noted that these activities were not contained in the previous permits issued to the County of Los Angeles, and were imposed only on local agencies and not on the general public. (AR 5603-04).

On July 20, 2010, Petitioners filed this Petition.

Standard of Review

Petitioner seeks review of the Board's decision under CCP section 1094.5. CCP section 1094.5 is the administrative mandamus provision which structures the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. Topanga Ann's for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 514-15 (1974).

The pertinent issues under section 1094.5 are (1) whether the respondent has proceeded without jurisdiction, (2) whether there was a fair trial, and (3) whether there was a prejudicial abuse of discretion. CCP § 1094.5(b). An abuse of discretion is established if the respondent has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. CCP § 1094.5(c).

A review of the Commission's factual determinations proceeds under the substantial evidence test. City of Richmond v. Commission on State Mandates, 64 Cal. App. 4th 1190, 1194-95 (1998). Applying that test, the Court must ensure that findings are legally relevant as well as supported by the evidence. See City and County of San Francisco v. Board of Permit Appeals, 207 Cal. App. 3d 1099, 1110 (1989). Substantial evidence review also includes a duty to determine whether the agency committed errors of law in applying the facts before it. Id. at 1111. Whether a statute creates a reimbursable state mandate is a question of law. Connell v. Superior Court, 59 Cal. App. 4th 382, 395 (1997); Long Beach Unified School Dist. v. State of California, 225 Cal. App. 3d 155, 174 (1990). Questions of law are subject to *de novo* review. City of Richmond, *supra*, 64 Cal. App. 4th at 1105.

An agency is presumed to have regularly performed its official duties. (Ev. Code § 664). The Petitioner, therefore, has the burden of proof to demonstrate wherein the proceedings were unfair, in excess of jurisdiction, or showed prejudicial abuse of discretion. Alford v. Pierno, 27 Cal. App. 3d 682, 691 (1972).

Analysis

Petitioners assert two arguments in support of their contention that the Commission erred and must be reversed. They shall be evaluated separately.

1. The Challenged Receptacle Requirement Is a Federal Mandate.

There is a two-step test to determine whether a particular program is mandated by federal law and not, therefore, subject to state subvention.

First, did the state have "no real choice" in deciding whether to comply with the federal act? Hayes, *supra*, 11 Cal. App. 4th at 1594. A federal mandate exists even if "the state has adopted an implementing 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. Id. at 1593. But, "[t]his reasoning would not hold true where the manner of implementation of the federal program was left to the true discretion of the state." Id. For example, in City of Sacramento, *supra*, 50 Cal. 3d at 73-74, the Supreme Court explained that certain regulatory standards imposed by the federal government are "coercive . . . in every practical sense." But, there is no requirement of such compulsion under article XIII B. Id. at 76 (there is "no final test for 'mandatory' versus 'optional' compliance with federal law.") Rather, the standard depends on a number of factors, such as the nature and purpose of the federal program; whether its design suggests an intention to coerce; when state participation began, and the practical consequences of non-participation, non-compliance or withdrawal. Id.

Second, did the program exceed the requirements of a compulsory federal law? San Diego Unified School Dist. v. Commission on State Mandates, 33 Cal. 4th 859, 880 (2004).

Petitioners assert that the Commission's entire analysis is analytically defective as a matter of law. For the reasons set forth below, the Court agrees.

First, the Commission's conclusion that the state has "freely chosen" to implement the storm water permit program is legally incorrect. The reasons given, *i.e.*, (1) that California "voluntarily adopts the [NPDES] permitting program" and (2) because federal law "does not expressly require states to have this program," do not equate with a conclusion that the NPDES permitting program at issue here is optional.

A review of the Clean Water Act clearly dictates that NPDES permits issued – by either the U.S. EPA or a qualified state agency – are not voluntary. Federal law requires the County of Los Angeles to have an NPDES permit for municipal storm water discharges. That same federal law compels those permits to educe the discharge of pollutants to the maximum extent practicable.[9] This federal statutory scheme mandates NPDES permitting, even if California took no action at all. And, if California did not administer its own water quality program through the Porter-Cologne Act, California's dischargers,

[9] Congress established the maximum extent practicable standard because municipal storm water runoff, unlike other pollutant discharges, could not be adequately addressed by blanket effluent limitations. Building Industry Ass'n of San Diego County v. State Water Resources Control Board, 124 Cal. App. 4th 866, 884 (2004).

both private and governmental, would still have to comply with federal law – and be directly regulated by the federal government.[10]

Second, there is no substantial evidence in the administrative record to support the Commission's conclusion that the state's mandate in this instance was inconsistent with or more stringent than the Clean Water Act's "maximum extent practicable" requirement.[11] Rather, the Commission simply concluded that the claimed permit requirements were in excess of federal mandates because they could not be located in certain identified federal regulations.[12] (AR 5584, 5591, 5595). Unless expressly dictated by an identifiable federal regulation, the Commission concluded that such requirements are state mandates.

The search for a comparable federal regulation as the pre-condition for finding a federal mandate utterly ignores and misapplies the flexible regulatory standard inherent in the Clean Water Act. The "maximum extent practicable standard" is designed to provide administrative bodies the "tools to meet the fundamental goals of the Clean Water Act in the context of storm water pollution." Building Industry Ass'n of San Diego County v. State Water Resources Control Board, 124 Cal. App. 4th 866, 884 (2004). That flexible standard was designed to allow permit writers to use a combination of pollution controls that may be different in different permits. In re City of Irving, Texas, Municipal Storm Sewer System, (July 16, 2001), 10 E.A.D. 111 (E.P.A.), *6. And, the flexible standard provides an agency to tailor permits to the "site-specific nature of MS4," and the ability

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[10] And, such an outcome would be clearly contrary to the Legislative intention behind Porter-Cologne. "It is in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act. Water Code § 13370, subdivision (c).

[11] The Real Parties assert that the State Board has held that the "maximum extent practicable" standard does not apply to permit requirements that address the entry of pollutants into the storm sewer system. See In the Matter of the Petitions of Building Industry Association of San Diego County and Western States Petroleum Association, State Water Board Order WQ 2001-15. A review of that case, however, fails to support that contention. The administrative decision presented different circumstances and involved different permit requirements. That order concerned an attempted prohibition on all discharges into the municipal storm sewer system until the pollutants had been reduced to the maximum extent practicable. The State Board found the order to broad because it restricted all discharges and, therefore, necessarily interfered with a flexible approach to the mix of pollutant reductions before reaching the storm sewer system, and after – so long as the overall reductions are to the maximum extent practicable. Water Quality Order WQ 2001-15 does not undermine the EPA's recognition that municipal storm water programs will include requirements that reduce pollutants before reaching the storm sewer, including *inter alia*, the capacity to direct permit requirements at the sources of pollution, rather than solely at the end of the pipe. City of Irving, *supra*, 10 EAD 111 at * 6. The Water Board Order simply did not consider the issue of whether the maximum extent practicable standard contained in the Clean Water Act prohibits control of discharges into a municipal storm sewer system.

[12] The Commission's reliance on Long Beach School Dist. v. State of California, 225 Cal. App. 3d 155, 173 (1990) is misplaced. In that case, the court concluded that a state executive order mandating desegregation was a state mandate because it required schools to provide a higher level of service than was required by the federal constitution. Id. at 187. In this case, the federal applicable law, *i.e.*, the maximum extent practicable standard, directly mandates the type of requirements included in the instant permit.

to direct permit requirements "at the sources of pollution in the MS4 rather than solely at the end of the pipe." Id.

To ignore this flexible standard imposed and mandated under the Clean Water Act, and instead to require a comparable federal regulatory dictates, is legally erroneous.[13] Under the Commission's approach, a permit requirement that is merely practicable or easy (not even practicable to the maximum extent) would be a state mandate if the U.S. EPA failed to express the requirement as a regulation.[14] Such an approach is clearly erroneous.

Third, the Commission erred in isolating a specific requirement to conclude that the issued NPDES permit was a state mandate. One permit provision cannot exceed the "maximum extent practicable" standard imposed by the Clean Water where the permit as a whole does not. (AR 3517). For example, the placement and maintenance of trash receptacles is fairly included within those management practices for maintaining public streets in such a way to reduce the impact on receiving waters of discharges from municipal sewer systems. See, e.g., 40 C.F.R. § 122.26(d)(2)(iv)(A)(3).

That the receptacle and inspection requirements were not included in previous permits issued by the County does not take this regulation out of the purview of the Clean Water Act. The U.S. EPA "anticipates that storm water management programs will evolve and mature over time." 55 Fed. Reg. 48052. Thus, the permits for discharges from municipal separate storm sewer systems will be written to reflect changing conditions that result from program development and implementation and corresponding improvements in water quality. Id. Given that the federal regulatory scheme anticipates changing permit requirements, that these requirements have not yet been articulated does not mean that the requirement exceeds the "maximum extent practicable" standard.

As Petitioners argue, if litter and debris cannot be properly disposed of by persons waiting at transit stops, the inevitable downstream result will be the introduction of pollutants into the streets and, thereafter, into the storm drains – leading inevitably to the discharge of pollutants into the nearby waterways. It cannot be seriously doubted that the placement and maintenance of trash receptacles at transit stops will help prevent the introduction of these known contaminants into the water. As the trash receptacle requirement is an obvious remedy, it is clearly within the maximum extent practicable

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[13] "The permitting agency has discretion to decide what practices, techniques, methods, and other provisions are appropriate and necessary to control the discharge of pollutants." City of Rancho Cucamonga v. Regional Water Quality Control Board-Santa Ana Region, 135 Cal. App. 4th 1377, 1389 (2006). The only requirement is that the Regional Board comply with federal law requiring detailed conditions for NPDES permits. Id.

[14] While there may be other cases in which the state agencies may impose standards that clearly exceed those imposed under a "maximum extent practicable" approach to storm water pollutants in the Clean Water Act, this case does not present that situation. See, e.g., Water Code § 13377 (allowing for more stringent state effluent standards); 33 U.S.C. § 1370 (allowing for more stringent state pretreatment standards). See also City of Burbank v. State Water Resources Control Board, 35 Cal. 4th 613, 628 (2005). There is nothing in the administrative record here to support a conclusion that placing receptacles at transit stops is not practicable, much less not practicable to the maximum extent.

standard. In fact, the County's own proposal recommended minimizing trash from entering waterways by removing trash from open channels, and controlling litter and debris in the street. (AR 3677-78).

As the trash receptacle requirement of the NPDES permit is within the maximum extent practicable standard under the mandatory provisions of the Clean Water Act, it is imposed by federal law and is not subject to reimbursement under article XIII B, section 6 of the California Constitution.

2. The Inspection Provisions in the Permit Are Not State Mandates.

The remaining challenged permit activities related to the inspection of certain commercial and industrial facilities and construction sites. A portion of the permit pertains to inspections of commercial facilities, such as restaurants, automotive service facilities and retail gasoline stations. While each commercial property has unique inspection requirements, the permit requires that all facilities be inspected on a regular basis, twice during the five year permit period, to confirm that best management practices are being effectively implements with the law. (AR 3533-36). Another portion of the permit requires the inspection of certain industrial facilities referred to in the permit as Phase I Facilities. (AR 3535-36). And, a third part of the permit provides that a program be implemented to control runoff from construction activity to storm drains at all construction sites within its jurisdiction. (AR 3546-47).

As with the receptacle requirement, these inspection mandates are clearly pursuant to the maximum extent practicable standard under the Clean Water Act.[15] And, in addition, federal regulations also specifically contemplate inspections of industrial facilities (40 C.F.R. § 122.26 (d)(2)(iv)(B) & (C)), and construction sites (40 C.F.R. § 122.26 (d)(2)(iv)(D)). As discussed above, the Commission's rationale that these are not federal mandates because they are not expressly dictated by federal regulation is erroneous.[16] (AR 5591, 5600). A federal mandate does not require explicit mention of every mandated activity. Rather, the relevant inquiry is whether these inspection activities fall within the Clean Water Act's maximum extent practicable standard. As there is nothing in the record to suggest that they exceed this standard, the Commission's conclusion to the contrary must fail.

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[15] The County of Los Angeles acknowledged that site inspections are within the maximum extent practicable standard because they recommended inspections in their permit applications as well. (AR 3671).

[16] Nor does the Commission's reliance upon the existence of a statewide general industrial permit (GIASP) to negate the existence of a federal mandate make sense. (AR 5594). The issue properly framed is whether the inspection requirements are mandated under the federal Clean Water Act, not whether they may also be required under the GIASP permit. At most, "the GIASP permit may add additional inspections at the time and expense of the state." Opening Brief at 28. Although extensively argued to the Court, the existence of mutual inspection schemes does not constitute a derogation of state responsibilities to the real parties, in violation of Hayes. There is only a single question (asking for a certain permit number) that is obtained by the real parties under the existing permits that would otherwise be obtained by the state under its separate inspection obligations.

Nor are these inspections create requirements in excess of the federal mandate because they were not previously imposed.[17] While they had not been previously required, this fact does not dictate the conclusion that they are not federal mandates. A requirement that the discharge of pollutants requires a NPDES permit is neither new nor different. And, the inclusion of new and advanced measures is clearly anticipated under the Clean Water Act. 55 Fed. Reg. 48052. As conditions and technologies change, the maximum extent practicable standard will similarly change. Id. Given that the federal regulatory scheme anticipates changing permit requirements, that these requirements have not yet been articulated does not mean that the requirement exceeds the "maximum extent practicable" standard.

Accordingly, these inspection requirements are federal, not state, mandates and are not subject to reimbursement under article XIII B, section 6 of the California Constitution.

Conclusion

For these reasons, the writ is GRANTED and the matter is remanded for further proceedings consistent with this decision and judgment.

Counsel for Petitioners is to submit to this Department a proposed judgment and a proposed writ within 10 days with a proof of service showing that copies were served on Respondent by hand delivery or fax. The Court will hold these documents for ten days before signing and filing the judgment and causing the clerk to issue the writ.

The administrative record is ordered returned to the party who lodged it to be preserved without alteration until a final judgment is rendered and to forward it to the Court of Appeal in the event of appeal.

The Court's ruling, signed and filed this date, shall be deemed to be the Court's Statement of Decision.

DATED: AUGUST 15, 2011

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ANN I. JONES, JUDGE OF THE SUPERIOR COURT

[17]Although not previously required, the County of Los Angeles specifically included the inspection of commercial and industrial facilities in its application. (AR 3680-71). Essentially, the County admitted that its "site visit program" was clearly mandated under the maximum extent practicable standard. The County also included extensive and detailed measures relating to the control and containment of construction site wastes and erosion, including inspection of these sites. (AR 3672-74).

TAB NO. 16

Received
September 15, 2011
Commission on
State Mandates

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Los Angeles Regional Quality Control Board
Order No. 01-182
Permit CAS004001
Parts 4C2a., 4C2b, 4E & 4F5c3

Filed September 2, 2003, (03-TC-04)
September 26, 2003 (03-TC-19)
by the County of Los Angeles, Claimant

Filed September 30, 2003 (03-TC-20 & 03-TC-21) by the Cities of Artesia, Beverly Hills, Carson, Norwalk, Rancho Palos Verdes, Westlake Village, Azusa, Commerce, Vernon, Bellflower, Covina, Downey, Monterey Park, Signal Hill, Claimants

Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21

Municipal Stormwater and Urban Runoff Discharges

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

(Adopted July 31, 2009)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on July 31, 2009. Leonard Kaye and Judith Fries appeared on behalf of the County of Los Angeles. Howard Gest appeared on behalf of the cities. Michael Lauffer appeared on behalf of the State Water Resources Control Board and the Regional Water Quality Control Board. Carla Castaneda and Susan Geanacou appeared on behalf of the Department of Finance. Geoffrey Brosseau appeared on behalf of the Bay Area Stormwater Management Agencies Association.

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

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 4-2.

Summary of Findings

The consolidated test claim, filed by the County of Los Angeles and several cities, allege various activities related to placement and maintenance of trash receptacles at transit stops and inspections of various facilities to reduce stormwater pollution in compliance with a permit issued by the Los Angeles Regional Water Quality Control Board.

The Commission finds that the following activity in part 4F5c3 of the permit is a reimbursable state mandate on local agencies subject to the permit that are not subject to a trash total

Received
September 15, 2011
Commission on
State Mandates

maximum daily load:[1] "Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary."

The Commission also finds that the remainder of the permit (parts 4C2a, 4C2b & 4E) does not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit.

BACKGROUND

The claimants allege various activities related to placement and maintenance of trash receptacles at transit stops and inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I industrial facilities (as defined) and construction sites to reduce stormwater pollution in compliance with a permit issued by the Los Angeles Regional Water Quality Control Board (LA Regional Board), a state agency.

History of the test claims

The test claims were filed in September 2003,[2] by the County of Los Angeles and several cities within it (the permit covers the Los Angeles County Flood Control District and 84 cities in Los Angeles County, all except Long Beach). The Commission originally refused jurisdiction over the permits based on Government Code section 17516's definition of "executive order" that excludes permits issued by the State Water Resources Control Board (State Water Board) or Regional Water Quality Control Boards (regional boards). After litigation, the Second District Court of Appeal held that the exclusion of permits and orders of the State and Regional Water Boards from the definition of "executive order" is unconstitutional. The court issued a writ commanding the Commission to set aside the decision "affirming your Executive Director's rejection of Test Claim Nos. 03-TC-04, 03-TC-19, 03-TC-20 and 03-TC-21" and to fully consider those claims.[3]

The County of Los Angeles and the cities re-filed their claims in October and November 2007. The claims were consolidated by the Executive Director in December 2008. Thus, the

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[1] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

[2] Originally, test claims 03-TC-04 (*Transit Trash Receptacles*) and 03-TC-19 (*Inspection of Industrial/Commercial Facilities)* were filed by the County of Los Angeles on September 5, 2003. Test claim 03-TC-21 (*Stormwater Pollution Requirements*) was filed by the Cities of Baldwin Park, Bellflower, Cerritos, Covina, Downey, Monterey Park, Pico Rivera, Signal Hill, South Pasadena, and West Covina on September 30, 2003. Test claim 03-TC-20 (*Waste Discharge Requirements*) was filed by Cities of Artesia, Beverly Hills, Carson, La Mirada, Monrovia, Norwalk, Rancho Palos Verdes, San Marino, and Westlake Village on September 30, 2003.

[3] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898.

Received
September 15, 2011
Commission on
State Mandates

reimbursement period is as though the claims were filed in September 2003, i.e., beginning July 1, 2002.[4]

Before discussing the specifics of the permit, an overview of municipal stormwater pollution puts the permit in context.

Municipal stormwater

One of the main objectives of the permit is "to assure that stormwater discharges from the MS4 [Municipal Separate Storm Sewer Systems][5] shall neither cause nor contribute to the exceedance of water quality standards and objectives nor create conditions of nuisance in the receiving waters, and that the discharge of non-stormwater to the MS4 has been effectively prohibited." (Permit, p. 13.)

Stormwater runoff flows untreated from urban streets directly into streams, lakes and the ocean. To illustrate the effect of stormwater[6] on water pollution, the Ninth Circuit Court of Appeal has stated the following:

> Storm water runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.[7]

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[4] Government Code section 17557, subdivision (e).

[5] Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2. (40 C.F.R. § 122.26 (b)(8).)

[6] Storm water means "storm water runoff, snow melt runoff, and surface runoff and drainage." (40 C.F.R. § 122.26 (b)(13).)

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

Received
September 15, 2011
Commission on
State Mandates

Because of the stormwater pollution problems described by the Ninth Circuit above, California and the federal government regulate stormwater runoff as described below.

California law

The California Supreme Court summarized the state statutory scheme and regulatory agencies applicable to this test claim as follows:

> In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, § 13000 et seq., added by Stats.1969, ch. 482, § 18, p. 1051.) Its goal is "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (§ 13001.) As relevant here, one of those regional boards oversees the Los Angeles region (the Los Angeles Regional Board).
>
> Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (§ 13240).[8]

Much of what the regional board does, especially as pertaining to permits like the one in this claim, is based in federal law as described below.

Federal law

The Federal Clean Water Act (CWA) was amended in 1972 to implement a permitting system for all discharges of pollutants[9] from point sources[10] to waters of the United States, since

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

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

[10] A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

discharges of pollutants are illegal except under a permit.[11] The permits, issued under the national pollutant discharge elimination system, are called NPDES permits. Under the CWA, each state is free to enforce its own water quality laws so long as its effluent limitations[12] are not "less stringent" than those set out in the CWA (33 USCA 1370). The California Supreme Court described NPDES permits as follows:

> Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra,* 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)[13]

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

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

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

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[11] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[12] *Effluent limitation* means any restriction imposed by the Director on quantities, discharge rates, and concentrations of "pollutants" which are "discharged" from "point sources" into "waters of the United States," the waters of the "contiguous zone," or the ocean. (40 C.F.R. § 122.2.)

[13] *City of Burbank v. State Water Resources Control Bd., supra,* 35 Cal.4th 613, 621. Actually, State and regional board permits allowing discharges into state waters are called "waste discharge requirements" (Wat. Code, § 13263).

Received
September 15, 2011
Commission on
State Mandates

> than required by federal law-from taking into account the economic effects of doing so.[14]

Actions that dischargers must implement as prescribed in permits are commonly called "best management practices" or BMPs.[15]

Stormwater was not regulated by U.S. EPA in 1973 because of the difficulty of doing so. This exemption from regulation was overturned in *Natural Resources Defense Council v. Costle* (1977) 568 F.2d 1369, which ordered U.S. EPA to require NPDES permits for stormwater runoff. By 1987, U.S. EPA still had not adopted regulations to implement a permitting system for stormwater runoff. The Ninth Circuit Court of Appeals explained the next step as follows:

> In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), "Municipal and Industrial Stormwater Discharges." Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges "associated with industrial activity," discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation.[16]

NPDES permits are required for "A discharge from a municipal separate storm sewer system serving a population of 250,000 or more."[17] The federal Clean Water Act specifies the following criteria for municipal storm sewer system permits:

> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.[18]

In 1990, U.S. EPA adopted regulations to implement Clean Water Act section 402(p), defining which entities need to apply for permits and the information to include in the permit application.

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

[15] Best management practices, or 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." (40 CFR § 122.2.)

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

[17] 33 USCA 1342 (p)(2)(C).

[18] 33 USCA 1342 (p)(3)(B).

Received
September 15, 2011
Commission on
State Mandates

The permit application must propose management programs that the permitting authority will consider in adopting the permit. The management programs must include the following:

> [A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.[19]

General state-wide permits

In addition to the regional stormwater permit at issue in this claim, the State Board has issued two general statewide permits,[20] as described in the permit as follows:

> To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for stormwater discharges: one for stormwater from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for stormwater from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. … Facilities discharging stormwater associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for stormwater discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations. (Permit, p. 11.)

The State Board has statutory fee authority to conduct inspections to enforce the general state-wide permits.[21] The statewide permits are discussed in further detail in the analysis.

The Los Angeles Regional Board permit (Order No. 01-182, Permit CAS004001)

To obtain the permit, the County of Los Angeles, on behalf of all permittees, submitted on January 31, 2001 a Report of Waste Discharge, which constitutes a permit application, and a Stormwater Quality Management Program, which constituted the permittees' proposal for best management practices that would be required in the permit.[22]

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[19] 40 Code of Federal Regulations section 122.26 (d)(2)(iv).

[20] A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA within a geographical area." (40 CFR § 122.2.)

[21] Water Code section 13260, subdivision (d)(2)(B)(i) - (iii).

[22] State Water Resources Control Board, comments submitted April 18, 2008, page 8 and attachment 36.

Received
September 15, 2011
Commission on
State Mandates

The permit states that its objective is: "to protect the beneficial uses of receiving waters in Los Angeles County."[23] The permit was upheld by the Second District Court of Appeal in 2006, which described it as follows:

> The 72-page permit is divided into 6 parts. There is an overview and findings followed by a statement of discharge prohibitions; a listing of receiving water limitations; the Storm Water Quality Management Program; an explanation of special provisions; a set of definitions; and a list of what are characterized as standard provisions. The county, the flood control district, and the 84 cities are designated in the permit as the permittees.[24]

After finding that "the county, the flood control district, and the 84 cities discharge and contribute to the release of pollutants from "municipal separate storm sewer systems" (storm drain systems)" and that the discharges were the subject of regional board permits in 1990 and 1996, the regional board found that the storm drain systems in the county discharged a host of specified pollutants into local waters. The permit summed up by stating: "Various reports prepared by the regional board, the Los Angeles County Grand Jury, and academic institutions indicated pollutants are threatening to or actually impairing the beneficial uses of water bodies in the Los Angeles region."[25]

The permit also specifies prohibited and allowable discharges, receiving water limitations, the implementation of the Storm Water Quality Management Program "requiring the use of best management practices to reduce pollutant discharge into the storm drain systems to the maximum extent possible."[26] As the court described the permit:

> In the prohibited discharges portion of the permit, the county and the cities were required to "effectively prohibit non-stormwater discharges" into their storm sewer systems. This prohibition contains the following exceptions: where the discharge is covered by a National Pollutant Discharge Elimination permit for non-stormwater emission; natural springs and rising ground water; flows from riparian habitats or wetlands; stream diversions pursuant to a permit issued by the

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[23] Permit page 13. The permit also says: "This permit is intended to develop, achieve, and implement a timely comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the Maximum Extent Practicable (MEP) from the permitted areas in the County of Los Angeles to the waters of the US subject to the Permittees' jurisdiction."

[24] *County of Los Angeles v. California State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 990.

[25] *County of Los Angeles v. California State Water Resources Control Board , supra,* 143 Cal.App.4th 985, 990

[26] *County of Los Angeles v. California State Water Resources Control Board,, supra,* 143 Cal.App.4th 985, 994.

> regional board; "uncontaminated ground water infiltrations" … and waters from emergency fire-fighting flows.[27]

There is also a list of permissible discharges that are incidental to urban activity, as specified (e.g., landscape irrigation runoff, etc.). In the part on receiving water limitations, the permit prohibits discharges from storm sewer systems that "cause or contribute" to violations of "Water Quality Standards" objectives in receiving waters as specified in state and federal water quality plans. Storm or non-stormwater discharges from storm sewer systems which constitute a nuisance are also prohibited.[28]

To comply with the receiving water limitations, the permittees must implement control measures in accordance with the permit.[29]

The permittees are also to implement the Storm Water Quality Management Program (SQMP) that meets the standards of 40 Code of Federal Regulations, part 122.26(d)(2) (2000) and reduces the pollutants in stormwaters to the maximum extent possible with the use of best management practices. And the permittees must revise the SQMP to comply with specified total maximum daily load (TMDL) allocations.[30] If a permittee modified the countywide SQMP, it must implement a local management program. Each permittee is required by November 1, 2002, to adopt a stormwater and urban runoff ordinance. By December 2, 2002, each permittee must certify that it had the legal authority to comply with the permit through adoption of ordinances or municipal code modifications.[31]

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[27] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985, 991-992.

[28] "'Nuisance' means anything that meets all of the following requirements: (1) is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal; (3) occurs during, or as a result of, the treatment or disposal of wastes." *Id.* at 992.

[29] If the Storm Water Quality Management Program did not assure compliance with the receiving water requirements, the permittee must immediately notify the regional board; submit a Receiving Water Limitations Compliance Report that describes the best management practices currently being used and proposed changes to them; submit an implementation schedule as part of the Receiving Water Limitations Compliance Report; and, after approval by the regional board, promptly implement the new best management practices. If the permittee makes these changes, even if there were further receiving water discharges beyond those addressed in the Water Limitations Compliance Report, additional changes to the best management practices need not be made unless directed to do so by the regional board. *Id.* at 993.

[30] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <http://www.epa.gov/OWOW/tmdl> as of October 3, 2008.

[31] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

Received
September 15, 2011
Commission on
State Mandates

The permit gives the County of Los Angeles additional responsibilities as principal permittee, such as coordination of the SQMP and convening watershed management committees. In addition, the permit contains a development construction program under which permittees are to implement programs to control runoff from construction sites, with additional requirements imposed on sites one acre or larger, and more on those five acres or larger. Permittees are to eliminate all illicit connections and discharges to the storm drain system, and must document, track and report all cases.

In this claim, however, claimants only allege activities in parts 4C2a, 4C2b, 4E and 4F5c3 of the permit. These parts concern placement and maintenance of trash receptacles at transit stops, and inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I industrial facilities (as defined) and construction sites, as quoted below.

Co-Claimants' Position

Co-claimants assert that parts 4C2a, 4C2b, 4E and 4F5c3 of the LA Regional Board's permit constitute a reimbursable state-mandate within the meaning of article XIII B, section 6, and Government Code section 17514.

Transit Trash Receptacles: Los Angeles County ("County") filed test claims 03-TC-04 and 03-TC-19. In 03-TC-04, *Transit Trash Receptacles*, filed by the County, and 03-TC-20, *Waste Discharge Requirements,* filed by the cities, the claimants allege the following activities as stated in the permit part 4F5c3 (Part 4, Special Provisions, F. Public Agency Activities Program, 5. Storm Drain Operation and Management):

> c. Permittees not subject to a trash TMDL[32] shall: [¶]...[¶]
>
> (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

Claimant County asserts that this permit condition requires the following:

1. Identifying all transit stops within its jurisdiction except for the Los Angeles River and Ballona Creek Watershed Management areas.
2. Selecting proper trash receptacle design and evaluating proper placement of trash receptacles.
3. Designing receptacle pad improvement, if needed.
4. Constructing and installing trash receptacle units.
5. Collecting trash and maintaining receptacles.

Inspection of Industrial and Commercial Facilities: In claim 03-TC-19, *Inspection of Industrial/ Commercial Facilities*, filed by the County, and 03-TC-20, *Waste Discharge Requirements,* filed by the cities, claimants allege the following activities as stated in the permit parts 4C2a and 4C2b (Part 4, Special Provisions, C. Industrial/Commercial Facilities Control Program):

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[32] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <http://www.epa.gov/OWOW/tmdl> as of October 3, 2008.

2. Inspect Critical Sources – Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified in the following subsections:

a) Commercial Facilities

(1) Restaurants

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections-: Each Permittee, in cooperation with its appropriate department (such as health or public works), shall inspect all restaurants within its jurisdiction to confirm that stormwater BMPs are being effectively implemented in compliance with State law, County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP [Storm Water Quality Management Program]. At each restaurant, inspectors shall verify that the restaurant operator:

- has received educational materials on stormwater pollution prevention practices;
- does not pour oil and grease or oil and grease residue onto a parking lot, street or adjacent catch basin;
- keeps the trash bin area clean and trash bin lids closed, and does not fill trash bins with washout water or any other liquid;
- does not allow illicit discharges, such as discharge of washwater from floormats, floors, porches, parking lots, alleys, sidewalks and street areas (in the immediate vicinity of the establishment), filters or garbage/trash containers;
- removes food waste, rubbish or other materials from parking lot areas in a sanitary manner that does not create a nuisance or discharge to the storm drain.

(2) Automotive Service Facilities

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections: Each permittee shall inspect all automotive service facilities within its jurisdiction to confirm that stormwater BMPs are effectively implemented in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each automotive service facility, inspectors shall verify that each operator:

- maintains the facility area so that it is clean and dry without evidence of excessive staining;
- implements housekeeping BMPs to prevent spills and leaks;
- properly discharges wastewaters to a sanitary sewer and/or contains wastewaters for transfer to a legal point of disposal;

- is aware of the prohibition on discharge of non-stormwater to the storm drain;
- properly manages raw and waste materials including proper disposal of hazardous waste;
- protects outdoor work and storage areas to prevent contact of pollutants with rainfall and runoff;
- labels, inspects, and routinely cleans storm drain inlets that are located on the facility's property; and
- trains employees to implement stormwater pollution prevention practices.

(3) Retail Gasoline Outlets and Automotive Dealerships

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each RGO [Retail Gasoline Outlet] and automotive dealership within its jurisdiction, in compliance with the SQMP, Regional Board Resolution 98-08, and the Stormwater Quality Task Force Best Management Practice Guide for RGOs. At each RGO and automotive dealership, inspectors shall verify that each operator:

- routinely sweeps fuel-dispensing areas for removal of litter and debris, and keeps rags and absorbents ready for use in case of leaks and spills;
- is aware that washdown of facility area to the storm drain is prohibited;
- is aware of design flaws (such as grading that doesn't prevent run-on, or inadequate roof covers and berms), and that equivalent BMPs are implemented;
- inspects and cleans storm drain inlets and catch basins within each facility's boundaries no later than October 1st of each year;
- posts signs close to fuel dispensers, which warn vehicle owners/operators against "topping off" of vehicle fuel tanks and installation of automatic shutoff fuel dispensing nozzles;
- routinely checks outdoor waste receptacle and air/water supply areas, cleans leaks and drips, and ensures that only watertight waste receptacles are used and that lids are closed; and
- trains employees to properly manage hazardous materials and wastes as well as to implement other stormwater pollution prevention practices.

b) Phase I Facilities[33]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

Facilities in Tier 1 Categories:[34] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[35] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity[36] to stormwater. For those facilities that do

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[33] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[34] Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...;* Restaurants; *Wholesale trade (scrap, auto dismantling)...;* Automotive service facilities; *Fabricated metal products ...; Motor freight ...; Chemical/allied products ...;* Automotive Dealers/Gas Stations ...; *Primary Metals.*"

[35] Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products...; Miscellaneous Manufacturing ...; Food and kindred Products...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...;* Laundries ...; *Instruments...; Textile Mills Products ...; Apparel ...*"

[36] "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]...[¶] (x) Construction activity including clearing, grading and excavation,

Received
September 15, 2011
Commission on
State Mandates

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

Inspection of Construction Sites: In claims 03-TC-20 and 03-TC-21, *Waste Discharge Requirements*, the cities allege the activities in permit parts 4C2a, 4C2b, and 4F5c3, as listed in the test claims cited above, in addition to the following activities as stated in part 4E of the permit (Part 4, Special Provisions, E. Development Construction Program):

- For construction sites one acre or greater, each Permittee shall comply with all conditions in section E1 above and shall: …

  (b) Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. The Local SWPPP [Storm Water Pollution Prevention Plan] shall be reviewed for compliance with local codes, ordinances, and permits. For inspected sites that have not adequately implemented their Local SWPPP, a follow-up inspection to ensure compliance will take place within 2 weeks. If compliance has not been attained, the Permittee will take additional actions to achieve compliance (as specified in municipal codes). If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

  Part 4E3 of the Order provides, in relevant part, as follows:

  3. For sites five acres and greater, each Permittee shall comply with all conditions in Sections E1 and E2 and shall:

  a) require, prior to issuing a grading permit for all projects requiring coverage under the state general permit,[37] proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction

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except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;" [40 CFR §122.26 (b)(14), Emphasis added.]

[37] A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA [Clean Water Act] within a geographical area." (40 CFR § 122.2.) California has issued one general permit for construction activity and one for industrial activity.

Activity Storm Water Permit][38] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.

b) Require proof of an NOI and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.

c) Use an effective system to track grading permits issued by each Permittee. To satisfy this requirement, the use of a database or GIS system is encouraged, but not required.

Both county and city claimants allege more than $1000 in costs in each test claim to comply with the permit activities.

In comments submitted June 4, 2009 on the draft staff analysis, the County of Los Angeles asserts that local agencies do not have fee authority to collect trash from trash receptacles that must be placed at transit stops, and that voter approval under Proposition 218 would be required to do so. The County also argues that voter approval under Proposition 218 would be required for stormwater inspection costs, and cites as evidence the City of Santa Clarita's stormwater pollution prevention fee, as well as legislative proposals now in the legislature that would, if enacted, provide fee authority.

In comments submitted June 8, 2009 on the draft staff analysis, the cities disagree with the conclusion that they have fee authority to recoup the costs of the transit-stop trash receptacles, and disagree that they have fee authority to inspect facilities covered by the state-issued general stormwater permits, as discussed in more detail below.

State Agency Positions

Department of Finance: Finance, in comments filed March 27, 2008 on all four test claims, alleges that the permit does not impose a reimbursable mandate within the meaning of section 6 of article XIII B of the California Constitution because "The permit conditions imposed on the local agencies are required by federal laws" so they are not reimbursable pursuant to Government Code section 17556, subdivision (c). Finance asserts that "requirements of the permit are federally required to comply with the NPDES [National Pollutant Discharge Elimination System] program … [and] is enforceable under the federal CWA [Clean Water Act]."

Finance also argues that the claimants had discretion over the activities and conditions to include in the permit application. The permittees submitted a Storm Water Quality Management Program prevention report with their applications, in which they had the option to use "best management practices" to identify alternative practices to reduce water pollution. Since the local agencies prescribed the activities to be included in the permit, the requirements are a downstream result of the local agencies' decision to include the particular activities in the permit. Finance cites the *Kern* case,[39] which held that if participation in the underlying program is voluntary, the resulting new consequential requirements are not reimbursable mandates.

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[38] See page 11, paragraph 22 of the permit for a description of the statewide permits.

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

Received
September 15, 2011
Commission on
State Mandates

Finally, Finance states that some local agencies are using fees for funding the claimed permit activities, so should the Commission find that the permit constitutes a reimbursable mandate, the fees should be considered as offsetting revenues.

Finance submitted comments on the draft staff analysis on June 19, 2009, agreeing that the local agencies have fee authority sufficient to pay for the mandated activities. Finance disagrees, however, with the portion of the analysis that finds that the activities are not federal mandates.

State Water Resources Control Board: The State Board filed comments on the four test claims on April 18, 2008, noting that the federal CWA mandates that municipalities apply for and receive permits regulating discharges of pollutants from their municipal separate storm sewer system (MS4) to waters of the United States. "Pursuant to federal regulations, the Permit contains numerous requirements for the cities and County to take actions to reduce the flow of pollutants into the rivers and the Bay, known as Best Management practices (BMPs)."

The State Board asserts that the permit is mandated on the local governments by federal law, and applies to many dischargers of stormwater, both public and private, so it is not unique to local governments. The federal mandate requires that the permit be issued to the local governments, and the specific requirements challenged are consistent with the minimum requirements of federal law. According to the State Board, even if the permit were interpreted as going beyond federal law, any additional state requirements are de minimis. And the costs are not subject to reimbursement because the programs were proposed by the cities and County themselves, and because they have the ability to fund these requirements through charges and fees and are not required to raise taxes.

In comments filed with the State Board on April 10, 2008 (attached to the State Board comments on the test claim), the United States Environmental Protection Agency (U.S. EPA) asserts that the permit conditions reduce pollutants to the "maximum extent practicable." The transit trash receptacle and inspection programs, according to U.S. EPA, are founded in section 402 (p) of the Clean Water Act, and are well within the scope of the federal regulations (40 CFR § 122.26 (d)(2)(iv)(A)(3)).

In its comments on the draft staff analysis submitted June 5, 2009, the State Board agrees with the conclusion and staff recommendation to deny the test claim, but disagrees with parts of the analysis. The State Board asserts that federal law: (1) requires local agencies to obtain NPDES permits from California Water Boards, and (2) mandates the permit, which is less stringent than permits for private industry. The State Board also states that the permit does not exceed the minimum federal mandate, as found by a court of appeal. Finally, the State Board argues that the federal stormwater law is one of general application, and therefore does not impose a state mandate.

Interested Party Positions

Bay Area Stormwater Management Agencies Association: In comments on the draft staff analysis received June 3, 2009 (although the letter is dated April 29, 2009) the Bay Area Stormwater Management Agencies Association (BASMAA) states that this matter is of statewide importance with broad implications, and fundamentally a matter of public finance. BASMAA also urges keeping the voters' objectives paramount. BASMAA agrees that the permit requirements are a new program or higher level of service and that the requirements go beyond the federal Clean Water Act's mandates. As for the portion of the draft staff analysis that

Received
September 15, 2011
Commission on
State Mandates

discusses local agency fee authority, BASMAA calls it "myopic" saying it "falls short in its consideration of all potentially relevant issues and appellate court precedents that need to be presented to the Commission to serve the interest of the public." (Comments p. 3.) BASMAA contends that many permit requirements relate to local communities and their residents rather than specific business activities, and require public services that are essentially incident to real property ownership, and/or may only be financed via fees that remain subject to the Proposition 218 voting requirement or increased property taxes. BASMAA also states that many permit activities would fall on joint power authorities or special districts that have no fee authority, or for which exemptions from Proposition 218 would not be applicable. BASMAA requests that the analysis be revised to revisit the conclusions regarding "funded vs. unfunded" requirements, and to recognize and distinguish the many types of stormwater activities for which regulatory fees would not apply.

League of California Cities and California State Association of Counties (CSAC): In joint comments on the draft staff analysis received June 4, 2009, the League of Cities and CSAC agree with the draft staff analysis that the permit is a mandate, but question whether the *Connell* and *County of Fresno* decisions are still valid as applied to Government Code section 17556, subdivision (d), which prohibit the Commission from finding costs mandated by the state if the local agency has fee authority. This is because of the voters' approval of Proposition 218 in 1996. The League and CSAC urge the Commission not to find that fee authority exists for local agencies (1) to the extent there may be doubt about whether a local agency has it, and (2) to the extent that there is no person upon which the local agency can impose the fee.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[40] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[41] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[42] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or

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[40] Article XIII B, section 6, subdivision (a), provides:

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

[41] *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

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

task.[43] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[44]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[45] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[46] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[47]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[48]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[49] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[50]

The permit provisions in the consolidated test claim are discussed separately to determine whether they are reimbursable state-mandates.

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

[44] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[45] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

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

[47] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[48] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

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

[50] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Received
September 15, 2011
Commission on
State Mandates

Issue 1: Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) subject to article XIII B, section 6, of the California Constitution?

The issues discussed here are whether the permit provisions are an executive order within the meaning of Government Code section 17516, whether they are discretionary, and whether they constitute a federal mandate.

A. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) an executive order within the meaning of Government Code section 17516?

The Commission has jurisdiction over test claims involving statutes and executive orders as defined by Government Code section 17516, which defines an "executive order" for purposes of state mandates, as "any order, plan, requirement, rule, or regulation issued by any of the following:

(a) The Governor.
(b) Any officer or official serving at the pleasure of the Governor.
(c) Any agency, department, board, or commission of state government."[51]

The LA Regional Water Board is a state agency.[52] The permit it issued is both a plan for reducing water pollution, and contains requirements for local agencies toward that end. Therefore, the Commission finds that the permit is an executive order within the meaning of article XIII B, section 6 and Government Code section 17516.

B. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) the result of claimants' discretion?

The permit provisions require placing and maintaining trash receptacles at transit stops and inspecting specified facilities and construction sites.

The Department of Finance, in comments submitted March 27, 2008, asserts that the claimants had discretion over what activities and conditions to include in the permit application, so that any resulting costs are downstream of the claimant's decision to include those provisions in the permit. Thus, Finance argues that the costs are not mandated by the state.

Similarly, the State Board, in its April 18, 2008 comments, cites the Stormwater Quality Management Program (SQMP) submitted by the county that constituted the claimants' proposal for the BMPs required under the permit. The State Water Board refers to (on p. 28 of the SQMP) the county's proposal to "collect trash along open channels and encourage voluntary trash collection in natural stream channels." The State Water Board further states that the SQMP (pp. 22-23) contains the municipalities' proposal for (1) site visits to industrial and commercial facilities, including automotive service businesses and restaurants to verify evidence of BMP

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[51] Section 17516 also states: ""Executive order" does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code." The Second District Court of Appeal has held that this statutory language is unconstitutional. *County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898, 904.

[52] Water Code section 13200 et seq.

Received
September 15, 2011
Commission on
State Mandates

implementation, and (2) maintaining a database of automotive and food service facilities including whether they have NPDES stormwater permit coverage.

Claimant County of Los Angeles, in its June 23, 2008 rebuttal comments (pp.3-4), stated whether or not most jurisdictions place transit receptacles at transit stops is not relevant to the existence of a state mandate because Government Code section 17565 provides that if a local agency has been incurring costs for activities that are subsequently mandated by the state, the activities are still subject to reimbursement. The County also states that the permit application only proposed an industrial/commercial *educational* site visit program, not an inspection program. The claimants allege that the inspection program was previously the state's duty, but that the permit shifted it to the local agencies.

Claimant cities in their June 28, 2008 comments also construe the SQMP proposal as involving only educational site visits, which they characterize as very different from compliance inspections. And cities assert that "nowhere in the Report of Waste Discharge do the applicants propose compliance inspections of facilities that hold general industrial and general construction stormwater permits for compliance with those permits." According to the cities, the city and county objected orally and in writing to the inspection permit provision.

In determining whether the permit provisions at issue are a downstream activity resulting from the discretionary decision by the local agencies, the following rule stated by the Supreme Court in the *Kern High School Dist.* case applies:

> [A]ctivities undertaken at the option or discretion of a local government entity … do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[53]

The Commission finds that the permit activities at issue were not undertaken at the option or discretion of the claimants. The claimants were required by state and federal law to submit the NPDES permit application in the form of a Report of Waste Discharge and SQMP. Submitting them was not discretionary. According to the record,[54] the county on behalf of all claimants, submitted on January 31, 2001 a Report of Waste Discharge (ROWD), which constitutes a permit application, and a SQMP, which constitutes the claimants' proposal for best management practices that would be required in the permit.

The duty to apply for an NPDES permit is not within the claimants' discretion. According to the federal regulation:

> a) *Duty to apply.* (1) Any person[55] who discharges or proposes to discharge pollutants … and who does not have an effective permit … must submit a

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[53] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

[54] State Water Resources Control Board, comments submitted April 18, 2008, page 8 & attachment 36.

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

> complete application to the Director in accordance with this section and part 124 of this chapter.[56]

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: "Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state … shall file a report of the discharge in compliance with the procedures set forth in Section 13260 …"[57] Thus, submitting the ROWD is not discretionary.

Federal regulations also anticipate the filing of an application for a stormwater permit, which contains the information in the SQMP. The regulation states in part:

> (d) *Application requirements for large and medium municipal separate storm sewer discharges.* The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application.[58]

According to the permit, section 122.26, subdivision (d), of the federal regulations contains the essential components of the SQMP (p. 32), which is an enforceable element of the permit (p. 45). Section 122.26, subdivision (d)(2)(iv)(C), in the federal regulations is interpreted in the permit to "require that MS4 permittees implement a program to monitor and control pollutants in discharges to the municipal system from industrial and commercial facilities that contribute a substantial pollutant load to the MS4." (p. 35.) In short, the claimants were required by law to submit the ROWD and SQMP, with specified contents.

Because the claimants do not voluntarily participate in the NPDES program, the Commission finds that the *Kern High School Dist.* case does not apply to the permit, the contents of which were not the result of the claimants' discretion.

C. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) a federal mandate within the meaning of article XIII B, sections 6 and 9, subdivision (b)?

The next issue is whether the parts of the permit at issue are federally mandated, as asserted by the State Board and the Department of Finance (whose comments are detailed below). If so, the parts of the permit would not constitute a state mandate.

In *County of Los Angeles v. Commission on State Mandates,* the court stated as follows regarding this permit: "We are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under all circumstances."[59] But after

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[56] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[57] Water Code section 13376.

[58] 40 Code of Federal Regulations, section 122.26 (d).

[59] *County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898, 914.

summarizing the arguments on both sides, the court declined to decide the issue, stating: "Resolution of the federal or state nature of these [permit] obligations therefore is premature and, thus, not properly before this court."[60] The court agreed with the Commission (calling it an "inescapable conclusion") that the federal versus state issues in the test claims must be addressed in the first instance by the Commission.[61]

The California Supreme Court has stated that "article XIII B, section 6, and the implementing statutes … by their terms, provide for reimbursement only of *state*- mandated costs, not *federally* mandated costs."[62]

When analyzing federal law in the context of a test claim under article XII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[63] When federal law imposes a mandate on the state, however, and the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[64]

Similarly, Government Code section 17556, subdivision (c), states that the Commission shall not find "costs mandated by the state" if "[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation."

In *Long Beach Unified School Dist. v. State of California*,[65] the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.[66] The *Long Beach* court stated that unlike the federal law at issue, "the executive

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[60] *Id.* at page 918.

[61] *Id.* at page 917. The court cited *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal. 3d 830, 837, in support.

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

[63] *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593, citing *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 76; see also, Government Code sections 17513 and 17556, subdivision (c).

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

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

[66] *Id.* at page 173.

Order and guidelines require specific actions … [that were] required acts. These requirements constitute a higher level of service."[67]

In analyzing the permit under the federal Clean Water Act, we keep the following in mind. First, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act.[68] Second, the California Supreme Court has acknowledged that an NPDES permit may contain terms that are federally mandated and terms that exceed federal law.[69] The federal Clean Water Act also allows for more stringent measures, as follows:[70]

> Permits for discharges from municipal storm sewers [¶]…[¶] (iii) shall require controls to reduce the discharges of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the … State determines appropriate for the control of such pollutants. (33 U.S.C.A. 1342 (p)(3)(B)(iii).)

As discussed further below, the Commission finds that the permit activities are not federally mandated because federal law does not require the permittees to install and maintain trash receptacles at transit stops, or require inspections of restaurants, automotive service facilities, retail gasoline outlets or automotive dealerships. As to inspecting phase I facilities or construction sites, the federal regulatory scheme authorizes states to perform the inspections under a general statewide permit, making it possible to avoid imposing a mandate on the local agencies to do so.

In its June 2009 comments on the draft staff analysis, the State Board disagrees that specific mandates in the permit exceed the federal requirements, the State Board argues:

> This approach fails to recognize that NPDES storm water permits, whether issued by U.S. EPA or California's Water Boards, are designed to translate the general federal mandate into specific programs and enforceable requirements. Whether issued by U.S. EPA or the California's Water Boards, the federal NPDES permit will identify specific requirements for municipalities to reduce pollutants in their storm water to the maximum extent practicable. The federally required pollutant reduction is a federal mandate. … The fact that state agencies have responsibility for specifying the federal permit requirements for municipalities does not convert the federal mandate into a state mandate.[71]

The Commission disagrees. Based on the *Long Beach Unified School Dist.* case discussed above and applied in the analysis below, the specific requirements in the permit may constitute a state mandate even though they are imposed in order to comply with the federal Clean Water Act.

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

[68] 33 U.S.C. § 1370.

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

[70] 33 USCA section 1370.

[71] State Board comments submitted June 2009, page 6.

Received
September 15, 2011
Commission on
State Mandates

Finance, in its June 2009 comments on the draft staff analysis, distinguishes this permit from the issue in the *Long Beach Unified School Dist.* case. According to Finance, in *Long Beach,* the courts had suggested certain steps and approaches that might help alleviate racial discrimination, although the state's executive order and guidelines required specific actions. But in this claim, federal law requires NPDES permits to include specific requirements.

The Commission agrees that NPDES permits are required to include specific measures. But as discussed in more detail below, those measures are not the same as the specific requirements at issue in this permit (in Parts 4C2a, 4C2b, 4E, and 4F5c3).

The State Board's June 2009 comments also discuss *County of Los Angeles v. State Water Resources Control Board,*[72] which involved the same permit as in this test claim. The State Board asserts that this case holds, in an unpublished part, that "the permit did not exceed the federal minimum requirements for the MS4 program."[73] (Comments, p. 5.) The State Board asserts that the Commission is bound by this decision.

The Commission reads the *County of Los Angeles* case differently than the State Board. The plaintiffs (permittees and others) in that case challenged the permit on a variety of issues, including that the regional board did not have jurisdiction to issue it, and that it violated the California Environmental Quality Act. The court did not, however, discuss the permit conditions at issue in this test claim. In the portion cited by the State Board, the court was addressing the consideration of the permit's economic effects. One of the plaintiffs' challenges to the permit was that the regional board was required to consider the economic effects in issuing the permit. By alleging the regional board had not done so, the plaintiffs argued that the permit imposed conditions more stringent than required by the federal Clean Water Act. The court held that the plaintiff's contentions were waived for failure to set forth all the documents received by the regional board, and that the regional board had considered the costs and benefits of implementation of the permit. In other parts of the opinion, however, the court acknowledged the regional board's authority to impose permit restrictions beyond the "maximum extent feasible"[74]

The *County of Los Angeles* case is silent on the permit provisions at issue in this claim[75] (Parts 4C2a, 4C2b, 4E, and 4F5c3) except when it said: "we need no [sic] address the parties'

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[72] *County of Los Angeles v. State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

[73] The court's opinion, including the unpublished parts, are in attachment 26 of the State Board's comments submitted April 18, 2008.

[74] See page 18 of attachment 26 of the State Board's comments submitted April 18, 2008.

[75] In *County of Los Angeles,* the plaintiffs also challenged the following parts of the permit: (1) part 2.1 that deals with receiving water restrictions and that prohibits all water discharges that violate water quality standards or objectives regardless of whether the best management practices are reasonable; (2) part 3.C, which requires the permittees to revise their storm water quality management programs in order to implement the total maximum daily loads for impaired water bodies, and (3) parts 3.G and 4., which authorize the regional board to require strict requirements with numeric limits on pollutants which are incorporated into the total maximum daily load restrictions. The court held that these contentions were waived for failure to set forth all the

Received
September 15, 2011
Commission on
State Mandates

remaining contentions concerning trash receptacles."[76] The court also said inspections under the permit were not unlawful. Nonetheless, the case is not binding on the Commission in deciding the issues in this claim.

California in the NPDES program: By way of background, under the federal statutory scheme, a stormwater permit may be administered by the Administrator of U.S. EPA or by a state-designated agency, but states are not required to have an NPDES program. Subdivision (b) of section 1324 of the federal Clean Water Act, the section that describes the NPDES program (and which, in subdivision (p), describes the requirements for the municipal stormwater system permits) states in part:

> At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator [of U.S. EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. [Emphasis added.]

And the federal stormwater statute states that the permits:

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

The federal statutory scheme indicates that California is neither required to have an NPDES program nor to issue stormwater permits. According to section 1342 (p) quoted above, the Administrator of U.S. EPA would do so if California had no program. The California Legislature, when adopting the NPDES program[77] to comply with the Federal Water Pollution Control Act of 1972 stated the following findings and declaration in Water Code section 13370:

(a) The Federal Water Pollution Control Act [citation omitted] as amended, provides for permit systems to regulate the discharge of pollutants … to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.

(b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.

(c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government, of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the

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applicable evidence, and that the regional board has authority to impose restrictions beyond the maximum extent feasible.

[76] See page 22, attachment 26 of the State Board's comments submitted April 18, 2008.

[77] Water Code section 13374 states: "The term 'waste discharge requirements' as referred to in this division is the equivalent of the term 'permits' as used in the Federal water Pollution Control Act, as amended."

Received
September 15, 2011
Commission on
State Mandates

> provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Act for the purpose of carrying out its responsibilities under this program.

Based on this Water Code section 13370, in which California voluntarily adopts the permitting program, and on the federal statutes quoted above that authorize but do not expressly require states to have this program, the state has freely chosen[78] to effect the stormwater permit program.

Any further discussion in this analysis of federal "requirements" should be construed in the context of California's choice to participate in the federal regulatory NPDES program.

In its June 2009 comments on the draft staff analysis, the State Board argues as follows:

> [T]he ... analysis treats the state's decision to *administer* the NPDES permit program in 1972 as the 'choice' referred to in *Hayes*. ...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.[79]

Finance, in its June 2009 comments, also disagrees with this part of the draft staff analysis, asserting that the duty to apply for a NPDES permit is required by federal law on public and private dischargers, which in this case are local agencies.

Even though California opted into the NPDES program, further analysis is needed to determine whether the federal regulations impose a mandate on the local agencies. To the extent that state requirements go beyond the federal requirements, there would be a state mandate.[80] Thus, the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) are discussed below in context of the following federal law governing stormwater permits: Clean Water Act section 402(p) (33 USCA 1342 (p)(3)(B)) and Code of Federal Regulations, title 40, section 122.26.

Placing and maintaining trash receptacles at transit stops (part 4F5c3): This part of the permit states:

> c. Permittees not subject to a trash TMDL[81] shall: [¶]...[¶]
> (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

The comments of the State Water Board and U.S. EPA assert that the permit conditions merely implement a federal mandate under the federal Clean Water Act and its regulations. The U.S.

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

[79] State Board comments submitted June 2009, page 4.

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

[81] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

EPA submitted a letter to the State Water Board regarding the permit conditions in April 2008, which the State Water Board attached to its comments. Regarding the trash receptacles, the letter states:

> [M]aintaining trash receptacles at all public transit stops is well within the scope of these [Federal] regulations. Among the minimum controls required to reduce pollutants from runoff from commercial and residential areas are practices for "operating and maintaining public streets, roads, and highways … [40 CFR] § 122.26(d)(2)(iv)(A)(3).[82]

U.S. EPA also cites EPA's national menu of BMPs for stormwater management programs, "which recommends a number of BMPs to reduce trash discharges." Among the recommendations is 'improved infrastructure' for trash management when necessary, which includes the placement of trash receptacles at appropriate locations based on expected need."[83]

The State Water Board, in comments filed April 18, 2008, states that part 4F of the permit (regarding trash receptacles) concerns "the municipalities' own activities, as opposed to its regulation of discharges into its system by others." The State Water Board cites the same section 122.26 regulation as U.S. EPA, and states that the requirements "reflect the federal requirement to reduce pollutants from the MS4 to the maximum extent practicable. It is federal law that animates the requirement and federal law that mandates specificity in describing the BMPs." The State Water Board alleges that two appellate courts[84] have determined that the permit provisions constitute the "maximum extent practicable" standard, which is the minimum requirement under federal law.

The Department of Finance also asserts that the permit requirements are a federal mandate.

The County of Los Angeles, in comments filed June 23, 2008, states that "Nothing in the federal Clean Water Act requires the County to install trash receptacles at transit stops. Nothing in the federal regulations or the Clean Water Act itself imposes this obligation." The county states that the U.S.EPA's citation to BMPs for stormwater management programs "may be permitted under federal law … and even encouraged as 'reasonable expectations.' But such requirements are not mandated on the County by federal law." The County admits the existence of "an abundance of federal guidance and encouragement to have the County install and maintain trash receptacles at all public transit stops. But these are merely federal suggestions, not mandates."

The city claimants, in comments filed June 25, 2008, also argue that the requirement for transit trash receptacles is not a federal mandate, stating that nothing in the Clean Water Act or the federal regulations requires cities to install trash receptacles at transit stops. City claimants also submit a survey of other municipal stormwater permits, finding that none of those issued by U.S. EPA required installation of trash receptacles at transit stops.

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[82] Letter from Alexis Strauss, Director, Water Division, U.S. EPA, to Tam M. Doduc, Chair, and Dorothy Rice, Executive Director, State Water Resources Control Board, April 10, 2008, page 3.

[83] *Id.* at page 3.

[84] The State Water Board cites: *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region* (2006) 135 Cal.App.4th 1377; *County of Los Angeles v. California State Water Resources Control Board* (2006) 148 Cal.App.4th 985.

The federal law applicable to this issue is section 402 of the Clean Water Act, which states:

> Permits for discharges from municipal storm sewers--
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator[85] or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B).)

The applicable federal regulations state as follows:

> (d) Application requirements for large and medium municipal separate storm sewer discharges. The operator[86] of a discharge[87] from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. ... Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]
>
> (2) Part 2 of the application shall consist of: [¶]...[¶]
>
> (iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design

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

[86] "*Owner or operator* means the owner or operator of any "facility or activity" subject to regulation under the NPDES program." (40 CFR § 122.2.)

[87] "*Discharge* when used without qualification means the "discharge of a pollutant. *Discharge of a pollutant* means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 CFR § 122.2.)

Received
September 15, 2011
Commission on
State Mandates

> and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:
>
> (A) A description of structural and source control measures[88] to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include: [¶]...[¶]
>
> (3) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities. (40 CFR § 122.26(d)(2)(iv)(A)(3).) [Emphasis added.]

The Commission finds that the plain language of the federal statute (33 USCA § 1342 (p)(3)(B)) and regulation (40 CFR § 122.26 (d)(2)(iv)(A)(3)) does not require the permitees to install and maintain trash receptacles at transit stops.

Specifically, the state freely chose[89] to impose the transit trash receptacle requirement on the permittees because neither the federal statute nor the regulations require it. Nor do they require the permittees to implement "practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems"[90] although the regulation requires a description of practices for doing so. Because installing and maintaining trash receptacles at transit stops is not expressly required of cities or counties or municipal separate storm sewer dischargers in the federal statutes or regulations, these are activities that "mandate costs that exceed the mandate in the federal law or regulation."[91]

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[88] Minimum control measures are defined in 40 CFR § 122.34 to include: 1) Public education and outreach on storm water impacts; (2) Public involvement/participation; (3) Illicit discharge detection and elimination. (4) Construction site storm water runoff control; (5) Post-construction storm water management in new development and redevelopment.; (6) Pollution prevention/good housekeeping for municipal operations.

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

[90] 40 CFR § 122.26(d)(2)(iv)(A)(3).

[91] Government Code section 17556, subdivision (c).

In *Long Beach Unified School Dist. v. State of California*,[92] the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.[93] The *Long Beach Unified School District* court stated:

> Where courts have suggested that certain steps and approaches may be helpful [in meeting constitutional and case law requirements] the executive Order and guidelines require *specific actions.* ...[T]he point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts. These requirements constitute a higher level of service.[94] [Emphasis added.]

The reasoning of *Long Beach Unified School Dist.* is applicable to this claim. Although "operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems..."[95] is a federal requirement on municipalities, the permit requirement to place trash receptacles at all transit stops and maintain them is an activity, like in *Long Beach Unified School Dist.*, that is a *specified action* going beyond federal law.[96]

Neither of the cases cited by the State Water Board demonstrate that placing trash receptacles at transit stops is required by federal law. In *City of Rancho Cucamonga v. Regional Water Quality Control Board –Santa Ana Region*[97] the court upheld a stormwater permit similar to the one at issue in this claim. The City of Rancho Cucamonga challenged the permit on a variety of grounds, including that it exceeded the federal requirements for stormwater dischargers to "reduce the discharge of pollutants to the maximum extent practicable"[98] and that it was overly prescriptive. The court concluded that the permit did not exceed the maximum extent practicable standard and upheld the permit in all respects. There is no indication in that case, however, that the permit at issue required trash receptacles at transit stops. Similarly, in a suit regarding the same permit at issue in this case, the *Los Angeles County*[99] court dismissed various challenges to the permit, but made no mention of the permit's transit trash receptacle provision.

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

[93] *Id.* at page 173.

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

[95] 40 Code of Federal Regulations, section 122.26 (d)(2)(iv)(A)(3).

[96] *Ibid.*

[97] *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region, supra,* 135 Cal.App.4th 1377.

[98] 33 USCA section 1342 (p)(3(B)(iii).

[99] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

Therefore, the Commission finds that placing and maintaining trash receptacles at all transit stops within the jurisdiction of each permittee, as specified, is not a federal mandate within the meaning of article XIII B, sections 6 and 9, subdivision (b).

Part 4F5c3 of the permit states as follows:

> c. Permittees not subject to a trash TMDL shall: (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

Based on the mandatory language (i.e., "shall") in part 4F5c3 of the permit, the Commission finds it is a state mandate for the claimants that are not subject to a trash TMDL to place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003, and to maintain all trash receptacles as necessary.

Inspecting commercial facilities (part 4C2a): Section 4C2a of the permit requires inspections of restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships as follows:

> 2. Inspect Critical Sources – Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified in the following subsections:
>
> (a) Commercial Facilities
>
> (1) Restaurants
>
> Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.
>
> Level of Inspections: Each Permittee, in cooperation with its appropriate department (such as health or public works), shall inspect all restaurants within its jurisdiction to confirm that stormwater BMPs are being effectively implemented in compliance with Statw law, County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each restaurant, inspectors shall verify that the restaurant operator:
>
> - has received educational materials on stormwater pollution prevention practices;
> - does not pour oil and grease or oil and grease residue onto a parking lot, street or adjacent catch basin;
> - keeps the trash bin area clean and trash bin lids closed, and does not fill trash bins with washout water or any other liquid;
> - does not allow illicit discharges, such as discharge of washwater from floormats, floors, porches, parking lots, alleys, sidewalks and street areas (in the immediate vicinity of the establishment), filters or garbage/trash containers;

- removes food waste, rubbish or other materials from parking lot areas in a sanitary manner that does not create a nuisance or discharge to the storm drain.

(2) Automotive Service Facilities

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections: Each permittee shall inspect all automotive service facilities within its jurisdiction to confirm that stormwater BMPs are effectively implemented in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each automotive service facility, inspectors shall verify that each operator:

- maintains the facility area so that it is clean and dry without evidence of excessive staining;
- implements housekeeping BMPs to prevent spills and leaks;
- properly discharges wastewaters to a sanitary sewer and/or contains wastewaters for transfer to a legal point of disposal;
- is aware of the prohibition on discharge of non-stormwater to the storm drain;
- properly manages raw and waste materials including proper disposal of hazardous waste;
- protects outdoor work and storage areas to prevent contact of pollutants with rainfall and runoff;
- labels, inspects, and routinely cleans storm drain inlets that are located on the facility's property; and
- trains employees to implement stormwater pollution prevention practices.

(3) Retail Gasoline Outlets and Automotive Dealerships

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each RGO and automotive dealership within its jurisdiction, in compliance with the SQMP, Regional Board Resolution 98-08, and the Stormwater Quality Task Force Best Management Practice Guide for RGOs. At each RGO and automotive dealership, inspectors shall verify that each operator:

- routinely sweeps fuel-dispensing areas for removal of litter and debris, and keeps rags and absorbents ready for use in case of leaks and spills;
- is aware that washdown of facility area to the storm drain is prohibited;
- is aware of design flaws (such as grading that doesn't prevent run-on, or inadequate roof covers and berms), and that equivalent BMPs are implemented;

Received
September 15, 2011
Commission on
State Mandates

- inspects and cleans storm drain inlets and catch basins within each facility's boundaries no later than October 1st of each year;
- posts signs close to fuel dispensers, which warn vehicle owners/operators against "topping off" of vehicle fuel tanks and installation of automatic shutoff fuel dispensing nozzles;
- routinely checks outdoor waste receptacle and air/water supply areas, cleans leaks and drips, and ensures that only watertight waste receptacles are used and that lids are closed; and
- trains employees to properly manage hazardous materials and wastes as well as to implement other stormwater pollution prevention practices. [¶]...[¶]

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

The state asserts that these inspection requirements in permit part 4C2a are a federal mandate.

In comments filed April 18, 2008, the State Water Board quotes from the MS4 Program Evaluation Guide issued by U.S. EPA, asserting that it requires inspections of businesses. The State Water Board also states:

> The federal regulations also specifically require local stormwater agencies, as part of their responsibilities under NPDES permits, to conduct inspections. [citing 40 CFR § 122.26(d)(2)(iv)(C).] Throughout the federal law, there are numerous requirements for entities that discharge pollutants to waters of the United States to monitor and inspect their facilities and their effluent. [citing Clean Water Act §402(b)(2)(B); 40 CFR § 122.44(i)).] The claimants are the dischargers of pollutants into surface waters; as part of their permit allowing these dischargers they must conduct inspections.

Similarly, the April 10, 2008 letter from U.S. EPA to the State Water Board and attached to the Board's comments submitted April 18, 2008, states:

> A program for commercial and industrial facility inspection and enforcement that includes restaurants and automobile facilities, would appear to be both practicable and effective. Such an inspection program ensures that stormwater discharges from such facilities are reducing their contribution of pollutants and that there are no non-stormwater discharges or illicit connections. Thus these programs are founded in both 402 (p)(3)(B)(ii) and (iii) and are well within the scope of 40 CFR § 122.26(d)(2)(iv)(A) and (B).

The County of Los Angeles, in its June 23, 2008 rebuttal comments, asserts that federal law requires prohibiting non-stormwater discharges into the storm sewers, and reducing the discharge of pollutants in stormwater to the maximum extent practicable (33 USC 1342(p)) but not inspecting restaurants, automotive service facilities, retail gas outlets, or automotive dealerships.

Received
September 15, 2011
Commission on
State Mandates

Only municipal landfills, hazardous waste treatment, disposal and recovery facilities and related facilities are required to be inspected (40 CFR § 122.26(d)(2)(iv)(C)).

In comments received June 25, 2008, the city claimants argue that the LA Regional Board freely chose to impose the permit requirements on the permittees, and make the following arguments: (1) The inspection obligations were not contained in two prior permits issued to the cities and the County—thus, the requirements are not federal mandates; (2) No federal statute or regulation requires the cities or the County to inspect restaurants, automotive service facilities, retail gas outlets, automotive dealerships or facilities that hold general industrial permits; (3) Stormwater NPDES permits issued by the U.S. EPA do not contain the requirement to inspect restaurants, auto service facilities, retail gas outlets and automotive dealerships, or require the extensive inspection of facilities that hold general industrial stormwater permits as contained in the Order [i.e. permit]; (4) The Administrator of U.S. EPA, as well as the head of the water division for U.S. EPA Region IX, have specifically stated that a municipality has an obligation under a stormwater permit only to assure compliance with local ordinances; the state retains responsibility to inspect for compliance with state law, including state-issued permits.

The city claimants dispute the State Board's contention that the court in *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377 held that federal law required inspections like those at issue in the permit. The cities quote part of the *City of Rancho Cucamonga* case with the following emphasis:

> Rancho Cucamonga and the other permittees are responsible for inspecting construction and industrial sites and commercial facilities within their jurisdiction for compliance with and enforcement of local municipal ordinances and permits. *But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits.* The Regional Board may conduct its own inspections but permittees must still enforce their own laws at these sites. (40 C.F.R. § 122.26, subd. (d)(2) (2005).)

In discussing the federal mandate issue, the applicable federal law is section 402 of the Clean Water Act, which states that municipal storm sewer system permits:

> (i) may be issued on a system- or jurisdiction-wide basis; (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B).)

The applicable federal regulations (40 CFR § 122.26 (d)(2)(iv)(B)&(C)) state as follows:

> (d) Application requirements for large and medium municipal separate storm sewer discharges. The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such

operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]

(2) Part 2 of the application shall consist of: [¶]...[¶]

(iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on: [¶]...[¶]

(B) A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

(1) A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-stormwater discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States [¶]...[¶]

(C) A description of a program to monitor and control pollutants in stormwater discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

(1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges. (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1) & (C)(1).) [Emphasis added.]

There is a requirement in subdivision (d)(2)(iv)(B)(1) for implementing and enforcing "an ordinance, orders, or similar means to prevent illicit discharges to the municipal separate storm system." There is no express requirement in federal law, however, to inspect restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships. Nor does the

portion of the MS4 Program Evaluation Guide quoted by the State Water Board contain mandatory language to conduct inspections for these facilities.

In its April 2008 comments, the State Water Board argues that this reading of the regulations is not reasonable, and that U.S. EPA acknowledged that the initial selection by MS4s was only a starting point. In its comments (p.15), the State Water Board also states:

> Because the federal mandate requires Water Boards to choose specific BMPs [Best Management Practices] that are included in MS4 permits as requirements, the 'discretion' exercised in selecting those BMPs is necessarily a part of the federal mandate. It is not comparable to the discretion that the courts in *Hayes* or *San Diego* spoke of, where the state truly had a 'free choice.' The Los Angeles Water Board was mandated by federal law to select BMPs that would result in compliance with the federal MEP [Maximum Extent Practicable] standard. ... Therefore, it is clear that the mere exercise of discretion in selecting BMPs does not create a reimbursable mandate.

The State Water Board would have the Commission read requirements into the federal law that are not there. The Commission, however, cannot read a requirement into a statute or regulation that is not on its face or its legislative history.[100]

Based on the plain language of the federal regulations that are silent on the types of facilities at issue in the permit, the Commission finds that performing inspections at restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships, as specified in the permit, is not a federal mandate.

Moreover, the requirement to inspect the facilities listed in the permit is an activity, as in the *Long Beach Unified School Dist.* case discussed above,[101] that is a specified action going beyond the federal requirement for inspections "to prevent illicit discharges to the municipal separate storm sewer system." (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1).) As such, the inspections are not federally mandated.

The permit states in part: "Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified ..." Based on the mandatory language in part 4C2a of the permit, the Commission finds that this part is a state mandate on the claimants to perform the inspections at restaurants, automotive service facilities, retail gasoline outlets, and automotive dealerships at the frequency and levels specified in the permit.

Inspecting phase I industrial facilities (part 4C2b): Part 4C2b of the permit regarding phase I industrial facilities requires the following:

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[100] *Gillett-Harris-Duranceau & Associates, Inc. v. Kemple* (1978) 83 Cal.App.3d 214, 219-220. "Rules governing the interpretation of statutes also apply to interpretation of regulations." *Diablo Valley College Faculty Senate v. Contra Costa Community College Dist.* (2007) 148 Cal.App.4th 1023, 1037.

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

b) Phase I Facilities[102]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

Facilities in Tier 1 Categories:[103] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[104] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity to stormwater. For those facilities that do have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

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[102] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[103] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...;* Restaurants; *Wholesale trade (scrap, auto dismantling)...;* Automotive service facilities; *Fabricated metal products ...; Motor freight ...; Chemical/allied products ...;* Automotive Dealers/Gas Stations ...; *Primary Metals.*"

[104] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products...; Miscellaneous Manufacturing ...; Food and kindred Products...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...;* Laundries ...; *Instruments...; Textile Mills Products ...; Apparel ...*"

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

The issue is whether these inspection requirements for phase I industrial facilities is a federal mandate. The governing federal regulation is 40 CFR section 122.26 (d)(2)(iv)(B)&(C), which is cited above. Specifically on point is subpart (C), which states that the proposed management program must include the following:

> (C) A description of a program to monitor and control pollutants in stormwater discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:
>
> (1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges; (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1) & (C)(1).) [Emphasis added.]

The phase I facilities in the permit are defined to include.

> (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities. (Permit, p. 62)

And the Tier 1 facilities in the permit include municipal landfills, hazardous waste treatment, disposal and recovery facilities and facilities subject to SARA Title III (see permit attachment B, pp. B-1 to B-2). Thus, there is a federal requirement to inspect these phase I and tier 1 facilities in the permit. The issue is whether this requirement constitutes a federal mandate on local agencies. The Commission finds that it does not.

It is the state that mandates the phase I inspection and related activities in that the state freely chooses to impose the inspection and enforcement requirements on the local agency permittees.[105] This is because the federal regulatory scheme provides an alternative means of regulating and inspecting these industrial facilities under the state-enforced, statewide permit, as follows:

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

> (c) Application requirements for stormwater discharges associated with industrial activity[106] and stormwater discharges associated with small construction activity -
>
> (1) Individual application. Dischargers of stormwater associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated stormwater general permit. Facilities that are required to obtain an individual permit, or any discharge of stormwater which the Director is evaluating for designation (see 124.52(c) of this chapter) under paragraph (a)(1)(v) of this section and is not a municipal storm sewer, shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of this paragraph. [Emphasis added.]

The state has issued a statewide general activity industrial permit (GIASP) that is enforced through the regional boards.[107] This, along with the statewide construction permit, is described in the permit itself:

> To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for stormwater discharges: one for stormwater from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for stormwater from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. The GCASP was reissued on August 19, 1999. The GIASP was reissued on April 17, 1997. Facilities discharging stormwater associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for stormwater discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The USEPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and

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[106] According to 40 CFR § 122.26, (b)(14): "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. … The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]…[¶](x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more."

[107] For example, page 2 of the Fact Sheet for the General Construction Activity Storm Water Permit states: "This General Permit shall be implemented and enforced by the nine California Regional Water Quality Control Boards (RWQCBs)."

Received
September 15, 2011
Commission on
State Mandates

> non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations.[108]

There is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspections of industrial facilities (specified in part 4C2b of the permit) under the state-enforced general permit. Nor does federal law require the owner or operator of the discharge to perform these activities in part 4C2b of the permit. In fact, the State Board collects fees for the regional boards for performing inspections under the GIASP (see Wat. Code, § 13260, subd. (d)(2)(B)(ii)).

In its April 18, 2008 comments, the State Water Board asserts:

> Because the federal mandate requires Water Boards to choose specific BMPs [Best Management Practices] that are included in MS4 permits as requirements, the 'discretion' exercised in selecting those BMPs is necessarily a part of the federal mandate. It is not comparable to the discretion that the courts in *Hayes* or *San Diego* spoke of, where the state truly had a 'free choice.' The Los Angeles Water Board was mandated by federal law to select BMPs that would result in compliance with the federal MEP [Maximum Extent Practicable] standard. ... Therefore, it is clear that the mere exercise of discretion in selecting BMPs does not create a reimbursable mandate.[109]

The Commission disagrees. Inasmuch as the federal regulation (40 CFR § 122.26 (c)) authorizes coverage under a statewide general permit for the inspections of industrial activities, and the federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) does not expressly require those inspections to be performed by the county or cities (or the "owner or operator of the discharge") the Commission finds that the state has freely chosen[110] to impose these activities on the permittees. Therefore, the Commission finds that there is no federal mandate on the claimants to perform inspections of phase I facilities as specified in part 4C2b of the permit.

As to whether the permit is a state mandate, part 4C2b contains the following mandatory language:

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[108] Permit, page 11, paragraph 22.

[109] State Water Board comments, submitted April 18, 2008, page 15.

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

b) Phase I Facilities[111]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below. [Emphasis added.]

Frequency of Inspection

Facilities in Tier 1 Categories:[112] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[113] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity[114] to stormwater. For those facilities that do

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[111] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[112] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...;* Restaurants; *Wholesale trade (scrap, auto dismantling)...;* Automotive service facilities; *Fabricated metal products ...; Motor freight ...; Chemical/allied products ...;* Automotive Dealers/Gas Stations ...; *Primary Metals.*"

[113] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products...; Miscellaneous Manufacturing ...; Food and kindred Products...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...;* Laundries ...; *Instruments...; Textile Mills Products ...; Apparel ...*"

[114] "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]...[¶] (x) Construction activity including clearing, grading and excavation,

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

Based on this mandatory language to perform the inspections of phase I facilities as specified, the Commission finds that part 4C2b of the permit is a state-mandate.

Inspecting construction sites (part 4E): Part 4E of the permit contains the following requirements:

- Implement a program to control runoff from construction activity at all construction sites within each permittees jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

For construction sites one acre or greater, each permittee shall:

- Require the preparation and submittal of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
    - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).
    - If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
    - If non-compliance continues the Regional Board shall be notified for further joint enforcement actions. (Permit, 4E2b.)

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except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more." [40 CFR §122.26 (b)(14), Emphasis added.]

- Require by March 10, 2003, before issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction stormwater permit, proof of a Waste Discharger Identification Number for filing a Notice of Intent for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs [Best Management Practices] as the State SWPPP (Permit, 4E2c.)
- For sites five acres and greater:
  - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction Activity Storm Water Permit] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.
  - Require proof of an Notice of Intent (NOI) and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
  - Use an effective system to track grading permits issued by each permittee. (Permit, 4E3.)
- For projects subject to the GCASP [General Construction Activity Storm Water Permit], permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, permittees shall include, at a minimum, the following documentation: Project location; Developer; Estimated project size; and Records of communication with the developer regarding filing requirements. (Permit, 4E4b.)
- Train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the stormwater management program no later than August 1, 2002, and annually thereafter. For permittees with a population of 250,000 or more (2000 US Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees. (Permit, 4E5.)

The applicable federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) on the issue of whether the inspection of construction sites is a federal mandate is as follows:

> (d) Application requirements for large[115] and medium[116] municipal separate storm sewer discharges. The operator[117] of a discharge from a large or medium

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[115] "(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 250,000 or more as

municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. ... Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]

(2) Part 2 of the application shall consist of: [¶]...[¶]

(iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on: [¶]...[¶]

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in stormwater runoff

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determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or (ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. ..." (40 CFR § 122.26 (b)(4).)

[116] "(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or (ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. ..." (40 CFR § 122.26 (b)(7).)

[117] "*Owner or operator* means the owner or operator of any 'facility or activity' subject to regulation under the NPDES program." (40 CFR § 122.2.)

> from construction sites to the municipal storm sewer system, which shall include: [¶]...[¶]
>
> (3) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and ... [Emphasis added.]

The language of the federal regulation indicates a duty to inspect construction sites and enforce control measures as specified in part 4E of the permit. The *Rancho Cucamonga* case cited by the State Board also states that federal law requires NPDES permittees to inspect construction sites.[118]

The issue, however, is whether the federal requirements to inspect construction sites and enforce control measures amounts to a federal mandate on the local agencies. The Commission finds that it does not. First, the federal regulations quoted above do not specify the frequency or other specifics of the inspection program as the permit does. These are activities, as in the *Long Beach Unified School Dist.* case discussed above,[119] that are specified actions going beyond the federal requirement for inspections "to prevent illicit discharges to the municipal separate storm sewer system." (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1).) As such, it is not a federal mandate for the local agency permittees to inspect construction sites.

Moreover, it is the state that mandates the inspections of construction sites and related activities in that the state freely chooses to impose the inspection and enforcement requirements on the local agency permittees.[120] The federal regulations do not require: (1) a municipality to have a separate permit for construction activity or enforcement; or (2) that the inspections and related activities in part 4E of the permit be conducted by the owner or operator of the discharge. Rather, these activities may be conducted by the state under a state-wide, state-enforced, general permit, as stated in the federal stormwater regulation (40 CFR § 122.26 (c)), which states in part:

> (c) Application requirements for stormwater discharges associated with industrial activity [includes construction activity of five or more acres] and stormwater discharges associated with small construction activity[121] [construction activity from one to less than five acres]--

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[118] *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region, supra,* 135 Cal.App.4th 1377, 1390.

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

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

[121] According to 40 CFR § 122.26, (b)(15): "Storm water discharge associated with small construction activity means the discharge of storm water from: (i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The

> (1) Individual application. Dischargers of stormwater associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated stormwater general permit. [Emphasis added.]

The state has issued a statewide general construction permit, as described on page 11 of the permit as quoted above, which is enforced through the regional boards.[122] In fact, the State Board collects fees for the regional board for performing inspections under the GCASP (see Wat. Code, § 13260, subd. (d)(2)(B)(ii)).

There is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspection of construction sites and related activities (in part 4E of the permit) under the state-enforced general permit. Nor does federal law require the owner or operator of the discharge to perform these activities in part 4E of the permit. Therefore, the Commission finds that the requirement for local-agency permittees to inspect construction sites in section 4E of the permit is not a federal mandate.

The Commission finds that, based on the permit's mandatory language, the following activities in part 4E are state mandates on the permittees within the meaning of article XIII B, section 6:

- Implement a program to control runoff from construction activity at all construction sites within each permittee's jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

  For construction sites one acre or greater:

- Require the preparation of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
  - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).

Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where: …"

[122] For example, page 2 of the Fact Sheet for the General Construction Activity Storm Water Permit states: "This General Permit shall be implemented and enforced by the nine California Regional Water Quality Control Boards (RWQCBs)."

- If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
- If non-compliance continues, notify the Regional Board for further joint enforcement actions. (Permit, 4E2b.)

- Require by March 10, 2003, before issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction stormwater permit, proof of a Waste Discharger Identification Number for filing a Notice of Intent for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs [Best Management Practices] as the State SWPPP. (Permit, 4E2c.)
- For sites five acres and greater:
  - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction Activity Storm Water Permit] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.
  - Require proof of an Notice of Intent (NOI) and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
  - Use an effective system to track grading permits issued by each permittee. (Permit, 4E3.)
- For projects subject to the GCASP [General Construction Activity Storm Water Permit], permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, permittees shall include, at a minimum, the following documentation: Project location; Developer; Estimated project size; and Records of communication with the developer regarding filing requirements. (Permit, 4E4b.)
- Train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the stormwater management program no later than August 1, 2002, and annually thereafter. For permittees with a population of 250,000 or more (2000 US Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees. (Permit, 4E5.)

One of the requirements in part 4E3c of the permit is to: "Use an effective system to track grading permits issued by each permittee. To satisfy this requirement, the use of a database or

Received
September 15, 2011
Commission on
State Mandates

GIS system is encouraged, but not required." The Commission finds that, based on the plain language of this provision, using an effective system to track grading permits is a state mandate, although use of a database or GIS system is not.

Overall, the Commission finds that the permit provisions (parts 4C2a, 4C2b, 4E & 4F5c3) are subject to article XIII B, section 6, of the California Constitution.

Issue 2: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) impose a new program or higher level of service?

The next issue is whether the permit provisions at issue, i.e., found above to be state-mandated, are a program, and whether they are a new program or higher level of service.

First, courts have defined a "program" for purposes of article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[123]

The State Water Board, in its April 2008 comments, argues that the NPDES program is not a program because "the NPDES permit program, and the stormwater requirements specifically, are not peculiar to local government. Industrial and construction facilities must also obtain NPDES stormwater permits."

In comments submitted June 25, 2008, the cities call the State Board's argument inapposite, and cite the *Carmel Valley Fire Protection District* case[124] regarding whether the permit constitutes a "program." According to claimant, "[t]he test is not whether the general program applies to both governmental and non-governmental entities. The test is whether the specific executive orders at issue apply to both government and non-governmental entities."

The Commission finds that the permit activities constitute a program within the meaning of article XIII B, section 6. The permit activities are limited to local governmental entities. The permit defines the "permittees" as the County of Los Angeles and 84 incorporated cities within the Los Angeles County Flood Control District (Permit, p. 1 & attachment A). The permit lists no private entities as "permittees." Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in Los Angeles County. (Or as stated on page 13 of the permit: "The objective of this Order is to protect the beneficial uses of receiving waters in Los Angeles County.") Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.

In its comments on the draft staff analysis submitted June 5, 2009, the State Board disagrees with this conclusion because NPDES permits may also apply to private entities.

The State Board made this same argument in *County of Los Angeles v. Commission on State Mandates*, which the court addressed by stating: "[T]he applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation

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[123] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[124] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6."[125]

In other words, the issue is not whether NPDES permits generally constitute a "program" within the meaning of article XIII B, section 6. The only issue before the Commission is whether the permit in this test claim (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitutes a program because this permit is the only one over which the Commission has jurisdiction. Because they apply exclusively to local agencies, the Commission finds that the activities (parts 4C2a, 4C2b, 4E & 4F5c3) in this permit (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitute a program within the meaning of article XIII B, section 6.

The next step to determine whether the permit is a new program or higher level of service, the permit is compared to the legal requirements in effect immediately before its adoption.[126]

The Commission finds that local agencies were not required by state or federal law to place and maintain trash receptacles at transit stops before the permit was adopted. Whether or not most cities or counties do so, as argued by the State Water Board in its April 2008 comments, is not relevant to finding a state-mandated new program or higher level of service because even if they do, Government Code section 17565 states: "If a local agency … at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency … for those costs incurred after the operative date of the mandate."

Because the transit trash receptacle requirement is newly mandated by the permit, and based on the plain language of part 4F5c3 of the permit, the Commission finds that it is a new program or higher level of service to place trash receptacles at transit stops and maintain them as specified in the permit.

For the same reason, the Commission finds that the inspections and enforcement activities at industrial and commercial facilities, including restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, and phase I facilities (in parts 4C2a & 4C2b of the permit) as well as inspection and enforcement at construction sites (in part 4E of the permit) are a new program or higher level of service. These were not required activities of the permittees prior to the permit's adoption.

In sum, the Commission finds that all the permit provisions at issue in this test claim impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Issue 3: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E & 4F5c3) impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

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

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

The final issue is whether the permit provisions impose costs mandated by the state,[127] and whether any statutory exceptions listed in Government Code section 17556 apply to the test claims. Government Code section 17514 defines "cost mandated by the state" as follows:

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

Government Code section 17564 requires reimbursement claims to exceed $1000 to be eligible for reimbursement.

In test claims 03-TC-20 and 03-TC-21, the cities' claimant representative declares (p. 24) that the cities will incur costs estimated to exceed $1000 to implement the permit conditions.

In test claim 03-TC-04, the County of Los Angeles states (p. 18) that the costs in providing the services claimed "far exceed the minimum reimbursement amount of $1000 per annum." In the attached declaration for *Transit Trash Receptacles*, the County declares (pp. 22-23) the following itemization of costs from December 13, 2001 to October 31, 2002:

> (1) Identify all transit stops in the jurisdiction: $19,989.17;
>
> (2) Select proper trash receptacle design, evaluate proper placement, specification and drawing preparation: $38,461.87;
>
> (3) Preliminary engineering works (construction contract preparation, specification reviewing process, bid advertising and awarding): $19,662.02;
>
> (4) Construct and install trash receptacle units: $230,755.58, construction management $34,628.31;
>
> (5) Trash collection and receptacle maintenance in FY 2002-03, $3,513.94, maintenance contractor costs for maintaining and collecting trash in FY 2002-03, $93,982.50;
>
> (6) Projected costs for on-going maintenance in FY 2003-04, $375,570.00.

Similarly, attached to claim 03-TC-19 (pp. 20-21) are declarations that itemize the County of Los Angeles' costs for *Inspection of Industrial/Commercial Facilities* program, from December 13, 2001 to September 15, 2003, as follows:

> (1) inspect 1744 restaurants: $234,931.83;
>
> (2) inspect 1110 automotive service facilities: $149,526.36;
>
> (3) inspect 249 retail gasoline outlets and automotive dealerships: $33,542.45;
>
> (4) Identify and inspect all Phase I (387 Tier 1 and 543 Tier 2) facilities within the jurisdiction: $125,155.31;
>
> (5) Total $543,155.95.

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

Received
September 15, 2011
Commission on
State Mandates

These declarations illustrate that the costs associated with the permit activities exceed $1,000. The Commission, however, cannot find "costs mandated by the state" within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, which is discussed below.

A. Did the claimants request the activities in the permit within the meaning of Government Code section 17556, subdivision (a)?

The first issue is whether the claimants requested the activities in the permit. The Department of Finance and the State Water Board both asserted that they did. As discussed above, the claimants were required to submit a Report of Waste Discharge and Stormwater Quality Management Plan before the permit was issued.

Government Code section 17556, subdivision (a), provides that the Commission shall not find costs mandated by the state if:

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

Based on the language of the statute, section 17556, subdivision (a), does not apply because the permit is not a statute, the claimants did not request "legislative authority" to implement the permit, and the record lacks any resolutions adopted by the claimants. Therefore, the Commission finds that the claimants did not request the activities in the permit within the meaning of Government Code section 17556, subdivision (a).

B. Do the claimants have fee authority for the permit activities within the meaning of Government Code section 17556, subdivision (d)?

Government Code section 17556, subdivision (d), states:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency ... if, after a hearing, the commission finds any one of the following: [¶]...[¶] (d) The local agency ... has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

The constitutionality of Government Code section 17556, subdivision (d), was upheld by the California Supreme Court in *County of Fresno v. State of California*,[128] in which the court held that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes. The court stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra,* 43 Cal.3d at p. 61.) The provision was intended to

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[128] *County of Fresno v. State of California , supra,* 53 Cal.3d 482.

> preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*
>
> In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that "The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Considered within its context, the section effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.[129]

In *Connell v. Superior Court,*[130] the dispute was whether local agencies had sufficient fee authority for a mandate involving increased purity of reclaimed wastewater used for certain types of irrigation. The court cited statutory fee authority for the reclaimed wastewater, and noted that the water districts did not dispute their fee authority. Rather, the water districts argued that they lacked "sufficient" fee authority in that it was not economically feasible to levy fees sufficient to pay the mandated costs. In finding the fee authority issue is a question of law, the court stated that Government Code section 17556, subdivision (d), is clear and unambiguous, in that its plain language precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." The court rejected the districts' argument that "authority" as used in the statute should be construed as a "practical ability in light of surrounding economic circumstances" because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute (Wat. Code, § 35470) limited the authority of the Districts to levy fees "sufficient" to cover their costs. Thus, the court concluded that the plain language of section

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[129] *County of Fresno v. State of California, supra,* 53 Cal.3d 482, 487.

[130] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382.

17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.[131]

In its April 18, 2008 comments (p. 19), the State Board asserted that the claimants have fee authority to pay for the trash receptacle and inspection programs in the permit. Likewise, the Department of Finance, in its March 2008 comments, states that "some local agencies have set fees to be used toward funding the claimed permit activities" that should be considered offsetting revenues.

Los Angeles County, in its comments submitted in June 2008, states (p. 2) that it is "without sufficient fee authority to recover its costs." The County points out that the state or regional board has fee authority in Water Code section 13260, subdivision (d)(2)(B)(iii) for inspections of industrial and commercial facilities, but those fees are not shared with the County or the cities.[132] The County also states that the inspections are to determine compliance with the general industrial permit that is enforced by the regional boards.[133]

In their comments received June 25, 2008, the city claimants assert that they do not have fee authority. The cities first note that, for facilities that hold state-issued general industrial or general construction stormwater permits, the state already imposes an annual fee and therefore has occupied the field (Wat. Code, § 13260, subd. (d)(2)(B)(iii)). The cities also relate the difficulty of imposing a fee for inspecting restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships because, although the cities could enact a general businesses license on all businesses, "the cities could not charge other businesses for the cost of inspecting this subgroup without again running the risk of charging fees on the other businesses for services not related to regulation of them." The cities also dispute the State Water Board's assertion that transit users could be charged a fee for the transit trash receptacles because the County and cities do not operate the transit system.

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[131] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 398-402.

[132] Water Code section 13260, subdivision (d)(2)(B)(i) - (iii) states:

> (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund. (ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in the region. (iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs.

[133] Page 3 of the General Industrial Permit states in part: "Following adoption of this General Permit, the Regional Water Boards shall enforce its provisions."

Received
September 15, 2011
Commission on
State Mandates

In comments on the draft staff analysis submitted in June 2009, the League of California Cities and California State Association of Counties (CSAC) question whether the decisions in *Connell* (1997), and *County of Fresno* (1991), can any longer be cited as good authority for the constitutionality of Government Code section 17556, subdivision (d), given the voter-approval requirement of Proposition 218 (discussed below) added to the state Constitution in 1996. Proposition 218 requires, among other things, that new or increased property-related fees be approved by a majority of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners, except for property-related fees for sewer, water, or refuse collection services (Cal. Const., art. XIII D, § 6, subd. (c)).

The League and CSAC also urge the Commission, to the extent there may be legal doubt whether a local agency has the authority to impose a fee, to not find that the fee authority exception to reimbursement in Government Code section 17556, subdivision (d), applies.

The Commission disagrees with the League and CSAC. The Commission cannot ignore the precedents of *Connell* or *County of Fresno*, or find that they conflict with article XIII D of the California Constitution (Proposition 218), until the issue is decided by a court of law. With regards to Government Code section 17556, subdivision (d), article III, section 3.5 of the California Constitution forbids the Commission or any state agency from declaring a statute unenforceable or refusing to enforce it on the basis of its unconstitutionality unless an appellate court declares that it is unconstitutional. Since no appellate court has so declared, the Commission is bound to uphold and analyze the application of Government Code section 17556, subdivision (d), to this test claim.

The issue of local fee authority for the municipal stormwater permit activities, however, is one of first impression for the Commission. Although there are no authorities directly on point, some legal principles emerge that guide the analysis, as discussed below.

1. Local fee authority to inspect commercial and industrial and construction sites (parts 4C2a, 4C2b & 4E)

Fee authority to inspect under the police power: The law on local government fee authority begins with article XI, section 7, of the California Constitution, which states: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

The Third District Court of Appeal has stated that article XI, section 7, includes the authority to impose fees. In *Mills v. Trinity County*,[134] a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without the two-thirds affirmative vote of the county electors. In upholding the fees, the court stated:

> [S]o long as the local enactments are not in conflict with general laws, the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution.[135]

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[134] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656.

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

In addition to the *Mills* case, courts have held that water pollution prevention is a valid exercise of government police power.[136] And municipal inspections in furtherance of sanitary regulations have been upheld as "an exercise of that branch of the police power which pertains to the public health."[137]

In *Sinclair Paint v. State Board of Equalization,* [138] the California Supreme Court upheld a fee imposed on manufacturers of paint that funded a child lead-poisoning program, ruling it was a regulatory fee and not a special tax requiring a two-thirds vote under article XIII A, section 4, of the California Constitution (Proposition 13). The court recognized that determining under Proposition 13 whether impositions were fees or taxes is a question of law. In holding that the fee on paint manufacturers was "regulatory" and not a special tax, the court stated:

> From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less "regulatory" in nature than the initial permit or licensing programs that allowed them to operate.
>
> Viewed as a mitigating effects measure, [the fee] is comparable in character to several police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.[139] [Emphasis added.]

The *Sinclair Paint* court also recognized that regulatory fees help to prevent pollution when it stated: "imposition of 'mitigating effects' fees in a substantial amount ... also 'regulates' future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products."[140]

Although the court's holding in *Sinclair Paint* applied to a state-wide fee, the language it used (putting "ordinances" in the same category as "statutes") recognizes that local agencies also have the police power to impose regulatory fees. Moreover, the court relied on local government police power cases in its analysis.[141]

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

[137] *Sullivan v. City of Los Angeles Dept. of Bldg. & Safety* (1953) 116 Cal.App.2d 807, 811.

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

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

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

[141] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 873. The Court stated: "Because of the close, 'interlocking' relationship between the various sections of article XIII A (Citation omitted) we believe these "special tax" cases [under article XIII A, § 3, state taxes] may be helpful, though not conclusive, in deciding the case before us. The reasons why particular fees are, or are not, "special taxes" under article XIII A, section 4, [local government taxes] may apply equally to section 3 cases."

Received
September 15, 2011
Commission on
State Mandates

A regulatory fee is an imposition that funds a regulatory program[142] and is "enacted for purposes broader than the privilege to use a service or to obtain a permit. …the regulatory program is for the protection of the health and safety of the public."[143] Courts will uphold regulatory fees if they comply with the following principles:

> Fees charged for the associated costs of regulatory activities are not special taxes under an article XIII A section 4 analysis if the "fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [they] are not levied for unrelated revenue purposes." [Citations omitted] "A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation." [Citations omitted] "Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement." [Citations omitted] Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. [Citations omitted] Legislators "need only apply sound judgment and consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee."[144] [Emphasis added.]

Local fees for inspections of commercial and industrial facilities, and construction sites, would be preventative and could be imposed to comply with the criteria the courts have used to uphold regulatory fees, articulated above. And the regulatory fees fall within the local police power to prevent, clean up, or mitigate pollution.

Therefore, pursuant to article XI, section 7, the Commission finds that the claimants have fee authority within the meaning of Government Code section 17556, subdivision (d), sufficient to carry out the mandated activities in parts 4C2a, 4C2b and 4E of the permit. Therefore, the Commission finds that there are no "costs mandated by the state" within the meaning of Government Code section 17514 and 17556 to perform the activities in those parts of the permit (commercial, phase I, and construction site inspections and related activities).

In fact, in June 2005, claimant Covina adopted stormwater inspection fees on restaurants, retail gasoline outlets, automotive service facilities, etc., as part of its business license fee, expressly for the purpose of complying with the permit at issue in this test claim.[145]

Statutory fee authority to operate and maintain storm drains: Health and Safety Code section 5471 expressly authorizes cities and counties to charge fees for storm drainage maintenance and operation services:

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

[143] *Ibid.*

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

[145] City of Covina, Resolution No. 05-6455.

Received
September 15, 2011
Commission on
State Mandates

> [A]any entity[146] shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system. … Revenues derived under the provisions in this section, shall be used only for the acquisition, construction, reconstruction, maintenance, and operation of water systems and sanitation, storm drainage, or sewerage facilities ….

The statute makes no mention of "inspecting" commercial or industrial facilities or construction sites. Rather, the fee revenues are used for "maintenance and operation" of storm drainage facilities. Thus, for the types of businesses regulated by the permit (restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites) the Commission cannot find that pursuant to Health and Safety Code section 5471, the claimants have fee authority "sufficient" to pay for the mandated inspection program within the meaning of Government Code section 17556. The statute's "operation and maintenance" of storm drainage facilities does not encompass the state-mandated inspections of the facilities or construction sites specified in the permit.

2. Local fee authority under the police power and the Public Resources Code to place and maintain trash receptacles at transit stops (Permit, 4F5c3)

As discussed above, part 4F5c3 of the permit requires the County and cities to place and maintain trash receptacles at transit stops in their jurisdictions. Public Resources Code section 40059, subdivision (a), suggests that the County and cities have fee authority to perform this activity as follows:

> (a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following: (1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services.

The statute gives local governments the authority over the "nature, location and extent of providing solid waste handling services" and is broad enough to encompass "placing and maintaining" receptacles at transit stops. The statute also provides local governments with broad authority over the "level of services, charges and fees."

The draft staff analysis determined that the claimants had fee authority under Public Resources Code section 40059 and the police power (Cal. Const. art. XI, § 7) to install and maintain trash receptacles at transit stops and recommended that the Commission deny the test claim with respect to part 4F5c3 of the permit.

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[146] Entity is defined to include "counties, cities and counties, cities, sanitary districts, county sanitation districts, sewer maintenance districts, and other public corporations and districts authorized to acquire, construct, maintain and operate sanitary sewers and sewerage systems." Health and Safety Code section 5470, subdivision (e).

Received
September 15, 2011
Commission on
State Mandates

The city claimants, in June 2009 comments on the draft staff analysis, argue that section 40059, subdivision (a), does not apply here because it was adopted as a "savings provision" in legislation establishing the Integrated Waste Management Board (IWMB) in order to ensure that local trash collection agreements would not be affected by the IWMB legislation. The cities also cite *Waste Resources Technologies v. Department of Public Health* (1994) 23 Cal.app.4th 299, which held that the statute reflected the Legislature's intent to allow for local regulation of waste collection. According to the cities, the statute "was not intended as an *imprimatur* for local agencies to assess fees on their residents or on businesses to pay for the costs of trash generated by transit users when that requirement was established not as a matter of local choice but rather state mandate." (Comments, p. 7.)

The cities also argue that a valid fee must have a causal connection or nexus between the person or entity paying the fee, and the benefit or burden being addressed. Claimants assert that there is no group on which the claimants can assess a fee that has a relationship with the trash receptacles because the burden is created by the transit riders but benefits the public at large. City claimants also argue that they cannot assess fees on transit agencies or increase transit fares to recoup the cost of installing and maintaining trash receptacles because they have no authority to do so. As an example, the claimants cite the Metropolitan Transit Authority's (the largest public transit operator in Los Angeles County) authority to set fares (Pub. Util. Code, § 30638) that rests exclusively with the MTA's board.

As to the police power, City claimants argue that they cannot use it to assess fees on property owners or businesses for the cost of transit trash receptacles because doing so would collect more than the actual cost of the collection and thereby create a special tax that would require a two-thirds vote (Cal. Const. art. XIII A, § 4). And according to the claimants, they do not have statutory fee authority to assess property owners for the cost of installing and maintaining trash receptacles. Finally, claimants assert that a fee on property owners for transit stop trash receptacles, even if it were not a special tax, would require a vote under Proposition 218 (Cal. Const., art. XIII D).

The County of Los Angeles, in its June 2009 comments on the draft staff analysis, argues that local agencies do not have fee authority over bus operators, and for support cites *Biber Electric Co. v. City of San Carlos* (1960) 181 Cal.App.2d 342, which held that a local fee would conflict with a general state Vehicle Code provision. The County also asserts that no fee could be imposed on bus riders because the pollution prevention would benefit all county residents, not only those riding buses, and that such a fee would require a vote under Proposition 218 because the fee's purpose would be excluding trash from storm drains rather than routine collection.

The League of California Cities and CSAC, in their June 2009 comments on the draft staff analysis, criticize the conclusion that fee authority exists for transit trash receptacles because the analysis does not discuss upon whom the fee would be imposed. They also dispute the application of the *Connell* case because the issue is not whether the fee is economically feasible, but whether it is legally feasible. The League and CSAC point out that local agencies have no authority to impose the fee on transit agencies or their ridership, and that Proposition 218 imposes procedural and substantive requirements on adjacent business owners and residences, so that the local agency could not impose the fee or assessment on them without their consent. Thus, the League and CSAC argue that the local agencies do not have fee authority pursuant to

Government Code section 17556, subdivision (d): "sufficient to pay for the mandated program or increased level of service."

After considering these arguments, the Commission agrees that Government Code section 17556, subdivision (d), does not apply to the placement and maintenance of transit trash receptacles as specified in the permit because the claimants do not have the authority to impose fees.

Michael Lauffer was asked at the Commission hearing on July 31, 2009, why the transit trash requirement in the permit was not imposed on transit agencies. Mr. Lauffer testified that transit agencies were not named historically on the permits, and that the Board, at the time it established the requirements, thought it was appropriate to place them on municipalities. He also testified that nothing would prevent the municipalities under the permit from working with Metropolitan Transit Authority (MTA) to cooperatively implement the transit trash requirement, or to have the MTA carry out the primary obligation for meeting it. He added that the transit stops were public facilities, the language used in the federal regulations, which is why the permit included the requirement to place the trash receptacles there.[147]

Because the trash receptacles are required to be placed at transit stops that would typically be on city property (sidewalks)[148] or transit district property (for bus or metro or subway stations), there are no entities on which the claimants would have authority to impose the fees. The plain language of Public Resources Code section 40059 provides no fee authority over transit districts or transit riders, and the Metropolitan Transit Authority's fee statutes grant fee authority exclusively to its board (Pub. Util. Code, §§ 30638 & 130051.12).

Additionally, the claimants do not have fee authority under the police power because they do not provide the "services necessary to the activity for which the fee is charged."[149]

Thus, the Commission finds that part 4F5c3 of the permit imposes costs mandated by the state within the meaning of Government Code section 17514 and 17556.

The remainder of this analysis addresses the arguments raised by the claimants that their local fee authority for inspections would be preempted by a statute granting the state fee authority, and that a local fee would be a special tax. The application of Proposition 218 on the fee authority for inspection is also discussed.

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[147] Commission on State Mandates, Public Hearing, Reporter's Transcript of Proceedings, July 31, 2009, pages 52-53.

[148] "The general rule views the sidewalk as part of the street; it … holds the city liable for pedestrian injuries caused by the dangerous condition of the sidewalk." *Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 832.

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

Received
September 15, 2011
Commission on
State Mandates

3. Local fee authority to inspect industrial or construction sites (parts 4C2a, 4C2b & 4E) performed under the statewide general permits would not be preempted by state fee authority in Water Code section 13260, subdivision (b)(2)(B)

In their comments submitted in June 2008 (p. 14), the city claimants argue that the permittees cannot impose fees for inspections of industrial or commercial or construction sites as follows:

> [W]ith respect to facilities that hold state-issued general industrial or general construction stormwater permits, the state had occupied the field. …[T]he state already imposes an annual fee on general industrial and general construction stormwater permittees. That fee is explicitly designated, in part, to cover inspections of these facilities and regulatory compliance. Water Code § 13260(d)(2)(B).
>
> This state fee thus preempts any fee that the Cities or County could charge for inspection of these facilities.

The cities also assert that in 2001, the regional board initiated negotiation of a contract with the County whereby the regional board would pay the County to perform inspections of facilities that held general industrial stormwater permits (the 'Phase I facilities') on the regional board's behalf. Immediately after the permit was issued, the regional board terminated those negotiations.

In comments submitted in June 2009 on the draft staff analysis, city claimants clarify that their comments "are not directed towards the claimants' ability to assess fees for inspections of the other commercial establishments, i.e., restaurants and automotive service facilities, retail gasoline outlets and automobile dealerships, or Phase I facilities or construction sites that are not required to hold a state-issued general industrial or general construction stormwater permit."

According to the city claimants, fees for inspecting the phase I industrial facilities and construction sites under the statewide permits (the GIASP and GCASP) would be preempted by state fee authority in Water Code section 13260, under which the State Board collects fees for inspecting those sites. The city claimants state the fact that the specific destination of the funds from the fees in Water Code section 13260, subdivision (d)(2)(iii) is spelled out is evidence of intent that the Legislature fully occupied the field for inspections of GIASP and GCASP permit holders.

Because the fee authority to inspect commercial facilities (identified in the permit as restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships) is not contested by the city claimants, the discussion below is limited to industrial and construction site inspections performed under the statewide permits concurrently with the permit at issue in this claim.

The California Supreme Court has outlined the following rules as to when a statute preempts a local ordinance by fully occupying the field:

> A local ordinance *enters a field fully occupied* by state law in either of two situations-when the Legislature "expressly manifest[s]" its intent to occupy the legal area or when the Legislature "impliedly" occupies the field. (*Sherwin-Williams, supra,* 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534; see also 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 986, p.

> 551["[W]here the Legislature has manifested an intention, expressly or by implication, wholly to occupy the field ... municipal power [to regulate in that area] is lost."].)
>
> When the Legislature has not expressly stated its intent to occupy an area of law, we look to whether it has *impliedly* done so. This occurs in three situations: when " '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality." (*Sherwin-Williams, supra,* 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534.)[150]

The state statute at issue, the stormwater fee statute, in subdivision (d) of section 13260 of the Water Code, reads in pertinent part:

> (d)(1)(A) Each person who is subject to subdivision (a) [who discharges waste that affects the quality of waters of the state] or (c) shall submit an annual fee according to a fee schedule established by the state board.
>
> (B) The total amount of annual fees collected pursuant to this section shall equal that amount necessary to recover costs incurred in connection with the issuance, administration, reviewing, monitoring, and enforcement of waste discharge requirements and waivers of waste discharge requirements.
>
> (C) Recoverable costs include, but are not limited to, costs incurred in reviewing waste discharge reports, prescribing terms of waste discharge requirements and monitoring requirements, enforcing and evaluating compliance with waste discharge requirements and waiver requirements, conducting surface water and groundwater monitoring and modeling, analyzing laboratory samples, and reviewing documents prepared for the purpose of regulating the discharge of waste, and administrative costs incurred in connection with carrying out those actions. [¶]...[¶]
>
> (2) Subject to subparagraph (B), any fees collected pursuant to this section shall be deposited in the Waste Discharge Permit Fund which is hereby created. The money in the fund is available for expenditure by the state board, upon appropriation by the Legislature, for the purposes of carrying out this division.
>
> (B) (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund.

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[150] *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068. Emphasis in original.

Received
September 15, 2011
Commission on
State Mandates

> (ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in that region. (iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs. (Wat. Code, § 13260, subds. (d)(1) & (d)(2).) [Emphasis added.]

The State Water Board has adopted regulations to implement the stormwater fee that include fee schedules based on the threat to water quality and a complexity rating.[151] At the hearing on July 31, 2009, Michael Lauffer of the State Water Board testified that the fee is established annually by the State Board, based on the legislative appropriation for the boards to carry out their responsibilities. Mr. Lauffer testified that the annual fee for industrial facilities under this Water Code statute is $833, and the fee for construction facilities is variable, starting at $238, plus $24 per acre, with a cap of $2,600. [152]

The issue is whether Water Code section 13260, subdivision (d)(1) and (d)(2), preempts local fee authority. In resolving this, we look for express or implied preemption or intent to occupy the field.[153]

First, there is no express intent on the face of the Water Code statute to preempt any local fee ordinance because the statute is silent on local fees. As to implied intent to occupy the field of law, the Supreme Court has stated that it may be found if:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.[154]

The city claimants, in their comments on the draft staff analysis submitted in June 2009, argue as follows with regard to Water Code section 13260:

> Here, the Legislature adopted a statute that specifically established a mechanism for fees to be assessed on GIASP and GCASP holders, for those funds to be

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[151] Fees for NPDES permits for municipal separate stormwater sewer systems are in subdivision (b) of section 2200 of title 23 of the California Code of Regulations.

[152] Commission on State Mandates, Public Hearing, Reporter's Transcript of Proceedings, July 31, 2009, page 111.

[153] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

[154] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

> segregated and sent to the regional boards, and for a specified amount of those funds ("not less than 50 percent of the money") to be used by the regional boards "solely" on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs. Water Code section 13260(d)(2)(iii). Such a specific determination as to the destination of the funds for the purposes of inspection and compliance evidences the intent of the Legislature that the issue of funding for GIASP and GCASP inspections be "fully occupied."

The Commission disagrees. Specific determination of funds is not a factor the courts use to determine whether a state statute fully occupies the field. Applying the Supreme Court's factors from the *O'Connell v. City of Stockton* case, the subject matter of stormwater fees has not been "so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern."[155] The Water Code's single fee statute for state permit holders does not rise to that level. Second, the Commission cannot find that "the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action."[156] No clear indication of a paramount state concern can be found on the face of the Water Code fee statute. And the third instance does not apply because the subject is not "of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality."

The legislative history of the Water Code provision does not indicate any intent to occupy the field. The legislative history of the amendment to require 50 percent of the fees to be used for stormwater inspection and regulatory compliance issues indicated as follows:

> ...California's 1994 Water Quality Inventory Report states that storm waters and urban run-off are the leading sources of pollution in California estuaries and ocean waters. Proponents argue that non-compliance is rampant, with approximately 10,000 industries in the Los Angeles area alone who are required but have failed to obtain storm water permits. Further, proponents point out that the Los Angeles Regional Water Quality Control Board has only two staff to contact, educate, and control each site and question whether adequate revenues are returned to the regional boards for this program.[157]

The Legislature acknowledged that the state inspections at the time the statute was enacted were inadequate to prevent the pollution that the statewide permits were intended to prevent.

And the regional board, via the permit, acknowledges the role of both local regulation and state regulation under the general permits. Page 11 of the permit states:

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[155] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

[156] *Ibid.*

[157] Senate Rules Committee, Office of Senate Floor Analyses, third reading analysis of Assem. Bill No. 1186 (1997-1998 Reg. Sess.) as amended August 6, 1997.

> The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations.

As to inspection of construction sites, section 4E of the permit states:

> If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

Moreover, the Water Code statute provides broader fee authority than a local inspection fee. The statute requires the regional board to "spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs." (Wat. Code, § 13260, subd. (d)(2)(iii). Emphasis added.) Because the fees for GIASP and GCASP permit holders may also be spent on "regulatory compliance issues" in addition to the inspections, the Commission cannot find that a local fee ordinance would duplicate or be "coextensive" with state fee authority, and therefore cannot find that the state fee statute occupies the field. A local fee would merely partially overlap with the state fee.

As for the phase I facilities[158] subject to inspection, the inspections do not occupy the field because the permit specifies that these need not be inspected if the regional board has inspected them within the past 24 months.

According to the State Board's April 2008 comments, the overlapping fees were envisioned by U.S./EPA.

> In addition to the requirements for permits issued to municipalities, the Water Boards are also mandated to issue permits to entities that discharge stormwater "associated with industrial activity." (fn. CWA § 402(p)(2)(B)). As part of its responsibilities for its in lieu program, the State Boards must administer and enforce all of its permits. (fn. CWA § 402(p).) The State Water Board has issued

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[158] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

> permits for industrial and construction discharges of stormwater, and the Los Angeles Water Board administers those permits within its jurisdiction. Therefore, the Los Angeles Water Board does conduct inspections at businesses in Los Angeles County to ensure compliance with the state permits. In addition, the MS4 Permit requires the permittees also to conduct inspections. This approach, which may result in two different entities inspecting the same businesses to review stormwater practices, was specifically envisioned and required by U.S. EPA in adopting its stormwater regulations.

U.S./EPA, in its "MS4 Program Evaluation Guidance" document, acknowledged regulation at both the local and state levels as follows:[159]

> In addition to regulation of construction site stormwater at the local level, EPA regulations also require construction sites disturbing greater than one acre to obtain an NPDES permit. This permit can be issued by the state permitting authority or EPA, depending on whether the state has been delegated the NPDES authority. This dual regulation of construction sites at both the local and state or federal level can be confusing to permittees and construction operators.[160]

In fact, as to inspection duties and costs under two permit systems, one court has stated regarding a permit similar to the one in this claim:

> Rancho Cucamonga and the other permittees are responsible for inspection construction and industrial sites and commercial facilities within their jurisdiction for compliance with the enforcement of local municipal ordinance and permits. But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits.[161]

The reasoning of the *City of Rancho Cucamonga* case is instructive because a local regulatory fee could be used for local-government inspections, and the state fee is for state or regional inspections under the general statewide permits.

The state permit program and local inspection program under the regional board's permit can be viewed as two programs with similar, overlapping goals. Viewed in this way, the fees for two sets of inspections for construction sites (or for phase I facilities not inspected by the regional board within the past two years) would not necessarily exceed the costs of both sets of inspections.

In short, a local regulatory fee ordinance that provided for inspections of the industrial facilities and construction sites specified in the permit (parts 4C2a, 4C2b & 4E) would not be preempted

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[159] State Water Resources Control Board, comments submitted April 18, 2008, attachment 33.

[160] *Ibid.*

[161] *City of Rancho Cucamonga v. Regional Water Quality Control Board, supra,* 135 Cal.App.4th 1377. The test claim record is silent as to the number of facilities within the permit area that are subject to the General Industrial Activity Storm Water Permit, or how many construction sites within the permit area are subject to the General Construction Activity Storm Water Permit.

Received
September 15, 2011
Commission on
State Mandates

by the state fee authority in Water Code section 13260 or in title 23 of the California Code of Regulations.

4. Local fee authority to inspect industrial or construction sites covered under the state permits would not be a "special tax" under article XIII A, section 4, of the California Constitution

In their June 2008 rebuttal comments, the city claimants assert that they do not have sufficient fee authority under Government Code section 17556, subdivision (d). They focus on facilities that hold state-issued general industrial or construction stormwater permits and pay the state-imposed fees pursuant to Water Code section 13260, arguing that an additional local fee for inspecting these facilities would be considered a special tax. According to the city claimants:

> In order for a fee to be considered a "fee" as opposed to a "special tax," the fee cannot exceed the reasonable cost of providing the services necessary for which the fee is charged. See *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 659-660. Any fee assessed by the Cities or the County for inspection of these facilities would be a double assessment, and thus run afoul of this rule.

The city claimants, in their June 2009 comments on the draft staff analysis, again assert that forcing claimants to recover their costs for inspecting the state-permitted GIASP and GCASP facilities and sites, the regional board is creating a special tax on holders of those state permits.

Special taxes are governed by article XIII A, section 4, of the California Constitution:

> Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

Government Code section 50076 states that a fee is not a special tax under article XIII A, section 4, if the fees are: (1) "charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged," and (2) "are not levied for unrelated revenue purposes." The California Supreme Court has reaffirmed this rule.[162]

The Commission finds that a local regulatory stormwater fee, if appropriately calculated and charged, would not be a special tax within the meaning of article XIII A, section 4. There is no evidence in the record that a local regulatory fee charged for the stormwater inspections would exceed the reasonable cost of providing the inspections and related services or would otherwise violate the criteria in section 50076.

As the court stated in the *Connell v. Superior Court* case discussed above:

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[162] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th at p. 876: "[T]he term "special taxes" in article XIII A, section 4, does not embrace fees charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes."

Received
September 15, 2011
Commission on
State Mandates

> The [Water] Districts argue any fees levied by the districts "cannot exceed the cost to the local agency to provide such service," because such excessive fees would constitute a special tax. However, the districts fail to explain how this is an issue. No one is suggesting the districts levy fees that exceed their costs.[163]

Similarly, in this claim no one is suggesting that the local agencies levy regulatory fees that exceed their costs. Therefore, the Commission finds that a local regulatory fee for stormwater would not be a "special tax" under article XIII A, section 4, of the California Constitution for the activities at issue in the permit.

5. The local fee to inspect industrial and construction sites would not be subject to voter approval under article XIII D (Proposition 218) of the California Constitution

Some local government fees are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 (1996). Article XIII D defines a property-related fee or charge as any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including a user fee or charge for a property-related service. Among other things, new or increased property-related fees require a majority-vote of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners (article XIII D, § 6, subd. (c)). Exempt from voter approval, however, are property-related fees for sewer, water, or refuse collection services (*Ibid*).

In 2002, an appellate court decision in *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, found that a city's charges on developed parcels to fund stormwater management were property-related fees, and were not covered by Proposition 218's exemption for "sewer" or "water" services. This means that an election would be required to impose storm water fees if they are imposed "as an incident of property ownership."

The Commission finds that local fees for inspections of phase I facilities, restaurants, retail gasoline outlets, automotive dealerships, etc., would not be subject to the vote requirement of Proposition 218. In a case involving inspections of apartments in the City of Los Angeles in which a fee was charged to landlords, the California Supreme Court ruled that the regulatory fee for inspecting apartments was not a "levy ... upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service" [164] within the meaning of Proposition 218. The court interpreted the phrase "incident of property ownership" as follows:

> The foregoing language means that a levy may not be imposed on a property owner as such-i.e., in its capacity as property owner-unless it meets constitutional prerequisites. In this case, however, the fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners. The exaction at issue here is more in the nature of a fee for a business license than a charge

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[163] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 402.

[164] That is the definition of "fee" or "charge" in article XIII D, section 2, subdivision (e).

> against property. It is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business.[165]
>
> [¶]...[¶] In other words, taxes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners *as landowners.* The [City of Los Angeles'] ordinance does not do so: it imposes a fee on its subjects by virtue of their ownership of a business-i.e., because they are landlords.[166]

Following the reasoning of the *Apartment Assoc.* case, the inspection fees on restaurants, retail gasoline outlets, automotive dealerships, phase I facilities, etc., like the fee in *Apartment Assoc.*, would not be imposed on landowners as landowners, nor as an incident of property ownership, but by virtue of business ownership. Thus, the inspection fee would fall outside the voter requirement of Proposition 218.

As to the fees for inspecting construction sites, the Commission finds that they too would not be subject to Proposition 218's voter requirement. Article XIII D of the California Constitution states that it shall not be construed to "affect existing laws relating to the imposition of fees or charges as a condition of property development."[167]

Moreover, the California Supreme Court, in determining whether water connection fees are within the purview of Proposition 218, reasoned that "water service" fees were within the meaning of "property-related services" but "water connection" fees were not.

> Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed "upon a person as an incident of property ownership." (Art. XIII D, § 2, subd. (e).) A fee for ongoing water service through an existing connection is imposed "as an incident of property ownership" because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed "as an incident of property ownership" because it results from the owner's voluntary decision to apply for the connection.[168]

The Supreme Court's reasoning applies to local stormwater fees for inspecting construction sites. That is, the fee would not be an incident of property ownership because it results from the owner's voluntary decision to build on or develop the property. Therefore, the Commission finds that local inspection fees for stormwater compliance at construction sites would not be within the purview of the election requirement of Proposition 218. A recent report by the Office of the Legislative Analyst concurs with this conclusion.[169]

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[165] *Apartment Assoc. of Los Angeles County v.City of Los Angeles* (2001) 24 Cal.4th 830, 839-840.

[166] *Id.* at 842 [Emphasis in original.]

[167] Article XIII D, section 1, subdivision (b).

[168] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 427.

[169] "Local governments finance stormwater clean–up services from revenues raised from a variety of fees and, less frequently, through taxes. Property owner fees for stormwater services typically require approval by two–thirds of the voters, or a majority of property owners.

Received
September 15, 2011
Commission on
State Mandates

In its June 2009 comments, the County disagrees that stormwater pollution fees would not be subject to the voter requirement in Proposition 218, or that fee authority exists. In support, the County points to unadopted legislation pending in the current or in past legislative sessions that would provide fee authority or expressly exempt stormwater fees from the Proposition 218 voting requirement. For example SCA 18 (2009) would add "stormwater and urban runoff management" fees to those expressly exempted from the vote requirement in article XIII D, putting them in the same category as trash and sewer fees. SB 2058 (2002) would have required the regional water boards to share their fees with counties and cities. And SB 210 (2009) would provide cities and counties with stormwater regulatory or user-based fee authority.

The Commission finds that the unadopted legislative proposals cited by the County are unconvincing to show a lack of regulatory fee authority for business inspections as discussed above. First, courts have said that "As evidence of legislative intent, unadopted proposals have been held to have little value."[170] Second, if they were enacted, the legislative proposals would grant broader fee authority than is found in this analysis. For example, SCA 18, by adding a stormwater exception from the vote requirement in Proposition 218, would authorize *user* fees on residential property for stormwater and urban runoff programs, whereas this analysis addresses the much narrower issue of *regulatory* fees on businesses for inspections. Likewise, SB 2058 would have required the State Board's permit fees to be shared with "counties and cities" for the broad purpose of carrying out stormwater programs rather than for the narrower purpose of inspecting businesses. And SB 210 would likewise provide fee authority that is broader than regulatory fees; as the May 28, 2009 version expressly states in proposed section 16103, subdivision (c), of the Water Code: "The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter." In short, the legislative proposals cited by the County do not indicate that fee authority does not exist. Rather, the proposals would, if enacted, provide broader fee authority than now exists.

In comments received June 3, 2009, the Bay Area Stormwater Management Agencies Association (BASMAA) contends that many permit requirements relate to local communities and their residents rather than specific business activities, and require public services that are essentially incident to real property ownership, and/or may only be financed via fees that remain subject to the voting requirements of Proposition 218 or increased property taxes. BASMAA also states that many permit activities would fall on joint power authorities or special districts that have no fee authority, or for which exemptions from Proposition 218 would not be applicable. BASMAA requests that the analysis be revised to revisit the conclusions regarding "funded vs. unfunded" requirements, and to recognize and distinguish the many types of stormwater activities for which regulatory fees would not apply.

Developer fees and fees imposed on businesses that contribute to urban runoff, in contrast, are not restricted by Proposition 218 and may be approved by a vote of the governing body. Taxes for stormwater services require approval by two–thirds of the electorate." Office of the Legislative Analyst. *California's Water: An LAO Primer* (October 22, 2008) page 56.

[170] *County of Sacramento v. State Water Resources Control Board* (2007) 153 Cal.App.4th 1579, 1590.

Received
September 15, 2011
Commission on
State Mandates

The Commission disagrees. BASMAA raises issues that are outside the scope of the portions of the Los Angeles stormwater permit (parts 4C2a, 4C2b, 4E & 4Fc3) that were pled by the test claimants. Because the Commission's jurisdiction is limited by those parts of the permit pled in the test claim, it cannot opine on other issues outside the pleadings, even if it would raise issues closely related to other NPDES permits (or even other parts of this NPDES permit).

In sum, the Commission finds that the inspections and related activities at issue in the Los Angeles stormwater permit are not subject to voter approval in article XIII D of the California Constitution (Proposition 218), so a regulatory fee ordinance for stormwater inspections would not be subject to voter approval.

Given the existence of local regulatory fee authority under the police power (Cal. Const, art. XI, § 7), and lacking any evidence or information to the contrary, the Commission finds that the claimants' authority to adopt a regulatory fee is sufficient (pursuant to Gov. Code, § 17556, subd. (d)) to pay for the inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites, and related activities specified in the permit. Therefore, for the inspections and related activities at issue, the Commission finds that there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556.

CONCLUSION

For the reasons discussed above, the Commission finds that the following activity in part 4F5c3 of the permit is a reimbursable state mandate within the meaning of Government Code sections 17514 and 17556: For local agencies subject to the permit that are not subject to a trash TMDL[171] to: "Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary."

The Commission also finds that the remainder of the permit (parts 4C2a, 4C2b & 4E) does not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit.

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[171] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

Abbreviations

BMP - Best management practice

CWA – Clean Water Act

GCASP - General Construction Activity Storm Water Permit

GIASP - General Industrial Activity Storm Water Permit

MS4 - Municipal Separate Storm Sewer Systems

NOI - Notice of Intent for coverage under the GCASP

NPDES - national pollutant discharge elimination system

RGO - Retail Gasoline Outlet

ROWD – Report of Waste Discharge

SQMP - Storm Water Quality Management Program

SWPPP - Storm Water Pollution Prevention Plan

TMDL - Total Maximum Daily Load

U.S. EPA – United States Environmental Protection Agency

WDID - Waste Discharger Identification

TAB NO. 17

Received
September 15, 2011
Commission on
State Mandates

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: San Diego Regional Water Quality Control Board Order No. R9-2007-0001 Permit CAS0108758 Parts D.1.d.(7)-(8), D.1.g., D.3.a.(3), D.3.a.(5), D.5, E.2.f, E.2.g, F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c)iv-viii & x-xv, and L. Filed June 20, 2008, by the County of San Diego, Cites of Carlsbad, Del Mar, Imperial Beach, Lemon Grove, Poway, San Marcos, Santee, Solana Beach, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, San Diego, and Vista, Claimants.	Case No.: 07-TC-09 *Discharge of Stormwater Runoff - Order No. R9-2007-0001* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. *(Adopted on March 26, 2010)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on March 26, 2010. Tim Barry, John VanRhyn, Helen Peak, Shawn Hagerty and James Lough appeared on behalf of the claimants. Elizabeth Jennings appeared on behalf of the State Water Resources Control Board. Carla Shelton and Susan Geanacou appeared on behalf of the Department of Finance.

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

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 6-1.

Summary of Findings

The test claim, filed by the County of San Diego and several cities, alleges various activities related to reducing stormwater pollution in compliance with a permit issued by the San Diego Regional Water Quality Control Board, a state agency.

The Commission finds that the following activities in the permit (as further specified on pp. 122-132 below) are a reimbursable state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution:

- street sweeping (permit part D.3.a(5));
- street sweeping reporting (part J.3.a.(3)(c) x-xv);
- conveyance system cleaning (part D.3.a.(3));
- conveyance system cleaning reporting (J.3.a.(3)(c)(iv)-(viii));
- educational component (part D.5.a.(1)-(2) & D.5.b.(1)(c)-(d) & D.5.(b)(3));
- watershed activities and collaboration in the Watershed Urban Runoff Management Program (part E.2.f & E.2.g);
- Regional Urban Runoff Management Program (parts F.1., F.2. & F.3);
- program effectiveness assessment (parts I.1 & I.2);
- long-term effectiveness assessment (part I.5) and
- all permittee collaboration (part L.1.a.(3)-(6)).

The Commission also finds that the following test claim activities are not reimbursable because the claimants[1] have fee authority sufficient (within the meaning of Gov. Code § 17556, subd. (d)) to pay for them: hydromodification management plan (part D.1.g) and low-impact development (parts D.1.d.(7) & D.1.d.(8)), as specified below.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning; and
- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Effective January 1, 2010, fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101 by developing a watershed improvement plan pursuant to Statutes 2009, chapter 577, and the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

BACKGROUND

The claimants allege various activities for reducing stormwater pollution in compliance with a permit issued by the California Regional Water Quality Control Board, San Diego Region, (Regional Board), a state agency. Before discussing the specifics of the permit, an overview of the permit's purpose, and municipal stormwater pollution in general, puts the permit in context.

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[1] In this analysis, claimants and the permit term "copermittees" are used interchangeably, even though two of the copermittees (the San Diego Unified Port District and San Diego County Regional Airport Authority) are not claimants. The following are the claimants and copermittees that are subject to the permit requirements: Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, Vista, County of San Diego.

Received
September 15, 2011
Commission on
State Mandates

Municipal Stormwater

The purpose of the permit is to specify "requirements necessary for the copermittees[2] to reduce the discharge of pollutants in urban runoff to the maximum extent practicable (MEP)." Each of the copermittees or dischargers "owns or operates a municipal separate storm sewer system (MS4),[3] through which it discharges urban runoff into waters of the United States within the San Diego region."

Stormwater[4] runoff flowing untreated from urban streets directly into creeks, streams, rivers, lakes and the ocean, creates pollution, as the Ninth Circuit Court of Appeal has stated:

> Storm water runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.[5]

Because of these stormwater pollution problems described by the Ninth Circuit, both California and the federal government regulate stormwater runoff.

California Law

The California Supreme Court summarized the state statutory scheme and regulatory agencies applicable to this test claim as follows:

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[2] "Copermittees" are entities responsible for National Pollutant Discharge Elimination System (NPDES) permit conditions pertaining to their own discharges. (40 C.F.R. § 122.26 (b)(1).)

[3] Municipal separate storm sewer system means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2. (40 C.F.R. § 122.26 (b)(8).)

[4] Storm water means "storm water runoff, snow melt runoff, and surface runoff and drainage." (40 C.F.R. § 122.26 (b)(13).)

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

Received
September 15, 2011
Commission on
State Mandates

> In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, § 13000 et seq., added by Stats.1969, ch. 482, § 18, p. 1051.) Its goal is "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (§ 13001.)
>
> Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (§ 13240).[6]
>
> In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits [national pollutant discharge elimination system] required by federal law. (§ 13374.)[7]

As to waste discharge requirements, section 13377 of the California Water Code states:

> Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.

Much of what the Regional Board does, especially that pertains to permits like the one in this claim, is based in the federal Clean Water Act.

Federal Law

The Federal Clean Water Act (CWA) was amended in 1972 to implement a permitting system for all discharges of pollutants[8] from point sources[9] to waters of the United States, since

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

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

[8] According to the federal regulations, "Discharge of a pollutant" means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other

discharges of pollutants are illegal except under a permit.[10] The permits, issued under the national pollutant discharge elimination system, are called NPDES permits. Under the CWA, each state is free to enforce its own water quality laws so long as its effluent limitations[11] are not "less stringent" than those set out in the CWA (33 USCA 1370). The California Supreme Court described NPDES permits as follows:

> Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra,* 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)[12]

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

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

> The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority

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conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 C.F.R. § 122.2.)

[9] A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

[10] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[11] *Effluent limitation* means any restriction imposed by the Director on quantities, discharge rates, and concentrations of "pollutants" which are "discharged" from "point sources" into "waters of the United States," the waters of the "contiguous zone," or the ocean. (40 C.F.R. § 122.2.)

[12] *City of Burbank v. State Water Resources Control Bd., supra,* 35 Cal.4th 613, 621. State and regional board permits allowing discharges into state waters are called "waste discharge requirements" (Wat. Code, § 13263).

> to "enforce any effluent limitation" that is not "*less stringent*" than the federal standard (*id.* § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are *more stringent* than required by federal law-from taking into account the economic effects of doing so.[13]

Actions that dischargers must implement as prescribed in permits are commonly called "best management practices" or BMPs.[14]

Stormwater was not regulated by U.S. EPA in 1973 because of the difficulty of doing so. This exemption from regulation was overturned in *Natural Resources Defense Council v. Costle* (1977) 568 F.2d 1369, which ordered U.S. EPA to require NPDES permits for stormwater runoff. By 1987, U.S. EPA still had not adopted regulations to implement a permitting system for stormwater runoff. The Ninth Circuit Court of Appeals explained the next step as follows:

> In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), "Municipal and Industrial Stormwater Discharges." Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges "associated with industrial activity," discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation.[15]

NPDES permits are required for "A discharge from a municipal separate storm sewer system serving a population of 250,000 or more."[16] The federal Clean Water Act specifies the following criteria for municipal storm sewer system permits:

> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.[17]

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

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

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

[16] 33 USCA section 1342 (p)(2)(C).

[17] 33 USCA section 1342 (p)(3)(B).

Received
September 15, 2011
Commission on
State Mandates

In 1990, U.S. EPA adopted regulations to implement Clean Water Act section 402(p), defining which entities need to apply for permits and the information to include in the permit application. The permit application must propose management programs that the permitting authority will consider in adopting the permit. The management programs must include the following:

> [A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.[18]

General State-Wide Permits

In addition to the regional stormwater permit at issue in this claim, the State Board has issued two general statewide permits,[19] as described in the permit as follows:

> In accordance with federal NPDES regulations and to ensure the most effective oversight of industrial and construction site discharges, discharges of runoff from industrial and construction sites are subject to dual (state and local) storm water regulation. Under this dual system, the Regional Board is responsible for enforcing the General Construction Activities Storm Water Permit, SWRCB Order 99-08 DWQ, NPDES No. CAS000002 (General Construction Permit) and the General Industrial Activities Storm Water Permit, SWRCB Order 97-03 DWQ, NPDES No. CAS000001 (General Industrial Permit), and each municipal Copermittee is responsible for enforcing its local permits, plans, and ordinances, which may require the implementation of additional BMPs than required under the statewide general permits.

The State and Regional Boards have statutory fee authority to conduct inspections to enforce the general statewide permits.[20]

The Regional Board Permit (Order No. R9-2007-001, Permit CAS0108758)

Under Part A, "Basis for the Order," the permit states:

> This Order Renews National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0108758, which was first issued on July 16, 1990 (Order No. 90-42), and then renewed on February 21, 2001 (Order No. 2001-01). On August 25, 2005, in accordance with Order NO. 2001-01, the County of San Diego, as the Principal Permittee, submitted a Report of Waste Discharge (ROWD) for renewal of their MS4 Permit.

Attachment B of the permit (part 7(q)) states that "This Order expires five years after adoption." Attachment B also says (part 7 (r)) that the terms and conditions of the permit "are automatically

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[18] 40 Code of Federal Regulations section 122.26 (d)(2)(iv).

[19] A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA within a geographical area." (40 CFR § 122.2.)

[20] Water Code section 13260, subdivision (d)(2)(B)(i) - (iii).

Received
September 15, 2011
Commission on
State Mandates

continued pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of the expired permits (40 CFR 122.6) are complied with."[21]

Part J.2.d. of the permit requires the Principal Permittee (County of San Diego) to "submit to the Regional Board, no later than 210 days in advance of the expiration of this order, a report of Waste Discharge (ROWD) as an application for issuance of new waste discharge requirements." The permit specifies the contents of the ROWD.

The permit is divided into 16 sections. It prohibits discharges from MS4s that contain pollutants that "have not been reduced to the maximum extent practicable" as well as discharges "that cause or contribute to the violation of water quality standards." The permit also prohibits non-storm water discharges unless they are authorized by a separate NPDES permit, or fall within specified exemptions. The copermittees are required to "establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means." The copermittees are also required to develop and implement an updated Jurisdictional Urban Runoff Management Program (JURMP) for their jurisdictions that meets the requirements specified in the permit as well as a Watershed Urban Runoff Management Program (watersheds are defined in the permit) and a Regional Urban Runoff Management Program, each of which are to be assessed annually and reported on. Annual fiscal analyses are also required of the copermittees. The principal permittee has additional responsibilities, as specified.

The Regional Board prepared a 115-page Fact Sheet/Technical Report for this permit in which are listed, among other things, Regional Board findings, the federal law, and the reasons for the various permit requirements.

The 2001 version of the Regional Board's permit (treated as prior law in this analysis) was challenged by the Building Industry Association of San Diego County, among others. They alleged that the permit provisions violate federal law because they prohibit the municipalities from discharging runoff from storm sewers if the discharge would cause a water body to exceed the applicable water quality standard established under state law.[22] The court held that the Clean Water Act's "maximum extent practicable" standard did not prevent the water boards from including provisions in the permit that required municipalities to comply with state water quality standards.[23]

Attached to the claimants' February 2009 comments is a document entitled "Comparison Between the Requirement of Tentative Order 2001-01, the Federal NPDES Storm Water Regulations, the Existing San Diego Municipal Storm Water Permit (Order 90-42), and Previous Drafts of the San Diego Municipal Stormwater Permit" that compares the 2001 permit with the 1990 and earlier permits. One of the document's conclusions regarding the 2001 permit is: "40% of the requirements in Tentative Order 2001-01 which 'exceed the federal regulations' are based

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[21] California Code of Regulations, title 23, section 2235.4.

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

[23] *Id.* at page 870.

Received
September 15, 2011
Commission on
State Mandates

almost exclusively on (1) guidance documents developed by USEPA and (2) SWRCB's [State Board's] orders describing statewide precedent setting decision on MS4 permits."

Claimants' Position

Claimants assert that various parts of the Regional Board's 2007 permit constitute a reimbursable state mandate within the meaning of article XIII B, section 6, and Government Code section 17514. The parts of the permit pled by claimants are quoted below:

I. Regional Requirements for Urban Runoff Management Programs

A. Copermittee collaboration

Parts F.2. and F.3. (F. Regional Urban Runoff Management Program) of the permit provide:

> Each Copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program. The Regional Urban Runoff Management Program shall meet the requirements of section F of this Order, reduce the discharge of pollutants[24] from the MS4 to the MEP, and prevent urban runoff[25] discharges from the MS4 from causing or contributing to a violation of water quality standards.[26] The Regional Urban Runoff Management Program shall, at a minimum: [¶]...[¶]
>
> 2. Develop the standardized fiscal analysis method required in section G of this Order.[27]
>
> 3. Facilitate the assessment of the effectiveness of jurisdictional, watershed,[28] and regional programs.

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[24] Pollutant is defined in Attachment C of the permit as "Any agent that may cause or contribute to the degradation of water quality such that a condition of pollution or contamination is created or aggravated."

[25] Urban Runoff is defined in Attachment C of the permit as "All flows in a storm water conveyance system and consists of the following components: (1) storm water (wet weather flows) and (2) non-storm water illicit discharges (dry weather flows).

[26] Water Quality Standards is defined in Attachment C of the permit as "The beneficial uses (e.g., swimming, fishing, municipal drinking water supply, etc.) of water and the water quality objectives necessary to protect those uses.

[27] Section G requires the permittees to "collectively develop a standardized method and format for annually conducting and reporting fiscal analyses of their urban runoff management programs in their entirety (including jurisdictional, watershed, and regional activities)." Specific components of the method and time tables are specified in the permit (Permit parts G.2 & G.3).

[28] Watershed is defined in Attachment C of the permit as "That geographical area which drains to a specified point on a water course, usually a confluence of streams or rivers (also known as a drainage area, catchment, or river basin)."

Part L (All Copermittee Collaboration) of the Permit states:

> 1. Each Copermittee collaborate [sic] with all other Copermittees regulated under this Order to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.
>
> a. Management structure – All Copermittees shall jointly execute and submit to the Regional Board no later than 180 days after adoption of this Order, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement which at a minimum:
>
> (1) Identifies and defines the responsibilities of the Principal Permittee[29] and Lead Watershed Permittees;[30]
> (2) Identifies Copermittees and defines their individual and joint responsibilities, including watershed responsibilities;
> (3) Establishes a management structure to promote consistency and develop and implement regional activities;
> (4) Establishes standards for conducting meetings, decision-making, and cost-sharing.
> (5) Provides guidelines for committee and workgroup structure and responsibilities;
> (6) Lays out a process for addressing Copermittee non-compliance with the formal agreement;
> (7) Includes any and all other collaborative arrangements for compliance with this order.

Claimants stated that the Copermittees' costs to comply with this activity for fiscal year 2007-2008 was $260,031.29.

B. Copermittee collaboration – Regional Residential Education Program Development and Implementation

Part F.1 of the Permit provides:

The Regional Urban Runoff Management Program shall, at a minimum:

> 1. Develop and implement a Regional Residential Education Program. The program shall include:
>
> a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.
>
> b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a.

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[29] The Principal Permittee is the County of San Diego.

[30] According to the permit: "Watershed Copermittees shall identify the Lead Watershed Permittee for their WMA [Watershed Management Area]."

Received
September 15, 2011
Commission on
State Mandates

Claimants stated that the Copermittees' costs to comply with this activity was $131,250 in fiscal year 2007-2008.

C. Hydromodification[31]

Part D.1.g. of the Permit (D. Jurisdictional Urban Runoff Management Program, 1. Development Planning Component, g. Hydromodification – Limits on Increases of Runoff Discharge Rates and Durations) states:

> g. HYDROMODIFICATION – LIMITATIONS ON INCREASES OF RUNOFF DISCHARGE RATES AND DURATIONS
>
> Each Copermittee shall collaborate with the other Copermittees to develop and implement a hydromodification management plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects,[32]

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[31] Hydromodification is defined in Attachment C of the permit as "The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes."

Hydromodification is also defined as changes in the magnitude and frequency of stream flows as a result of urbanization, and the resulting impacts on the receiving channels in terms of erosion, sedimentation and degradation of in-stream habitat." *Draft Hydromodification Management Plan for San Diego County*, page 4. <http://www.projectcleanwater.org/pdf/susmp/sd_hmp_2009.pdf> as of May 28, 2009 .

[32] According to the permit, "Priority Development Projects" are: a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

[¶]…[¶] [Part D.1.d.(2):] (2) Priority Development Project Categories (a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments. (b) Commercial developments greater than one acre. This category is defined as any development on private land that is not for heavy industrial or residential uses where the land area for development is greater than one acre. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; municipal facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; airfields; and other light industrial facilities. (c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.). (d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539. (e) Restaurants. This

Received
September 15, 2011
Commission on
State Mandates

where such increased rates and durations are likely to cause increased erosion[33] of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses[34] and stream habitat due to increased erosive force. The HMP, once approved by the Regional Board, shall be incorporated into the local SUSMP [Standard Urban Storm Water Mitigation Plan][35] and implemented by each Copermittee so that post-project runoff discharge rates and durations shall not exceed estimated pre-project discharge rates and durations where the increased discharge rates and durations will result in increased potential for

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category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except for structural treatment BMP and numeric sizing criteria requirement D.1.d.(6)(c) and hydromodification requirement D.1.g. (f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater. (g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands. (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce. (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

[33] Erosion is defined in Attachment C of the permit as "When land is diminished or worn away due to wind, water, or glacial ice. Often the eroded debris (silt or sediment) becomes a pollutant via storm water runoff. Erosion occurs naturally but can be intensified by land clearing activities such as farming, development, road building and timber harvesting."

[34] Beneficial Uses is defined in Attachment C of the permit as "the uses of water necessary for the survival or well being of man, plants, and wildlife. These uses of water serve to promote tangible and intangible economic, social, and environmental goals. … "Beneficial Uses" are equivalent to "Designated Uses" under federal law." (Wat. Code, § 13050, subd. (f).)

[35] The Standard Urban Storm Water Mitigation Plan is defined in Attachment C of the permit as "A plan developed to mitigate the impacts of urban runoff from Priority Development Projects."

Received
September 15, 2011
Commission on
State Mandates

erosion or other significant adverse impacts to beneficial uses, attributable to changes in the discharge rates and durations.

(1) The HMP shall:

(a) Identify a standard for channel segments which receive urban runoff discharges from Priority Development Projects. The channel standard shall maintain the pre-project erosion and deposition characteristics of channel segments receiving urban runoff discharges from Priority Development Projects as necessary to maintain or improve the channel segments' stability conditions.

(b) Utilize continuous simulation of the entire rainfall record to identify a range of runoff flows for which Priority Development Project post-project runoff flow rates and durations[36] shall not exceed pre-project runoff flow rates and durations,[37] where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations. The lower boundary of the range of runoff flows identified shall correspond with the critical channel flow[38] that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches.

(c) Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

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[36] Flow duration is defined in Attachment C of the permit as "The long-term period of time that flows occur above a threshold that causes significant sediment transport and may cause excessive erosion damage to creeks and streams (not a single storm event duration). … Flow duration within the range of geomorphologically significant flows is important for managing erosion.

[37] Attachment C of the permit defines "Pre-project or pre-development runoff conditions (discharge rates, durations, etc.) as "Runoff conditions that exist onsite immediately before the planned development activities occur. This definition is not intended to be interpreted as that period before any human-induced land activities occurred. This definition pertains to redevelopment as well as initial development."

[38] Critical channel flow, according to Attachment C of the permit, is "the channel flow that produces the critical shear stress that initiates bed movement or that erodes the toe of channel banks. When measuring Qc [critical channel flow], it should be based on the weakest boundary material – either bed or bank."

(d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent urban runoff from the projects from increasing erosion of channel beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

(e) Include a review of pertinent literature.

(f) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects.

(g) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.

(h) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.

(i) Include technical information supporting any standards and criteria proposed.

(j) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.

(k) Include a description of pre- and post-project monitoring and other program evaluations to be conducted to assess the effectiveness of implementation of the HMP.

(l) Include mechanisms for addressing cumulative impacts within a watershed on channel morphology.

(m) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.

(2) The HMP may include implementation of planning measures (e.g., buffers and restoration activities, including revegetation, use of less-impacting facilities at the point(s) of discharge, etc.) to allow expected changes in stream channel cross sections, vegetation, and discharge rates, velocities, and/or durations without adverse impacts to channel beneficial uses. Such measures shall not include utilization of non-naturally occurring hardscape materials such as concrete, riprap, gabions, etc.

(3) Section D.1.g.(1)(c) does not apply to Development Projects[39] where the project discharges stormwater runoff into channels or storm drains where the preexisting channel or storm drain conditions result in minimal potential for erosion or other impacts to beneficial uses. Such situations may include discharges into channels that are concrete-lined or significantly hardened (e.g.,

[39] Development projects, according to Attachment C of the permit, are "New development or redevelopment with land disturbing activities; structural development, including construction or installation of a building or structure, the creation of impervious surfaces, public agency projects, and land subdivision."

with rip-rap, sackrete, etc.) downstream to their outfall in bays or the ocean; underground storm drains discharging to bays or the ocean; and construction of projects where the sub-watersheds below the projects' discharge points are highly impervious (e.g., >70%) and the potential for single-project and/or cumulative impacts is minimal. Specific criteria for identification of such situations shall be included as a part of the HMP. However, plans to restore a channel reach may reintroduce the applicability of HMP controls, and would need to be addressed in the HMP.

(4) HMP Reporting

The Copermittees shall collaborate to report on HMP development as required in section J.2.a of this Order.[40]

(5) HMP Implementation

180 days after approval of the HMP by the Regional Board, each Copermittee shall incorporate into its local SUSMP and implement the HMP for all applicable Priority Development Projects. Prior to approval of the HMP by the Regional Board, the early implementation of measures likely to be included in the HMP shall be encouraged by the Copermittees.

(6) Interim Hydromodification Criteria for Projects Disturbing 50 Acres or More

Within 365 days of adoption of this Order, the Copermittees shall collectively identify an interim range of runoff flow rates for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations (Interim Hydromodification Criteria), where the increased discharge flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in flow rates and durations. Development of the Interim Hydromodification Criteria shall include identification of methods to be used by Priority Development Projects to exhibit compliance with the criteria, including continuous simulation of the entire rainfall record. Starting 365 days after adoption of this Order and until the final Hydromodification Management Plan standard and criteria are implemented, each Copermittee shall require Priority Development Projects disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. Development Projects disturbing 50 acres or more are exempt from this requirement when:

(a) the project would discharge into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackcrete, etc.) downstream to their outfall in bays or the ocean;

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[40] Section J.2.a of the permit requires collaborating with other copermittees to develop the HMP, and submitting it for approval by the Regional Board. Part J.2.a also includes timelines for HMP completion and approval.

Received
September 15, 2011
Commission on
State Mandates

(b) the project would discharge into underground storm drains discharging directly to bays or the ocean; or

(c) the project would discharge to a channel where the watershed areas below the project's discharge points are highly impervious (e.g. >70%).

Claimants stated that the total cost of this activity is $1.05 million, of which $630,000 was spent in fiscal year 2007-2008, and the remaining $420,000 will be spent in fiscal year 2008-2009.

D. Low-Impact Development[41] ("LID") and Standard Urban Storm Water Mitigation Plan ("SMUSP")

Part D.1.d. of the Permit (D. Jurisdictional Urban Runoff Management Program, 1. Development Planning Component, d. Standard Urban Storm Water Mitigation Plans – Approval Process Criteria and Requirements for Priority Development Projects), paragraphs (7) and (8) state as follows:

(7) Update of SUSMP BMP Requirements

The Copermittees shall collectively review and update the BMP requirements that are listed in their local SUSMPs. At a minimum, the update shall include removal of obsolete or ineffective BMPs, addition of LID and source control BMP[42] requirements that meet or exceed the requirements of sections D.1.d.(4)[43] and D.1.d.(5),[44] and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update shall also add appropriate LID BMPs to any tables or discussions in the local SUSMPs addressing pollutant removal efficiencies of treatment control BMPs.[45] In addition, the update shall

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[41] Low Impact Development (LID) is defined in Attachment C of the permit as "A storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions."

[42] Source Control BMPs are defined in Attachment C of the permit as "Land use or site planning practices, or structural or nonstructural measures that aim to prevent urban runoff pollution by reducing the potential for contamination at the source of pollution. Source control BMPs minimize the contact between pollutants and urban runoff."

[43] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

[44] Part D.1.d.(5), regarding "Source control BMP Requirements" requires permittees to require each Priority Development Project to implement source control BMPs that must "Minimize storm water pollutants of concern in urban runoff" and include five other specific criteria.

[45] A treatment control BMP, according to Attachment C of the permit, is "Any engineered system designed to remove pollutants by simple gravity settling of particulate pollutants,

include review, and revision where necessary, of treatment control BMP pollutant removal efficiencies.

(8) Update of SUSMPs to Incorporate LID and Other BMP Requirements

(a) In addition to the implementation of the BMP requirements of sections D.1.d.(4-7) within one year of adoption of this Order, the Copermittees shall also develop and submit an updated Model SUSMP that defines minimum LID and other BMP requirements to be incorporated into the Copermittees' local SUSMPs for application to Priority Development Projects. The purpose of the updated Model SUSMP shall be to establish minimum standards to maximize the use of LID practices and principles in local Copermittee programs as a means of reducing stormwater runoff. It shall meet the following minimum requirements:

i. Establishment of LID BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(4) above.
ii. Establishment of source control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(5) above.
iii. Establishment of treatment control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(6) above.
iv. Establishment of siting, design, and maintenance criteria for each LID and treatment control BMP listed in the Model SUSMP, so that implemented LID and treatment control BMPs are constructed correctly and are effective at pollutant removal and/or runoff control. LID techniques, such as soil amendments, shall be incorporated into the criteria for appropriate treatment control BMPs.
v. Establishment of criteria to aid in determining Priority Development Project conditions where implementation of each LID BMP listed in section D.1.d.(4)(b) is applicable and feasible.
vi. Establishment of a requirement for Priority Development Projects with low traffic areas and appropriate or amendable soil conditions to construct a portion of walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such a pervious concrete, porous asphalt, unit pavers, and granular materials.
vii. Establishment of restrictions on infiltration of runoff from Priority Development Project categories or Priority Development Project areas that generate high levels of pollutants, if necessary.

(b) The updated Model SUSMP shall be submitted within 18 months of adoption of this Order. If, within 60 days of submittal of the updated Model SUSMP, the Copermittees have not received in writing from the Regional Board either

(1) a finding of adequacy of the updated Model SUSMP or (2) a modified schedule for its review and revision, the updated Model SUSMP shall be deemed adequate, and the Copermittees shall implement its provisions in accordance with section D.1.d.(8)(c) below.

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

Received
September 15, 2011
Commission on
State Mandates

(c) Within 365 days of Regional Board acceptance of the updated Model SUSMP, each Copermittee shall update its local SUSMP to implement the requirements established pursuant to section D.1.d.(8)(a). In addition to the requirements of section D.1.d.(8)(a), each Copermittee's updated local SUSMP shall include the following:

i. A requirement that each Priority Development Project use the criteria established pursuant to section D.1.d.(8)(a)v to demonstrate applicability and feasibility, or lack thereof, of implementation of the LID BMPs listed in section D.1.d.(4)(b).
ii. A review process which verifies that all BMPs to be implemented will meet the designated siting, design, and maintenance criteria, and that each Priority Development Project is in compliance with all applicable SUSMP requirements.

Claimants stated that the total cost of this activity is $52,200 to be spent in fiscal year 2007-2008.

E. Long Term Effectiveness Assessment

Part I.5 (I. Program Effectiveness Assessment) of the permit states:

5. Long-term Effectiveness Assessment

a. Each Copermittee shall collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6) of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).[46]

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

The claimants state that this activity is budgeted to cost $210,000.

[46] See footnote 50, page 21.

II. Jurisdictional Urban Runoff Management Program

A. Street Sweeping

Part D.3.a.(5) of the Permit (D.3 Existing Development Component, a. Municipal) provides:

> (5) Sweeping of Municipal Areas
>
> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
>
> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

Part J.3.a.(3)(c)x-xv (J. Reporting, 3. Annual Reports, a. jurisdictional urban runoff management program annual reports (3) Minimum contents (c) Municipal) requires annual reports to include the following:

> x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xiii. Identification of the total distance of curb-miles swept.
> xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
> xv. Amount of material (tons) collected from street and parking lot sweeping.

Claimants state the following costs for this activity: in fiscal year 2007-2008: Equipment: $2,080,245, Staffing: $1,014,321, Contract costs: $382,624; for 2008-2009: Equipment: $3,566,139 (for 2008-2012), Staffing $1,054,893 (4% increase), Contract costs: $382,624.

Received
September 15, 2011
Commission on
State Mandates

B. Conveyance System Cleaning

Part D.3.a.(3) of the Permit (D.3. Existing Development Component, a. Municipal) provides:

> (3) Operation and Maintenance of Municipal Separate Storm Sewer System and Structural Controls
>
> (a) Each Copermittee shall implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.
>
> (b) Each Copermittee shall implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include:
>
> i. Inspection at least once a year between May 1 and September 30 of each year[47] for all MS4 facilities that receive or collect high volumes of trash and debris. All other MS4 facilities shall be inspected at least annually throughout the year.
> ii. Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year.
> iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter[48] in a timely manner.
> iv. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed.
> v. Proper disposal of waste removed pursuant to applicable laws.
> vi. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

Part J.3.a.(3)(c) iv-viii (J. Reporting, 3. Annual Reports, a. jurisdictional urban runoff management program annual reports (3) Minimum contents (c) Municipal) requires annual reports to include the following:

> iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.
> v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

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

[48] Attachment C of the permit defines "anthropogenic litter" as "trash generated from human activities, not including sediment."

Received
September 15, 2011
Commission on
State Mandates

vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.
vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.
viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

The claimants state that this activity costs $3,456,087 in fiscal year 2007-2008, and increases 4% in subsequent years.

C. Program Effectiveness Assessment

Part I.1 and I.2 of the permit states:

1. Jurisdictional

a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;

(b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[49] Detection and Elimination, and Education); and

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

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.

(3) Utilize outcome levels 1-6[50] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

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[49] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[50] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral

(4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(5) Utilize Implementation Assessment,[51] Water Quality Assessment,[52] and Integrated Assessment,[53] where applicable and feasible.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff

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Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

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

[52] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[53] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[54] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;
(b) Each Watershed Education Activity implemented; and
(c) Implementation of the Watershed Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

(3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

(4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

(5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

(6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

(7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as

[54] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists the hydrologic units and major receiving water bodies.

necessary to achieve compliance with section A of this Order.[55] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

Claimants state that this activity in I.1. and I.2 costs $392,363 in fiscal year 2007-2008, is expected to increase to $862,293 in fiscal year 2008-2009, and is expected to increase 4% annually thereafter.

D. Educational Surveys and Tests

Part D.5 of the permit (under D. Jurisdictional Urban Runoff Management Program) states:

5. Education Component

Each Copermittee shall implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:

· Municipal Departments and Personnel
· Construction Site Owners and Developers
· Industrial Owners and Operators
· Commercial Owners and Operators
· Residential Community, General Public, and School Children

a. GENERAL REQUIREMENTS

(1) Each Copermittee shall educate each target community on the following topics where appropriate:

[55] Section A is "Prohibitions and Receiving Water Limitations."

Table 3. Education

Laws, Regulations, Permits, & Requirements	**Best Management Practices**
• Federal, state, and local water quality laws and regulations • Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction). • Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities • Regional Board's General NPDES Permit for Ground Water Dewatering • Regional Board's 401 Water Quality Certification Program • Statewide General NPDES Utility Vault Permit • Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits)	• Pollution prevention and safe alternatives • Good housekeeping (e.g., sweeping impervious surfaces instead of hosing) • Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste) • Non-storm water disposal alternatives (e.g., all wash waters) • Methods to minimized the impact of land development and construction • Erosion prevention • Methods to reduce the impact of residential and charity car-washing • Preventive Maintenance • Equipment/vehicle maintenance and repair • Spill response, containment, and recovery • Recycling • BMP maintenance
General Urban Runoff Concepts	**Other Topics**
• Impacts of urban runoff on receiving waters • Distinction between MS4s and sanitary sewers • BMP types: facility or activity specific, LID, source control, and treatment control • Short-and long-term water quality impacts associated with urbanization (e.g., land-use decisions, development, construction) • Non-storm water discharge prohibitions • How to conduct a storm water inspections	• Public reporting mechanisms • Water quality awareness for Emergency/ First Responders • Illicit Discharge Detection and Elimination observations and follow-up during daily work activities • Potable water discharges to the MS4 • Dechlorination techniques • Hydrostatic testing • Integrated pest management • Benefits of native vegetation • Water conservation •Alternative materials and designs to maintain peak runoff values •Traffic reduction, alternative fuel use

(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:

[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

i. Federal, state, and local water quality laws and regulations applicable to construction and grading[56] activities.
ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment).
iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

[56] Attachment C of the permit defines grading as "the cutting and/or filling of the land surface to a desired slope or elevation."

Received
September 15, 2011
Commission on
State Mandates

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

Claimants state that this activity in D.5 will cost $62,617 in fiscal year 2007-2008, and is expected to increase to $171,319 in fiscal year 2008-2009, and rise 4% annually thereafter.

III. Watershed Urban Runoff Management Program

A. Copermittee Collaboration

Parts E.2.f and E.2.g of the permit state:

2. Each Copermittee shall collaborate with other Copermittees within its WMA(s) [Watershed Management Area] as in Table 4 below to develop and implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below: [¶]...[¶]

f. Watershed Activities[57]

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;
(b) A time schedule for implementation of the activity, including key milestones;
(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;
(e) A description of how the activity is consistent with the collective watershed strategy;
(f) A description of the expected benefits of implementing the activity; and
(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source

[57] In their rebuttal comments submitted in February 2009, claimants mention part E.(3) of the permit that requires a detailed description of each activity on the Watershed Activities List. Part E.(3), however, was not in the test claim so staff makes no findings on it.

Received
September 15, 2011
Commission on
State Mandates

abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Copermittee Collaboration

Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

Claimants state that the copermittees' staffing costs for watershed program implementation in fiscal year 2007-2008 is $1,033,219 and is expected to increase to $1,401,765 in fiscal year 2008-2009, and are expected to increase four percent annually. For consultant services, the costs are $599,674 in fiscal year 2007-2008 and are expected to be $657,101 in 2008-2009, and are expected to rise five percent annually. For Watershed Urban Runoff Management Program implementation, claimants allege that the cost in fiscal year 2008-2009 is $1,053,880.

Claimants filed a 60-page rebuttal to Finance's and the State Board's comments on February 9, 2009, which is addressed in the analysis below.

Claimant County of San Diego filed comments on the draft staff analysis in January 2010 that disagrees with the findings regarding fee authority for certain permit activities involving development. These arguments are discussed further below.

State Agency Positions

Department of Finance: In comments filed November 16, 2008, Finance alleges that the permit does not impose a reimbursable mandate within the meaning of section 6 of article XIII B of the California Constitution because the permit conditions are required by federal laws so they are not reimbursable pursuant to Government Code section 17556, subdivision (c). Finance asserts that the State and Regional Water Boards "act on behalf of the federal government to develop, administer, and enforce the NPDES program in compliance with Section 402 of the CWA." Finance also states that more activities were included in the 2007 permit than the prior permit because "it appears … they were necessary to comply with federal law."

Finance also argues that the claimants had discretion over the activities and conditions to include in the permit application. The copermittees elected to use "best management practices" to identify alternative practices to reduce water pollution. Since the local agencies proposed the activities to be included in the permit, the requirements are a downstream result of the local agencies' decision to include the particular activities in the permit. Finance cites the *Kern* case,[58] which held that if participation in the underlying program is voluntary, the resulting new consequential requirements are not reimbursable mandates.

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

Received
September 15, 2011
Commission on
State Mandates

As to the claimants' identifying NPDES permits approved by other states to show the permit exceeds federal law, Finance states that this "demonstrates the variation envisioned by the federal authority in granting the administering agencies flexibility to address specific regional needs in the most practical manner."

Finally, Finance states that some local agencies are using fees for funding the claimed permit activities, so should the Commission find that the permit constitutes a reimbursable mandate, the fees should be considered as offsetting revenues.

Finance commented on the draft staff analysis in February 2010, echoing the comments of the State Board, which are summarized and addressed below.

State Water Resources Control Board: The State Board and Regional Board filed joint comments on the test claim on October 27, 2008, alleging that the permit is mandated on the local agencies by federal law, and that it is not unique to government because NPDES permits apply to private dischargers also. The State Board also states that the requirements are consistent with the minimum requirements of federal law, but even if the permit is interpreted as going beyond federal law, any additional state requirements are de minimis. In addition, the State Board alleges that the costs are not subject to reimbursement because most of the programs were proposed by the cities and County themselves, and because the claimants may comply with the permit requirements by charging fees and are not required to raise taxes.

The State Board further comments that the 2007 permit mirrors or is identical to the requirements in the 2001 permit, only providing more detail to the requirements already in existence and to implement the MEP performance standard. Like earlier permits, the 2007 permit implements the federal standard of reducing pollutants from the MS4 to the MEP (maximum extent practicable), but according to the State Board, "what *has* changed in successive permits is the level of specificity included in the permit to define what constitutes MEP." [Emphasis in original.] The State Board asserts that this level of specificity does not make the permit a state mandate, but that even if it is, the additional requirements are de minimis. The State Board also states that the local agencies have fee authority to pay for the permit requirements.

The State Board also addresses specific allegations in the test claim, as discussed below.

The State Board submitted comments on the draft staff analysis in January 2010, arguing that the test claim should not be reimbursable because (1) federal law requires local agencies to obtain NPDES permits from California Water Boards; (2) federal law mandates the permit that was issued, which is less stringent than permits for private industry; (3) the draft staff analysis incorrectly applies the *Hayes* case because the state did not shift the cost of the federal mandate to the local agencies; rather the federal mandate was imposed directly on local agencies and not on the state; (4) the permit provisions are not in addition to, but are required by federal law; (5) even though municipalities are singled out in the federal storm water law, the law is one of general application; and (6) potential limitations on the exercise of fee authority due to Proposition 218 do not invalidate claimants' fee authority because Government Code section 17556, subdivision (d), does not require unlimited or unilateral fee authority. These arguments are addressed below.

Received
September 15, 2011
Commission on
State Mandates

Interested Party Comments

Bay Area Stormwater Management Agencies Association (BASMAA): In comments submitted February 4, 2009, BASMAA speaks generally about California's municipal stormwater permitting program, stating that "increased requirements entail both new programs and higher levels of service." BASMAA also states:

> [T]he State essentially asserts that the federal minimum for stormwater permitting is anything one of its Water Boards says it is. Likewise, the State's assertion that its 'discretion to exceed MEP [the maximum extent practicable standard] originates in federal law' and 'requires [it], as a matter of law, to include other such permit provisions as it deems appropriate' is nothing more than an oxymoron that begs the question of what the federal Clean Water Act actually mandates rather than allows a delegated state permit writer to require as a matter of discretion. [Emphasis in original.]

BASMAA emphasizes that the water boards have wide discretion in determining the content of a municipal stormwater permit beyond the federal minimum requirements, and says that the boards need to work "proactively and collaboratively" with local governments in "prioritizing and phasing in actions that realistically can be implemented given existing and projected local revenues."

League of California Cities (League) and California State Association of Counties (CSAC): The League and CSAC filed joint comments on the draft staff analysis on January 26, 2010, expressing support for it "and its recognition of the constraints placed on cities and counties with respect to adopting new or increased property-related fees."

The League and CSAC disagree, however, with the finding that the hydromodification management plan (HMP, part D.1.g.), the requirement to include low impact development (LID) in the Standard Urban Stormwater Mitigation Plans (SUSMPs) (part D.1.d.(7)-(8)), and parts of the education component (part D.5) are not reimbursable because the claimants have fee authority (under Gov. Code, § 66000 et seq., The Mitigation Fee Act) sufficient to pay for them. The League and CSAC point out examples where a city or county constructs a priority development project for which no third party is available upon whom to assess a fee. They also assert that for these city or county projects, a nexus requirement cannot be demonstrated "because no private development impact have generated the need for the projects."

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[59] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[60] "Its

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[59] Article XIII B, section 6, subdivision (a), provides:

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new

purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[61] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[62]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[63]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[64] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[65] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[66]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[67]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[68] In making its

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crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[60] *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

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

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

[63] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[64] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

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

[66] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[67] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

Received
September 15, 2011
Commission on
State Mandates

decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[69]

The permit provisions in the test claim are discussed separately to determine whether they are reimbursable state-mandates.

Issue 1: Is the permit subject to article XIII B, section 6, of the California Constitution?

The issues discussed here are whether the permit provisions are an executive order within the meaning of Government Code section 17516, whether they are discretionary, whether they constitute a program, and whether they are a federal mandate or a state-mandated new program or higher level of service.

A. Is the permit an executive order within the meaning of Government Code section 17516?

The Commission has jurisdiction over test claims involving statutes and executive orders as defined by Government Code section 17516, which describes "executive order" for purposes of state mandates, as "any order, plan, requirement, rule, or regulation issued by any of the following: (a) The Governor. (b) Any officer or official serving at the pleasure of the Governor. (c) Any agency, department, board, or commission of state government."[70]

The California Regional Water Board, San Diego Region, is a state agency.[71] The permit it issued is a plan for reducing water pollution, and contains requirements for local agencies toward that end. Therefore, the Commission finds that the permit is an executive order within the meaning of article XIII B, section 6 and Government Code section 17516.

B. Is the permit the result of claimants' discretion?

The permit requires claimants to undertake various activities to reduce stormwater pollution in compliance with a permit issued by the Regional Board.

The Department of Finance, in comments submitted November 6, 2008, asserts that the claimants "had the option to use best management practices that would identify alternative practices to reduce pollution in water to the maximum extent practicable" Finance asserts that the claimants proposed permit requirements when they submitted the application for the permit,

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

[69] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[70] Section 17516 also states: ""Executive order" does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code." The Second District Court of Appeal has held that this statutory language is unconstitutional. *County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898, 904.

[71] Water Code section 13200 et seq.

Received
September 15, 2011
Commission on
State Mandates

and that increased costs due to downstream activities of an underlying discretionary activity are not reimbursable.

Similarly, the State Board, in its October 27, 2008 comments, states that the copermittees proposed the concepts that were incorporated into and form the basis of the permit provisions for which they now seek reimbursement.

In rebuttal comments submitted February 9, 2009, claimants dispute that the Report of Waste Discharge (ROWD, or permit application) "represents a copermittee proposal for 2007 Permit content or that the adopted 2007 Permit is 'based on the ROWD." According to claimants, the 2007 permit provisions "were not taken directly from, nor are they generally consistent with the intent of, most of the specific ROWD content upon which the state contends they are based."

In determining whether the permit provisions at issue are a downstream activity resulting from the discretionary decision by the local agencies, the following rule stated by the Supreme Court in the *Kern High School Dist.* case applies:

> [A]ctivities undertaken at the option or discretion of a local government entity … do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[72]

The Commission finds that the permit activities at issue were not undertaken at the option or discretion of the claimants. The claimants are required by law to submit the NPDES permit application in the form of a Report of Waste Discharge.[73] Submitting it is not discretionary, as shown in the following federal regulation:

> a) *Duty to apply.* (1) Any person[74] who discharges or proposes to discharge pollutants … and who does not have an effective permit … must submit a complete application to the Director in accordance with this section and part 124 of this chapter.[75]

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: "Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state … shall file a report of the discharge in compliance with the procedures set forth in Section 13260 …"[76] Thus, submitting the ROWD is not discretionary because the claimants are required to do so by both federal and California law.

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[72] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

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

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

[75] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[76] Water Code section 13376.

Received
September 15, 2011
Commission on
State Mandates

In addition to federal and state law, the 2001 permit required submission of the ROWD. The 2007 permit, under Part A "Basis for the Order," states: "On August 25, 2005, in accordance with Order No. 2001-01 [the 2001 Permit], the County of San Diego, as the Principal Permittee, submitted a Report of Waste Discharge (ROWD) for renewal of their MS4 Permit."[77]

And although the ROWD provides a basis for some (but not all) of the 2007 permit provisions at issue in this test claim, there is a substantial difference between what was included in the claimants' ROWD and the specific requirements the Regional Board adopted (e.g., copermittee collaboration, parts F.2., F.3 & L, Regional Residential Education Program Development, part F.1., Low Impact Development, part D.1.d(7)-(8), long-term effectiveness assessment, part I.5, program effectiveness assessment, parts I.1 & I.2, educational surveys and tests, part D.5, and the Watershed Urban Runoff Management Program, parts E.2.f & E.2.g). Other permit activities were not proposed in the ROWD (e.g., hydromodification, part D.1.g., street sweeping, parts D.2.a(5) & J.3.a(3)(c)x-xv, conveyance system cleaning, part D.3.a(3) & J.3.a(3)(c)iv-viii).

Because the claimants do not voluntarily participate in the NPDES program, the Commission finds that the *Kern High School Dist.* case does not apply to the permit, the contents of which are not the result of the claimants' discretion.

C. Does the permit constitute a program within the meaning of article XIII B, section 6 of the California Constitution?

As to whether the permit provisions in the test claim constitute a "program," courts have defined a "program" for purposes of article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[78]

The State Board, in its October 2008 comments, argues that the NPDES program is not a program because the NPDES permit program, and the stormwater requirements specifically, are not peculiar to local government in that industrial and construction facilities must also obtain NPDES stormwater permits.

The State Board reiterates this argument in its January 2010 comments, asserting that the draft analysis "fails to consider that private entities, as well as certain state … and … federal agencies also receive NPDES permits for storm water discharges." The State Board and Finance also cite *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, for the proposition that "where municipalities have separate but not more stringent requirements than private entities, there is no program subject to reimbursement." Finance, in its February 2010 comments, asserts that "the requirements within the test claim permit apply generally to state and private dischargers."

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

[78] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

Received
September 15, 2011
Commission on
State Mandates

Claimants, in their February 2009 rebuttal comments, disagree with the State Board and assert that an MS4 permit is unique to government and subject to unique regulations. Claimants cite the definition of an MS4 in 40 C.F.R. § 122.26(b)(8) as "a conveyance or system of conveyances … owned or operated by a State, city, town, borough, county, parish, district, association, or other public body …." Claimants argue that prohibiting "non-stormwater discharges into the storm sewers"[79] is a uniquely government function that provides for the health, safety, and welfare of the citizens in a community. Claimants also point out that the federal regulations for MS4 permits are in 40 C.F.R. §122.26(d), while the regulations pertaining to private industrial dischargers are in 40 C.F.R. § 122.26(c), different regulations that apply the Best Available Technology standard rather than the Maximum Extent Practicable standard imposed on MS4s.

The Commission finds that the permit activities constitute a program within the meaning of article XIII B, section 6. In *County of Los Angeles v. Commission on State Mandates*, the State Board argued that an NPDES permit[80] issued by the Los Angeles Regional Water Quality Control Board does not constitute a "program." The court dismissed this argument, stating: "[T]he applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6."[81] In other words, whether the law regarding NPDES permits generally constitute a "program" within the meaning of article XIII B, section 6 is not relevant. The only issue before the Commission is whether the permit in this test claim constitutes a program.

The permit activities in this claim (order no. R9-2007-001, NPDES no. CAS0108758) are limited to the local governmental entities specified in the permit. The permit defines the "permittees" as the County of San Diego and 18 incorporated cities, along with the San Diego Unified Port District and San Diego County Regional Airport Authority.[82] No private entities are regulated under this permit, so it is not a law (or executive order) of general application. That fact distinguishes this claim from the *City of Richmond* case cited by Finance and the State Board, in which the workers' compensation law was found to be one of general application. The same cannot be said of the permit in this claim (order no. R9-2007-001, NPDES no. CAS0108758) because no private entities are regulated by it.

Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in San Diego County. As stated in the permit: "This order specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable."

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[79] 33 U.S.C. § 1342(p)(3).

[80] Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001. The Commission issued a decision on parts 4C2a, 4C2b, 4E and 4Fc3 of this permit (test claims 03-TC-09, 03-TC-19, 03-TC-20, 03-TC-21) at its July 31, 2009 hearing.

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

[82] The cities are Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, and Vista.

Received
September 15, 2011
Commission on
State Mandates

Thus, the permit carries out the governmental function of providing public services, and also imposes unique requirements on local agencies in San Diego County to implement a state policy that does not apply generally to all residents and entities in the state. Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.

D. Are the permit provisions in the test claim a federal mandate or a state-mandated new program or higher level of service?

The next issue is whether the parts of the permit alleged in the test claim are a state mandate, or federally mandated, as asserted by the State Board and the Department of Finance. If so, the permit would not constitute a state mandate. The California Supreme Court has stated that "article XIII B, section 6, and the implementing statutes … by their terms, provide for reimbursement only of *state*-mandated costs, not *federally* mandated costs."[83]

Also discussed is whether the permit is a new program or higher level of service. To determine whether the permit is a new program or higher level of service, the permit is compared to the legal requirements in effect immediately before its adoption, in this case, the 2001 permit.[84]

When analyzing federal law in the context of a test claim under article XIII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[85] When federal law imposes a mandate on the state, however, and the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[86]

Similarly, Government Code section 17556, subdivision (c), states that the Commission shall not find "costs mandated by the state" if "[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation."

In *Long Beach Unified School Dist. v. State of California*,[87] the court considered whether a state executive order involving school desegregation constituted a state mandate. The regulations required, for example, conducting mandatory biennial racial and ethnic surveys, developing a reasonably feasible plan every four years to alleviate and prevent segregation to include specifics

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

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

[85] *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593, citing *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 76; see also, Government Code sections 17513 and 17556, subdivision (c).

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

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

elements, and taking mandatory steps to involve the community including public hearings. The state argued that its Executive Order did not mandate a new program because school districts in California have a constitutional duty to make an effort to eliminate racial segregation in the public schools. The court held that the executive order did require school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements imposed on school districts.[88] The court stated:

> A review of the Executive Order and guidelines shows that a higher level of service is mandated because their requirements go beyond constitutional and case law requirements. ...[T]he executive Order and guidelines require specific actions ... [that were] required acts. These requirements constitute a higher level of service."[89]

In analyzing the permit under the federal Clean Water Act, we keep the following in mind. First, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act.[90] The federal Clean Water Act allows for more stringent state-imposed measures, as follows:

> Permits for discharges from municipal storm sewers [¶]...[¶] (iii) shall require controls to reduce the discharges of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the ... State determines appropriate for the control of such pollutants. (33 U.S.C.A. 1342 (p)(3)(B)(iii).)

Second, the California Supreme Court has acknowledged that an NPDES permit may contain terms that are federally mandated and terms that exceed federal law.[91]

California in the NPDES program: Under the federal statutory scheme, a stormwater permit may be administered by the Administrator of U.S. EPA or by a state-designated agency, but states are not required to have an NPDES program. Subdivision (b) of section 1324 of the federal Clean Water Act, which describes the NPDES program (and subdivision (p), which describes the requirements for the municipal stormwater system permits) states in part:

> At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator [of U.S. EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. [Emphasis added.]

And the federal stormwater statute states that the permits:

> [S]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and

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[88] *Id.* at 173.

[89] *Ibid.*

[90] 33 U.S.C. section 1370.

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

Received
September 15, 2011
Commission on
State Mandates

> system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)(iii). [Emphasis added].)

The federal statutory scheme indicates that California is not required to have its own NPDES program nor to issue stormwater permits. According to section 1342 (p) quoted above, the Administrator of U.S. EPA would do so if California had no program. The California Legislature, when adopting the NPDES program[92] to comply with the Federal Water Pollution Control Act of 1972, stated the following findings and declaration in Water Code section 13370:

> (a) The Federal Water Pollution Control Act [citation omitted] as amended, provides for permit systems to regulate the discharge of pollutants … to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.
>
> (b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.
>
> (c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government, of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Act for the purpose of carrying out its responsibilities under this program.

Based on this statute, in which California voluntarily adopts the permitting program, and on the federal statutes quoted above that authorize but do not expressly require states to have this program, the state has freely chosen[93] to effect the stormwater permit program. Further discussion in this analysis of federal "requirements" should be construed in the context of California's choice to participate in the federal regulatory NPDES program.

Finance, in its February 2010 comments on the draft staff analysis, states:

> The state's role as a permitting authority acting on behalf of the federal government negates the existence of a state mandate because the test claim permit is issued in compliance with federal law. …[N]o state mandate exists if the state requirements, in the absence of state statute, would still be imposed upon local agencies by federal law.

Similarly, the State Board's January 2010 comments argue that the *Hayes* case is distinguishable from this test claim because NPDES permits do not impose a federal mandate on the state. Rather, federal law requires municipalities to comply with the permit. The State Board also states:

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[92] Water Code section 13374 states: "The term 'waste discharge requirements' as referred to in this division is the equivalent of the term 'permits' as used in the Federal water Pollution Control Act, as amended."

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

Received
September 15, 2011
Commission on
State Mandates

> This [draft staff analysis'] approach fails to recognize that NPDES storm water permits, whether issued by U.S. EPA or California's Water Boards, are designed to translate the general federal mandate into specific programs and enforceable requirements. Whether issued by U.S. EPA or the California's Water Boards, the federal NPDES permit will identify specific requirements for municipalities to reduce pollutants in their storm water to the maximum extent practicable. The federally required pollutant reduction is a federal mandate. … The fact that state agencies have responsibility for specifying the federal permit requirements for municipalities does not indicate that requirements extend beyond federal law, as in *Long Beach,* or convert the federal mandate into a state mandate.[94]

The Commission disagrees. As discussed above, the federal Clean Water Act[95] authorizes states to impose more stringent measures than required by federal law. The California Supreme Court has also recognized that permits may include state-imposed, in additional to federally required measures.[96] Those state measures that may constitute a state mandate if they "exceed the mandate in … federal law."[97] Thus, although California opted into the NPDES program, further analysis is needed to determine whether the state requirements exceed the federal requirements imposed on local agencies.

The permit provisions are discussed below in context of the following federal law governing stormwater permits: Clean Water Act section 402 (p) (33 USCA 1342 (p)(3)(B)) and Code of Federal Regulations, title 40, section 122.26. The federal stormwater statute states:

> Permits for discharges from municipal storm sewers--
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator[98] or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)).

The issues are whether the parts of the permit in the test claim are federal mandates or state mandates, and whether they are a new program or higher level of service.

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[94] State Board comments submitted January 2010.

[95] 33 U.S.C. sections 1370 and 1342 (p)(3)(B)(iii).

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

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

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

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

Part D of the permit describes the Jurisdictional Urban Runoff Management Program (JURMP) of which each copermittee "shall develop and implement" an updated version (p.15). Part J of the permit ("Reporting") requires the JURMP to be updated and revised to include specified information. The test claim includes parts D.1.g (hydromodification management plan), D.1.d.(7)-(8) (low-impact development or LID), D3a(5) (street sweeping) and J.3.a(3)x-xv (reporting on street sweeping), D.3.a.(3) (conveyance system cleaning) and J.3.a.(3)(c)(iv)-(viii) (reporting on conveyance system cleaning), and D.5 (educational surveys and tests).

Hydromodification (part D.1.g.): Part D.1 of the permit is entitled "Development Planning." Part D.1.g. requires developing and implementing, in collaboration with other copermittees, a hydromodification management plan (HMP) "to manage increases in runoff discharge rates and durations from all Priority Development Projects."[99] Priority development projects can include both private projects, and municipal (city or county) projects. The purpose of the HMP is:

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[99] According to the permit, Priority Development Projects are: a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2)..

[¶]…[¶] [Section D.1.d.(2):] (2) Priority Development Project Categories (a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments. (b) Commercial developments greater than one acre. This category is defined as any development on private land that is not for heavy industrial or residential uses where the land area for development is greater than one acre. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; municipal facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; airfields; and other light industrial facilities. (c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.). (d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539. (e) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except for structural treatment BMP and numeric sizing criteria requirement D.1.d.(6)(c) and hydromodification requirement D.1.g. (f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater. (g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment

Received
September 15, 2011
Commission on
State Mandates

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

Hydromodification is defined in Attachment C of the permit as "The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes."[100]

As detailed in the permit and on pages 12-17 above, the HMP must have specified content, including "a description of how the copermittees will incorporate the HMP requirements into their local approval processes." Also required is collaborative reporting on the HMP and implementation 180 days after the HMP is approved by the Regional Water Board, with earlier implementation encouraged.

According to the State Board's comments submitted in October 2008 the requirement to develop and implement a HMP is necessary to meet the minimum federal MEP standard. The Board states that "broad federal legal authority is contained in CWA sections 402(p)(3)(B)(ii)-(iii), CWA section 402(a), and in 40 C.F.R. sections 122.26 (d)(2)(i)(B)-(C), (E), and (F), 131.12, and 122.26(d)(2)(iv)(A)(2), which states:

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will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands. (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce. (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

[100] It is also defined as "changes in the magnitude and frequency of stream flows as a result of urbanization, and the resulting impacts on the receiving channels in terms of erosion, sedimentation and degradation of in-stream habitat." Draft Hydromodification Management Plan for San Diego County, page 4. <http://www.projectcleanwater.org/pdf/susmp/sd_hmp_2009.pdf> as of May 28, 2009.

(d) Application requirements for large and medium municipal separate storm sewer discharges. The operator[101] of a discharge[102] from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. ... Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]

(2) *Part 2.* Part 2 of the application shall consist of: [¶]...[¶]

(iv) *Proposed management program.* A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include: [¶]...[¶]

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[101] "*Owner or operator* means the owner or operator of any "facility or activity" subject to regulation under the NPDES program." (40 CFR § 122.2)

[102] "*Discharge* when used without qualification means the "discharge of a pollutant. *Discharge of a pollutant* means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 CFR § 122.2.)

Received
September 15, 2011
Commission on
State Mandates

> (*2*) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. …

The State Board also cited the U.S. Supreme Court decision, *P.U.D. No. 1 v. Washington Department of Ecology* (1994) 511 U.S. 700, for the state's authority to regulate flow under the federal Clean Water Act in order to protect water quality standards.

In response, the claimants' February 2009 comments state that the permit's Fact Sheet did not cite any federal authorities to justify the HMP portion of the permit, and that none exists. Claimants also assert that no other jurisdiction in the United States that was surveyed for the claim has a permit that requires a HMP. Claimants call the HMP requirement a flood control measure that is not a requirement in any other permit outside of California, and that the HMP exceeds the federal requirements and constitutes a state mandate. Claimants also point to the language in section 122.26(d)(2)(iv)(A)(2) that they say is:

> [A]imed directly at controlling pollutant discharges from an MS4 that originate in areas of new development. [The regulation] does not mention the need to include controls to reduce the *volume* of storm water discharged from these areas. … controls designed only to limit volume are not expressly required.

As to the *P.U.D. No. 1 v. Washington Department of Ecology* decision cited by the State Board, the claimants distinguish it as being decided under section 401 of the Clean Water Act, wherein the permit was issued under section 402. Claimants state that the *P.U.D.* case recognized state authority under the Clean Water Act rather than a federal mandate.

The Commission agrees with claimants about the applicability of the *P.U.D.* case, which determined whether the state of Washington's environmental agency properly conditioned a permit for a federal hydroelectric project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. The U.S. Supreme Court determined that Washington could do so, but the decision was based on section 401 of the Clean Water Act, which involves certifications and wetlands. Even if the decision could be applied to section 402 NPDES permits, it merely recognized state authority to regulate flows. The issue here is not whether the state has authority to regulate flows, but whether a federal mandate requires it. This was not addressed in the *P.U.D.* decision.

Overall, there is nothing in the federal regulations that requires a municipality to adopt or implement a hydromodification plan. Thus, the HMP requirement in the permit "exceed[s] the mandate in that federal law or regulation."[103] As in *Long Beach Unified School Dist. v. State of California*,[104] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[105] to

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[103] Government Code section 17556, subdivision (c).

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

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

impose these requirements. Thus, the Commission finds that part D.1.g. of the permit is not a federal mandate.

All of part D.1.g. of the permit requires the HMP to have specified contents except part D.1.g.(2), which states that the HMP "*may* include implementation of planning measures …" as specified. As the plain language of this part does not require the implementation of planning measures, the Commission finds that part D.1.g.(2) of the permit is not a state mandate.

The Commission also finds that HMP is not a state mandate for municipal (city or county) projects that are priority development projects, such as a hospital, laboratory or other medical facility, recreational facility, airfield, parking lot, street, road, highway, and freeway, a project over an acre, and a project located in an environmentally sensitive area.[106] Although these projects would be subject to the compliance with HMP requirements, there is no legal requirement to build municipal projects.[107] Thus, municipal projects are built by cities or counties voluntarily, and their decision triggers the requirements to comply with the HMP. In *Kern High School Dist.*,[108] the California Supreme Court decided whether the state must reimburse the costs of school site councils and advisory committees complying with the Brown (Open Meetings) Act for schools who participate in various school-related education programs. The court determined that participation in the underlying school site council program was not legally compelled and so mandate reimbursement was not required for the downstream compliance with the Brown Act. The court said:

> Activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds-even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[109]

As with the voluntary programs in *Kern,* there is no requirement for municipalities to undertake any of the priority development projects described in the permit. Thus, the Commission finds that the costs of complying with the HMP in part D.1.g., is not a state mandate for priority development projects undertaken by a city or county.

Based on the mandatory language of the remainder of part D.1.g. of the permit (except part D.1.g.(2) and except for municipal projects), the Commission finds that it is a state mandate on the claimants to do the following:

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[106] The County of San Diego, in its January 2010 comments on the draft staff analysis, raises the issue of its fee authority for municipal projects. The League of California Cities, in its January 2010 comments on the draft staff analysis, also discusses municipal projects, citing examples "where a city or county constructs a Priority Development Project for which no third party is available to assess a fee against."

[107] California Constitution, article XI, section 7. "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

[108] *Kern High School Dist., supra,* 30 Cal.4th 727.

[109] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

Each Copermittee shall collaborate with the other Copermittees to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all Priority Development Projects, where such increased rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force. The HMP, once approved by the Regional Board, shall be incorporated into the local SUSMP [Standard Urban Storm Water Mitigation Plan] and implemented by each Copermittee so that post-project runoff discharge rates and durations shall not exceed estimated pre-project discharge rates and durations where the increased discharge rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the discharge rates and durations.

(1) The HMP shall:

(a) Identify a standard for channel segments which receive urban runoff discharges from Priority Development Projects. The channel standard shall maintain the pre-project erosion and deposition characteristics of channel segments receiving urban runoff discharges from Priority Development Projects as necessary to maintain or improve the channel segments' stability conditions.

(b) Utilize continuous simulation of the entire rainfall record to identify a range of runoff flows for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations, where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations. The lower boundary of the range of runoff flows identified shall correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches.

(c) Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

(d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent urban runoff from the projects from increasing erosion of channel beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

(e) Include a review of pertinent literature.

(f) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects.

(g) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.

(h) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.

(i) Include technical information supporting any standards and criteria proposed.

(j) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.

(k) Include a description of pre- and post-project monitoring and other program evaluations to be conducted to assess the effectiveness of implementation of the HMP.

(l) Include mechanisms for addressing cumulative impacts within a watershed on channel morphology.

(m) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.

[¶]…[¶]

(3) Section D.1.g.(1)(c) does not apply to Development Projects where the project discharges stormwater runoff into channels or storm drains where the preexisting channel or storm drain conditions result in minimal potential for erosion or other impacts to beneficial uses. Such situations may include discharges into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackrete, etc.) downstream to their outfall in bays or the ocean; underground storm drains discharging to bays or the ocean; and construction of projects where the sub-watersheds below the projects' discharge points are highly impervious (e.g., >70%) and the potential for single-project and/or cumulative impacts is minimal. Specific criteria for identification of such situations shall be included as a part of the HMP. However, plans to restore a channel reach may reintroduce the applicability of HMP controls, and would need to be addressed in the HMP.

(4) HMP Reporting

The Copermittees shall collaborate to report on HMP development as required in section J.2.a of this Order.[110]

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[110] Section J.2.a of the permit requires collaborating with other copermittees to develop the HMP, and submitting it for approval by the Regional Board. Part J.2.a also includes timelines for HMP completion and approval.

(5) HMP Implementation

180 days after approval of the HMP by the Regional Board, each Copermittee shall incorporate into its local SUSMP and implement the HMP for all applicable Priority Development Projects. Prior to approval of the HMP by the Regional Board, the early implementation of measures likely to be included in the HMP shall be encouraged by the Copermittees.

(6) Interim Hydromodification Criteria for Projects Disturbing 50 Acres or More

Within 365 days of adoption of this Order, the Copermittees shall collectively identify an interim range of runoff flow rates for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations (Interim Hydromodification Criteria), where the increased discharge flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in flow rates and durations. Development of the Interim Hydromodification Criteria shall include identification of methods to be used by Priority Development Projects to exhibit compliance with the criteria, including continuous simulation of the entire rainfall record. Starting 365 days after adoption of this Order and until the final Hydromodification Management Plan standard and criteria are implemented, each Copermittee shall require Priority Development Projects disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. Development Projects disturbing 50 acres or more are exempt from this requirement when:

(a) The project would discharge into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackcrete, etc.) downstream to their outfall in bays or the ocean;

(b) The project would discharge into underground storm drains discharging directly to bays or the ocean; or

(c) The project would discharge to a channel where the watershed areas below the project's discharge points are highly impervious (e.g. >70%).

As to whether part D.1.g. of the permit (except for D.1.g.(2)) is a new program or higher level of service, the claimants, in their February 2009 comments, assert that it is.

> The 2001 Permit only included general statements regarding the need to control downstream erosion with post construction BMPs. The 2007 Permit increased these requirements by requiring the copermittees to, among other things, draft and implement interim and long-term hydromodification plans, and impose specific, strict post construction BMPs on new development projects within their jurisdiction.

The State Board, in its October 2008 comments, argues that part D.1 "expands upon and makes more specific the hydromodification requirements in the 2001 Permit."

Finance argues, in its February 2010 comments on the draft staff analysis, that the entire permit is not a new program or higher level of service because additional activities, beyond those

Received
September 15, 2011
Commission on
State Mandates

required by the 2001 permit, are necessary for the claimants to continue to comply with the federal Clean Water Act and reduce pollutants to the Maximum Extent Practicable.

The Commission disagrees with Finance. This analysis measures the 2007 permit against the 2001 permit to determine which provisions are a new program or higher level of service. Under the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service. The Commission does not read the federal Clean Water Act so broadly. In *Building Industry Assoc. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, the court held that the Clean Water Act's "maximum extent practicable" standard did not prevent the water boards from including provisions in the permit that required municipalities to comply with state water quality standards.[111]

The Regional Board prepared a Fact Sheet/Technical Report[112] for the permit that lists the federal authority and reasons the permit provisions were adopted. Regarding part D.1.g. of the permit, the Fact Sheet/Technical Report does not expressly mention the 2001 permit, but states:

> This section of the Order expands the requirements for control of hydromodification caused by changes in runoff resulting from development and urbanization. Expansion of these requirements is needed due to the current lack of a clear standard for controlling hydromodification resulting from modification. While the Model SUSMP[113] [adopted in 2002] developed by the Copermittees requires project proponents to control hydromodification, it provides no standard or performance criteria for how this is to be achieved.

The Commission finds that part D.1.g. of the permit (except for D.1.g.(2)) with respect to private priority development projects is a new program or higher level of service. The Fact Sheet/Technical Report describes the section as an "expansion" of hydromodification control requirements. The 2001 permit (in part F.1.b.(2)(j)) included only the following on hydromodification:

> Downstream Erosion – As part of the model SUSMP [Standard Urban Storm Water Mitigation Plan] and the local SUSMPs, the Copermittees shall develop criteria to ensure that discharges from new development and significant redevelopment maintain or reduce pre-development downstream erosion and protect stream habitat. At a minimum, criteria shall be developed to control peak storm water discharge rates and velocities in order to maintain or reduce pre-development downstream erosion and protect stream habitat. Storm water discharge volumes and durations should also be considered.

The requirements in the 2007 permit, however, are much more expansive and detailed, requiring development and implementation of a hydromodification management plan (HMP) to be approved by the Regional Board. And while the 2001 permit contained a broad description of

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

[112] The Fact Sheet/Technical Report was attached to the test claim.

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

Received
September 15, 2011
Commission on
State Mandates

the criteria required, part D.1.g. of the 2007 permit contains a detailed description of the contents of the HMP, including identifying standards for channel segments, using continuous simulation of the entire rainfall record to identify runoff flows, requiring priority development projects to implement hydrologic control measures, including other performance criteria for priority development projects to prevent urban runoff from the projects, and 9 other components to include in the HMP. Therefore, the Commission finds that part D.1.g. of the permit (except for D.1.g.(2)) is a new program or higher level of service over the 2001 permit.

In sum, the Commission finds that part D.1.(g) of the permit (except for D.1.g.(2)) is a state-mandated new program or higher level of service for private priority development projects. Reimbursement is not required for complying with the HMP for municipal priority development projects.

B. Low Impact Development (LID) and Standard Urban Storm Water Mitigation Plan (part D.1.d.): Also under part D.1 "Development Planning" is part D.1.d, which requires the copermittees to review and update their SUSMPs (Standard Urban Storm Water Mitigation Plans)[114]and (in paragraphs 7 and 8) add low impact development (LID) and source control BMP requirements for each priority development project, and to implement the updated SUSMP, as specified on pages 17-19 above. The purpose of LID is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects." LID best management practices include draining a portion of impervious areas into pervious areas prior to discharge into the storm drain, and constructing portions of priority development projects with permeable surfaces (*Id.*)

According to the State Board's comments submitted in October 2008, the requirement in part D.1.d. is necessary to meet the minimum federal MEP standard, and is supported by 40 C.F.R. section 122.26 (d)(2)(iv)(A)-(D), part of which is quoted in the discussion of hydromodification above. Part (d)(2)(iv)(A)(2) of the regulation requires part of the permit application to include:

> (2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed.

The State Board asserts that these regulations "require municipalities to implement controls to reduce pollutants in urban runoff from new development and significant redevelopment, construction, and commercial, residential, industrial and municipal land uses or activities." The Board cites a decision of the Washington Pollution Control Hearings Board that found that permit provisions to promote but not require low impact development "failed to satisfy the federal MEP standard and Washington state law because it … did not require LID at the parcel and subdivision level."

In their February 2009 rebuttal comments, the claimants assert: "while federal regulations require the large MS4 permits to include programs to reduce the discharge of pollutants from the

[114] The Permit defines the Standard Urban Storm Water Mitigation Plan as "A plan developed to mitigate the impacts of urban runoff from Priority Development Projects."

Received
September 15, 2011
Commission on
State Mandates

MS4 that originate in areas of new development, federal regulations do not require or even mention LID or LID principles." And "while requiring post-construction controls that limit pollutant discharges originating in areas of new development is clearly within the requirements of Section 122.26(d)(2)(iv)(A), the 2007 Permit's specific LID requirements are not." Claimants also address the Washington State Pollution Control Board decision by noting that the Board's decision "explicitly recognized that LID requirements are not federally mandated." The claimants also point out EPA-issued NPDES permits in Washington, D.C. and Albuquerque, New Mexico that make no reference to LID.

The Commission finds nothing in the federal regulation (40 C.F.R. § 122.26) that requires local agencies to collectively review and update the BMP requirements listed in their SUSMPs, or to develop, submit and implement "an updated Model SUSMP" that defines minimum LID and other BMP requirements for incorporation into the SUSMPs. Thus, the LID requirements in the permit "exceed the mandate in that federal law or regulation."[115] As in *Long Beach Unified School Dist. v. State of California*,[116] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[117] to impose these requirements. Thus, the Commission finds that part D.1.d. of the permit is not a federal mandate.

The Commission further finds that the LID requirements are not a state-mandated program for municipal projects for the same reason as discussed in the HMP discussion above: there is no requirement for cities or counties to build priority development projects, which would trigger the downstream requirement to comply with parts D.1.d.(7) and D.1.d.(8) of the permit, the LID portions of the permit.

As to non-municipal projects, however, because of the mandatory language on the face of the permit, the Commission finds that part D.1.d. of the permit is a state mandate for the claimants to do all of the following:

> (7) Update of SUSMP BMP Requirements
>
> The Copermittees shall collectively review and update the BMP requirements that are listed in their local SUSMPs. At a minimum, the update shall include removal of obsolete or ineffective BMPs, addition of LID and source control BMP requirements that meet or exceed the requirements of sections D.1.d.(4) and D.1.d.(5), and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update shall also add appropriate LID BMPs to any tables or discussions in the local SUSMPs addressing pollutant removal efficiencies of treatment control BMPs. In addition, the update shall include review, and revision where necessary, of treatment control BMP pollutant removal efficiencies.

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[115] Government Code section 17556, subdivision (c).

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

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

(8) Update of SUSMPs to Incorporate LID and Other BMP Requirements

(a) In addition to the implementation of the BMP requirements of sections D.1.d.(4-7) within one year of adoption of this Order, the Copermittees shall also develop and submit an updated Model SUSMP that defines minimum LID and other BMP requirements to be incorporated into the Copermittees' local SUSMPs for application to Priority Development Projects. The purpose of the updated Model SUSMP shall be to establish minimum standards to maximize the use of LID practices and principles in local Copermittee programs as a means of reducing stormwater runoff. It shall meet the following minimum requirements:

i. Establishment of LID BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(4) above.[118]

ii. Establishment of source control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(5) above.[119]

iii. Establishment of treatment control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(6) above.[120]

iv. Establishment of siting, design, and maintenance criteria for each LID and treatment control BMP listed in the Model SUSMP, so that implemented LID and treatment control BMPs are constructed correctly and are effective at pollutant removal and/or runoff control. LID techniques, such as soil amendments, shall be incorporated into the criteria for appropriate treatment control BMPs.

v. Establishment of criteria to aid in determining Priority Development Project conditions where implementation of each LID BMP listed in section D.1.d.(4)(b) is applicable and feasible.

vi. Establishment of a requirement for Priority Development Projects with low traffic areas and appropriate or amendable soil conditions to construct a portion of walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such a pervious concrete, porous asphalt, unit pavers, and granular materials.

vii. Establishment of restrictions on infiltration of runoff from Priority Development Project categories or Priority Development Project areas that generate high levels of pollutants, if necessary.

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[118] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

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

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

Received
September 15, 2011
Commission on
State Mandates

(b) The updated Model SUSMP shall be submitted within 18 months of adoption of this Order. If, within 60 days of submittal of the updated Model SUSMP, the Copermittees have not received in writing from the Regional Board either (1) a finding of adequacy of the updated Model SUSMP or (2) a modified schedule for its review and revision, the updated Model SUSMP shall be deemed adequate, and the Copermittees shall implement its provisions in accordance with section D.1.d.(8)(c) below.

(c) Within 365 days of Regional Board acceptance of the updated Model SUSMP, each Copermittee shall update its local SUSMP to implement the requirements established pursuant to section D.1.d.(8)(a). In addition to the requirements of section D.1.d.(8)(a), each Copermittee's updated local SUSMP shall include the following:

i. A requirement that each Priority Development Project use the criteria established pursuant to section D.1.d.(8)(a)v to demonstrate applicability and feasibility, or lack thereof, of implementation of the LID BMPs listed in section D.1.d.(4)(b).

ii. A review process which verifies that all BMPs to be implemented will meet the designated siting, design, and maintenance criteria, and that each Priority Development Project is in compliance with all applicable SUSMP requirements.

The State Board, in its October 2008 comments on the test claim, argues that the requirements in part D.1.d.(7) of the permit are not a new program or higher level of service because they "merely add definition to the scope of the local SUSMP already required in the 2001 Permit (see Section F.1.b.(2))." As to part D.1.d.(8), the State Board asserts that it:

> [P]rovides a framework for the Copermittees to develop criteria to be used in the application of LID requirements to Priority Development Projects. The Copermittees must develop their LID programs through an update to the Model SUSMP, the document that guides (and guided the 2001 Permit cycle) post-construction BMP implementation at Priority Development Projects.

According to the State Board, these parts of the permit are not a new program or higher level of service because they merely add additional detail in implementing the same minimum federal MEP standard and add specificity to already existing BMPs.

The claimants, in their February 2009 comments, assert that by adding requirements and increasing the specificity of existing requirements, the 2007 LID permit requirements are a new program or higher level of service.

The Commission finds that part D.1.d.(7) is a new program or higher level of service because it calls for a collective review and update of BMP requirements listed in the claimants' SUSMPs (presumably those drafted under the 2001 permit) that was not required under the 2001 permit.

The Commission also finds that part D.1.d.(8) is a new program or higher level of service because it requires developing, submitting, and implementing "an updated Model SUSMP" that defines minimum LID and other BMP requirements for incorporation into the copermittees SUSMPs. Although the 2001 permit required adopting a Model SUSMP and local SUSMP, it

Received
September 15, 2011
Commission on
State Mandates

did not require developing and submitting an updated Model SUSMP with the specified LID BMP requirements.

In sum, the Commission finds that parts D.1.d.(7) and D.1.d.(8) of the 2007 permit constitute a state-mandated new program or higher level of service for private priority development projects. Reimbursement is not required for complying with the LID requirements for municipal priority development projects.

C. Street sweeping and reporting (parts D.3.a.(5) & J.3.a(3)x-xv): Part D.3 is entitled "Existing Development." Part D.3.a.(5) requires regular street sweeping based on the amount of trash generated on the road, street, highway, or parking facility. Those identified as generating the highest volumes of trash are to be swept at least two times per month, those generating moderate volumes of trash are to be swept at least monthly, and those generating low volumes of trash are to be swept as necessary, but not less than once per year. The copermittees determine what constitutes high, moderate, and low trash generation.

In addition, section J.3.a.(3)(c) x-xv requires the copermittees, as part of their annual reporting, to identify the total distance of curb-miles of improved roads in each priority category, the total distance of curb-miles swept, the number of municipal parking lots and the number swept, the frequency of sweeping, and the tons of material collected from street and parking lot sweeping.

The State Board, in its comments submitted in October 2008, states that requiring minimum sweeping frequencies for streets determined by the copermittees to have high volumes of trash or debris is necessary to meet the minimum federal MEP standard. The State Board cites C.F.R. section 122.26(d)(2)(i)(B)-(C), (E) and (F) and 40 C.F.R. section 122.26(d)(2)(iv), and more specifically, section 122.26(d)(2)(iv)(A)(1), which states that the proposed management program include "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers." Also, section 122.26(d)(2)(iv)(A)(6) provides that the proposed management program include:

> [a] description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications, and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

The State Board also cites section 122.44(d)(1)(i), which states as follows regarding NPDES permits: "limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any State Water quality standard, including narrative criteria for water quality." And section 122.26(d)(2)(iv)(A)(3) states that the proposed management program include "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities."

In their February 2009 rebuttal comments, the claimants point out that street sweeping as a BMP to control "floatables" is not required by federal law in that none of the federal regulations

Received
September 15, 2011
Commission on
State Mandates

specifically require street sweeping. The claimants quote the following from *Hayes v. Commission on State Mandates*:[121] "if the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate."

The Commission agrees with claimants. The permit requires activities that fall within the federal regulations to include: "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."[122] And they also require: "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems…"[123]

Yet the more specific requirements in the permit include variable street sweeping schedules for areas impacted by different amounts of trash. They also require reporting on the amount of trash collected, which is not required by the federal regulations. These activities "exceed the mandate in that federal law or regulation."[124] As in *Long Beach Unified School Dist. v. State of California*,[125] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[126] to impose these requirements. Therefore, the Commission finds that parts D.3.a.(5) and J.3.a.(3)(c)x-xv of the permit are not a federal mandate.

Because of the mandatory language on the face of the permit, the Commission also finds part D.3.a(5) of the permit is a state mandate for the claimants to do all of the following:

> (5) Sweeping of Municipal Areas
>
> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
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> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

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

[122] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(1).

[123] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(3).

[124] Government Code section 17556, subdivision (c).

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

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

Received
September 15, 2011
Commission on
State Mandates

And as stated in part J.3.a(3)(c)x-xv (on p. 68) of the permit, the claimants report annually on:

> x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
>
> xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
>
> xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
>
> xiii. Identification of the total distance of curb-miles swept.
>
> xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
>
> xv. Amount of material (tons) collected from street and parking lot sweeping.

The State Board, in its October 2008 comments, argues that requiring minimum street sweeping frequencies does not result in a new program or higher level of service. According to the State Board:

> The 2001 Permit required Copermittees to perform street sweeping, but did not specify minimum frequencies. While the minimum frequencies may exceed some Copermittees' existing programs, the Claimants acknowledge than many Copermittees meet or exceed the mandatory requirements on a voluntary basis. To the extent the frequencies are already being met and the Permit imposes the same MEP standard as its predecessor … the 2007 Permit does not impose a higher level of service.

In their February 2009 rebuttal comments, the claimants cite Government Code section 17565 to argue that whether or not they were sweeping streets at frequencies equal or more than the permit requires is not relevant. Government Code section 17565 states: "If a local agency … at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency … for those costs incurred after the operative date of the mandate." The claimants also state that the 2001 permit did not in fact require street sweeping, "[a]t best it only included general statements regarding the need to control pollutants in streets and other impervious areas and, in any event, minimum frequencies were not required."

The Regional Board's Fact Sheet/Technical Report on part D.3.a.(5) of the 2007 permit states that street sweeping "has been added to ensure that the Copermittees are implementing this effective BMP at all appropriate areas."

The Commission finds that the street sweeping provision (part D.3.a.(5)) in the permit is a new program or higher level of service. The Commission agrees that Government Code section 17565 makes it irrelevant (for purposes of mandate reimbursement) whether or not claimants

Received
September 15, 2011
Commission on
State Mandates

were performing the activity prior to the permit, since voluntary activities do not affect reimbursement of an activity that is subsequently mandated by the state.

The 2001 permit, in part F.3.a.(3) and (4) stated:

> (a) To establish priorities for oversight of municipal areas and activities required under this Order, each Copermittee shall prioritize each watershed inventory in F.3.a.2. above by threat to water quality and update annually. Each municipal area and activity shall be classified as high, medium, or low threat to water quality. In evaluating threat to water quality, each Copermittee shall consider (1) type of municipal area or activity; (2) materials used (3) wastes generated; (4) pollutant discharge potential; (5) non-storm water discharges; (6) size of facility or area; (7) proximity to receiving water bodies; (8) sensitivity of receiving water bodies; and (9) any other relevant factors.
>
> (b) At a minimum, the high priority municipal areas and activities shall include the following:
>
> (i) Roads, Streets, Highways, and Parking Facilities. [¶]...[¶]
>
> F.3.a.(4) BMP Implementation (Municipal)
>
> (a) Each Copermittee shall designate a set of minimum BMPs for high, medium, and low threat to water quality municipal areas and activities (as determined under section F.3.a.(3)).The designated minimum BMPs for high threat to water quality municipal areas and activities shall be area or activity specific as appropriate.

Street sweeping is not expressly required in this 2001 permit provision, nor does it specify any frequencies or required reporting. Thus, the Commission finds that part D.3.a.(5) of the 2007 permit that requires street sweeping, as specified, is a new program or higher level of service, as well as part J.3.a(3)x-xv that requires reporting on street-sweeping activities.

D. Conveyance system cleaning and reporting (parts D.3.a.(3) & J.3.a.(3)(c)(iv)-(viii)): Also under part D.3 "Existing Development," part D.3.a.(3) requires conveyance system cleaning, including the following:

- Verifying proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from the MS4s and related drainage structures.
- Cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner.
- Cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately.
- Cleaning open channels of observed anthropogenic litter in a timely manner.

In J.3.a.(3)(c)(iv)-(viii), as part of the annual reporting requirements, copermittees shall provide a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned. In addition, copermittees must report by category tons of waste and litter removed from the facilities.

Received
September 15, 2011
Commission on
State Mandates

The State Board, in its comments submitted in October 2008, disagrees that the requirements exceed federal law, saying that "the same broad authorities applicable to the street sweeping requirement also apply to the conveyance system cleaning requirements." According to the State Board, specificity in inspection and cleaning requirements is consistent with and supported by U.S. EPA guidance. Also, to the extent that permit requirements are more specific than the federal regulations, the State Board asserts that the requirements are an appropriate exercise of the San Diego Water Board's discretion to define the MEP standard.

The claimants, in their February 2009 comments, state that "the requirements to inspect and perform maintenance to insure compliance with these standards is not limited by the 'regular schedule of maintenance' obligation but rather must be done as frequently as is necessary to comply with these specific standards." Also, claimants note that the content and detail in the reporting is more than required by the 2001 permit. As to the MEP standard required by the federal regulations, claimants assert that the U.S. EPA documents cited by the State Board provide guidance, not mandates, and the permit Fact Sheet does not specifically set forth mandatory annual inspection and maintenance requirements. According to the claimants, the only mandatory requirement is that a maintenance program exist, and that the applicant provide an inspection schedule if maintenance depends on the results of inspections or occurs infrequently. Yet the 2007 permit includes "very specific requirements that go beyond the U.S. EPA guidance and are not included within the federal regulations." Finally, claimants note that the State Board has acknowledged that the 2007 permit requirements are more specific than federal regulations, and cites the *Long Beach Unified School District* case to conclude that the specificity makes the requirements state mandates.

The Commission agrees with claimants. Like street sweeping, the permit requires conveyance system cleaning activities that fall within the federal regulations to include: "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."[127] And they also require: "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems…"[128]

Yet the permit requirements are more specific. Part D.3.a.(3) requires verifying proper operation of all municipal structural treatment controls, cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner, cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately, and cleaning open channels of observed anthropogenic litter in a timely manner. In addition, the reporting in part J requires a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned, and reporting by category tons of waste and litter removed from the facilities. These activities, "exceed[s] the mandate in that federal law or regulation."[129] As in *Long Beach*

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[127] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(1).

[128] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(3).

[129] Government Code section 17556, subdivision (c).

Unified School Dist. v. State of California,[130] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[131] to impose these requirements. Therefore, the Commission finds that parts D.3.a.(3) and J.3.a.(3)(c)iv-viii of the permit are not a federal mandate.

Rather, the Commission finds that part D.3.a.(3) of the 2007 permit is a state mandate on the claimants to do the following:

> (a) Implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.
>
> (b) Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include:
>
> i. Inspection at least once a year between May 1 and September 30 of each year for all MS4 facilities that receive or collect high volumes of trash and debris. All other MS4 facilities shall be inspected at least annually throughout the year.
>
> ii. Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year.
>
> iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner.
>
> iv. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed.
>
> v. Proper disposal of waste removed pursuant to applicable laws.
>
> vi. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

The Commission also finds that part J.3.a.(3)(c) iv-viii is a state mandate to report the following information in the JURMP annual report:

> iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.
>
> v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

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

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

vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.

vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.

viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

As to whether these provisions are a new program or higher level of service, the State Board, in its October 2008 comments, states that the 2001 permit contained "*more* frequent inspection and removal requirements than required in the 2007 Permit. It also contained record keeping requirements to document the facilities cleaned and the quantities of waste removed." [Emphasis in original.]

Claimants, in their February 2009 comments, argue that the 2001 permit, in part F.3.a.(5) required each copermittee to 'implement a schedule of maintenance activities at all structural controls designed to reduce pollutant discharges. By contrast, the 2007 permit requires each copermittee to 'implement a schedule of **inspection and** maintenance' and to '**verify proper operation of all municipal** structural controls...." [Emphasis in original.] Claimants also point out that the 2007 permit requires copermittees to:

- Clean any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner.
- Clean any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately.
- Clean open channels of observed anthropogenic litter in a timely manner.

According to claimants, these requirements were not included in the 2001 permit. Claimants also state that the requirement to inspect and perform maintenance "is not limited by the 'regular schedule of maintenance' obligation but rather must be done as frequently as is necessary to comply with these specific standards."

As to reporting, claimants state that the language in part D.3.a.(3)(b)(iv),(v) and (vi) of the 2007 permit and part F.3.a.(5)(c)(iii), (iv) and (v) of the 2001 permit track each other, but part J.3.a.(3)(c) iv through viii detail the information that the reports must now contain that was not in the 2001 permit, such as identifying the number of catch basins and inlets, the number inspected, the number found with accumulated waste exceeding the cleaning criteria, the distance of the MS4 cleaned, and other detail.

In analyzing whether parts D.3.a.(3) and J.3.a.(3)(c)(iv) – (viii) are a new program or higher level of service, we compare those provisions to the prior permit and look at the Regional Board's Fact Sheet/Technical Report, which states why Part D.3.a.(3) was added:

> **Section D.3.a.(3)** ... requires the Copermittees to inspect and remove waste from their MS4s prior to the rainy season. Additional wording has been added to clarify the intent of the requirements. The Copermittees will be required to inspect all storm drain inlets and catch basins. This change will assist the Copermittees in determining which basins/inlets need to be cleaned and at what

Received
September 15, 2011
Commission on
State Mandates

priority. Removal of trash has been identified by the copermittees as a priority issue in their long-term effectiveness assessment. To address this issue, wording has been added to require the Copermittees, at a minimum, inspect [sic] and remove trash from all their open channels at least once a year.

The 2001 permit contained the following in part F.3.a.(5)(b) and (c):

> (b) Each Copermittee shall implement a schedule of maintenance activities for the municipal separate storm sewer system.
> (c) The maintenance activities must, at a minimum, include:
> i. Inspection and removal of accumulated waste (e.g., sediment, trash, debris and other pollutants) between May 1 and September 30 of each year;
> ii. Additional cleaning as necessary between October 1 and April 30 of each year;
> iii. Record keeping of cleaning and the overall quantity of waste removed;
> iv. Proper disposal of waste removed pursuant to applicable laws;
> v. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

The Commission finds that some provisions in the 2007 permit are the same as in the 2001 permit. Specifically, part D.3.a(3)(a) is not a new program or higher level of service because the 2001 permit also required maintenance and inspection in part F.3.a.(5)(b) and (c). The Commission also finds that part D.3.a.(3)(b)(i),(iv)- (vi) of the 2007 permit is the same as part F.3.a.(5)(c)(i)(iii) - (v) in the 2001 permit, both of which require:

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

Therefore, the Commission finds that these provisions are not a new program or higher level of service.

The Commission also finds that part D.3.a.(3)(b)(ii) is not a new program or higher level of service. It gives the claimants the flexibility, after two years of inspections, to inspect MS4 facilities that require inspection and cleaning less than annually, but not less than every other year. Part F.3.a.(5)(c)(i) of the 2001 permit stated: "The maintenance activities must, at a minimum, include: i. inspection and removal of accumulated waste (e.g., sediment, trash, debris and other pollutants) between May 1 and September 30 of each year." Potentially less frequent inspections under the 2007 permit is not a new program or higher level of service.

The Commission finds that part D.3.a.(3)(b)(iii) of the 2007 permit is a new program or higher level of service on claimants to clean in a timely manner "Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity.... Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely

manner." This part contains specificity, e.g., a standard of accumulation greater than 33% of design capacity, which was not in the 2001 permit.

Further, the Commission finds that the reporting in part J.3.a.(3)(c) (iv) – (viii) is a new program or higher level of service. The 2001 permit did not require this information in the content of the annual reports.

E. Educational component (part D.5): Part D.5 requires the copermittees to perform the activities on pages 25-28 above, which can be summarized as:

- Implement an educational program so that copermittees' planning and development review staffs (and planning board/elected officials, if applicable) understand certain laws and regulations related to water quality.
- Implement an educational program that includes annual training before the rainy season so that the copermittees' construction, building, code enforcement, and grading review staffs, inspectors, and others will understand certain specified topics.
- At least annually, train staff responsible for conducting stormwater compliance inspections and enforcement of industrial and commercial facilities on specified topics.
- Implement an education program so that municipal personnel and contractors performing activities that generate pollutants understand the activity specific BMPs for each activity to be performed.
- Implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and others relating to specified topics.

The State Board, in its October 2008 comments on the test claim, states that federal regulations authorize the inclusion of an education component, in that the proposed management program must "include a description of appropriate educational and training measures for construction site operations" (40 C.F.R. § 122.26(d)(2)(iv)(D)(4)) and a "description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications, and other measures for commercial applicators and distributors…(40 C.F.R. § 122.26(d)(2)(iv)(A)(6)). The federal regulations also require a "description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers" (40 C.F.R. § 122.26(d)(2)(iv)(B)(5)) and a "description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials." (40 C.F.R. § 122.26(d)(2)(iv)(B)(6)). The State Board also says that according to the U.S. EPA's Phase II stormwater regulations, the MEP standard requires the copermittees to implement public education programs. According to the State Board, the regulations apply to copermittees with less developed storm water programs, and require the programs to include a public education and outreach program (40 C.F.R. § 122.34(b)(1)) and a public involvement/participation program (40 C.F.R. § 122.26(b)(2)). To the extent the permit requirements are more specific than federal law, the State Board calls them an appropriate use of the Regional Board's discretion "to require more specificity in establishing the MEP standard."

Received
September 15, 2011
Commission on
State Mandates

Claimants, in their February 2009 comments, characterize the federal regulations as only requiring them "to describe educational, public information, and other appropriate activities associated with their jurisdictional, watershed or stormwater management programs." By contrast, under the permit claimants argue that they are required to "implement specific educational and training programs that achieve measurable increases in specific target community knowledge and to ensure a measurable change in the behavior of such target communities rather than simply report on the … educational programs on an annual basis." Claimants state that they are required to perform testing and surveys and "new program elements to secure the measureable changes in knowledge and behavior."

The Commission agrees with claimants. As quoted in the State Board's comments, the federal regulations require nonspecific descriptions of educational programs, for example, requiring the permit application to "include appropriate educational and training measures for construction site operations" and "controls such as educational activities." The permit, on the other hand, requires implementation of an educational program with target communities and specified topics. These requirements "exceed the mandate in that federal law or regulation."[132] As in *Long Beach Unified School Dist. v. State of California*,[133] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[134] to impose these requirements. Thus, the Commission finds that part D.5 of the permit is not federally mandated.

Based on the mandatory language on the face of the permit, the Commission finds that part D.5 of the permit constitutes a state mandate on the copermittees to do all of the following:

> Each Copermittee shall implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:
>
> · Municipal Departments and Personnel
> · Construction Site Owners and Developers
> · Industrial Owners and Operators
> · Commercial Owners and Operators
> · Residential Community, General Public, and School Children
>
> a. GENERAL REQUIREMENTS
>
> (1) Each Copermittee shall educate each target community on the following topics where appropriate:

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[132] Government Code section 17556, subdivision (c).

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

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

Received
September 15, 2011
Commission on
State Mandates

Table 3. Education

Laws, Regulations, Permits, & Requirements	**Best Management Practices**
• Federal, state, and local water quality laws and regulations • Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction). • Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities • Regional Board's General NPDES Permit for Ground Water Dewatering • Regional Board's 401 Water Quality Certification Program • Statewide General NPDES Utility Vault Permit • Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits)	• Pollution prevention and safe alternatives • Good housekeeping (e.g., sweeping impervious surfaces instead of hosing) • Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste) • Non-storm water disposal alternatives (e.g., all wash waters) • Methods to minimized the impact of land development and construction • Erosion prevention • Methods to reduce the impact of residential and charity car-washing • Preventive Maintenance • Equipment/vehicle maintenance and repair • Spill response, containment, and recovery • Recycling • BMP maintenance
General Urban Runoff Concepts	**Other Topics**
• Impacts of urban runoff on receiving waters • Distinction between MS4s and sanitary sewers • BMP types: facility or activity specific, LID, source control, and treatment control • Short-and long-term water quality impacts associated with urbanization (e.g., land-use decisions, development, construction) • Non-storm water discharge prohibitions • How to conduct a storm water inspections	• Public reporting mechanisms • Water quality awareness for Emergency/ First Responders • Illicit Discharge Detection and Elimination observations and follow-up during daily work activities • Potable water discharges to the MS4 • Dechlorination techniques • Hydrostatic testing • Integrated pest management • Benefits of native vegetation • Water conservation •Alternative materials and designs to maintain peak runoff values •Traffic reduction, alternative fuel use

(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:
[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

i. Federal, state, and local water quality laws and regulations applicable to construction and grading[135] activities.
ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment).
iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

[135] Attachment C of the permit defines grading as "the cutting and/or filling of the land surface to a desired slope or elevation."

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

The State Board, in its October 2008 comments, states that the education requirement in part D.5. does not amount to a new program or higher level of service because the 2007 permit "includes education topics from the 2001 permit with minor wording and formatting changes. Additionally, the requirements were adopted to implement the same federal MEP standard as established in the CWA and in the 2001 Permit."

In their February 2009 comments, the claimants state that the 2001 permit did not require:

- Implementation of an education program so that the copermittee's planning and development review staff (and Planning Boards and Elected Officials, if applicable) understand certain specified laws and regulations related to water quality. (D.5.b.(1)(a).)
- Implementation of an education program that includes annual training prior to the rainy season so that the copermittee's construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of certain specified topics. (D.5.b.(1)(b).)
- Training of staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year relating to certain specified topics (D.5.b.(1)(c).)

Received
September 15, 2011
Commission on
State Mandates

- Implementation of an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed. (D.5.b.(1)(d).)
- Implementation of a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties relating to certain specified topics. (D.5.b.(2).)

This analysis of whether the permit is a new program or higher level of service is in the order presented in the permit. The Commission finds that nearly all of the educational topics in part D.5.a. are the same as those in the 2001 permit (part F.4). Both the 2001 and 2007 permits require the claimants to "educate" each specified target community on the following topics (Table 3 in the 2007 permit):

> **Laws, Regulations, Permits, & Requirements:** Federal, state, and local water quality laws and regulations; Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction); Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities; Regional Board's General NPDES Permit for Ground Water Dewatering; Regional Board's 401 Water Quality Certification Program; Statewide General NPDES Utility Vault Permit; Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits).
>
> **Best Management Practices:** Pollution prevention and safe alternatives; Good housekeeping (e.g., sweeping impervious surfaces instead of hosing); Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste); Non-storm water disposal alternatives (e.g., all wash waters); Methods to minimized the impact of land development and construction; Methods to reduce the impact of residential and charity car-washing; Preventive Maintenance; Equipment/vehicle maintenance and repair; Spill response, containment, and recovery; Recycling; BMP maintenance.
>
> **General Urban Runoff Concepts:** Impacts of urban runoff on receiving waters; Distinction between MS4s and sanitary sewers; Short-and long-term water , quality impacts associated with urbanization (e.g., land-use decisions, development, construction); How to conduct a storm water inspection.
>
> **Other Topics:** Public reporting mechanisms; Water quality awareness for Emergency/ First Responders; Illicit Discharge Detection and Elimination observations and follow-up during daily work activities; Potable water discharges to the MS4; Dechlorination techniques; Hydrostatic testing; Integrated pest management; Benefits of native vegetation; Water conservation; Alternative materials and designs to maintain peak runoff values; Traffic reduction, alternative fuel use.

Because the requirement to educate the target communities on these topics was in the 2001 permit, as well as the 2007 permit, the Commission finds that doing so, as required by part D.5.a(1), table 3, is not a new program or higher level of service.

Received
September 15, 2011
Commission on
State Mandates

Under the 2007 permit, the copermittees are required to "educate each target community" on the following educational topics that were not in the 2001 permit: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID [low-impact development], source control, and treatment control. Thus, the Commission finds that the part D.5.a.(1) is a new program or higher level of service to educate each target community on only the following topics: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID, source control, and treatment control.

Part D.5.a.(2) states: "(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and 'allowable' behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources." This provision was not in the 2001 permit, so the Commission finds that part D.5.a.(2) is a new program or higher level of service.

In part D.5.b.(1)(a) (Municipal Development Planning) the permit requires implementing an education program for "municipal planning and development review staffs (and Planning Board and Elected Officials, if applicable)" on specified topics. The 2001 permit required implementing an educational program for "Municipal Departments and Personnel" that would include planning and development review staffs, but not planning boards and elected officials. So the Commission finds that part D.5.b.(1)(a)(i) and (ii) is a new program or higher level of service for planning boards and elected officials.

Certain topics in part D.5.b.(1)(a) are a new program or higher level of service for both planning and development review staffs as well as planning boards and elected officials. Under both part F.4.a. of the 2001 permit, and D.5.b.(1)(a) of the 2007 permit, the copermittees are required to implement an educational program on the following topics:

> i. Federal, state, and local water quality laws and regulations applicable to Development Projects; [The 2001 permit, in F.4.a. (p. 35) says: "Federal, state and local water quality regulations that affect development projects."]
>
> ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization); [The 2001 permit, in F.4.a (p. 35) calls this "Waters Quality Impacts associated with land development."]

Thus the Commission finds that implementing an educational program on these topics is not a new program or higher level of service for municipal departments, but is for planning boards and elected officials.

The following topics were not listed in the 2001 permit, so the Commission finds that part D.5.b.(1)(a) is a new program or higher level of service to implement these in an educational program for all target communities:

> (iii) How to integrate LID BMP requirements into the local regulatory program(s) and requirements;
>
> (iv) Methods of minimizing impacts to receiving water quality resulting from development, including: [1] Storm water management plan development and review; [2] Methods to control downstream erosion impacts; [3] Identification of pollutants of concern; [4] LID BMP techniques; [5] Source control BMPs; and

> [6] Selection of the most effective treatment control BMPs for the pollutants of concern.

Part D.5.b.(1)(b) (Municipal Construction Activities) of the permit requires implementing an educational program for municipal "construction, building, code enforcement, and grading review staffs." Again, this is not a new program or higher level of service for those topics in which the 2001 permit also required an education program for "Municipal Departments and Personnel," such as:

> i. Federal, state, and local water quality laws and regulations applicable to construction and grading activities. [The 2001 permit, in F.4.a. (p. 35) says: "Federal, state and local water quality regulations that affect development projects."]
>
> ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment. [The 2001 permit, in F.4.a (p. 35) calls this "Water Quality Impacts associated with land development."]

The timing of the educational program specified in D.5.b.(1)(b) requires it to be implemented "prior to the rainy season." There is no evidence in the record, however, that this timing requirement is a new program or higher level of service compared with the 2001 permit. Thus the Commission finds that part D.5.b.(1)(b)(i) and (ii) are not a new program or higher level of service.

Municipal construction activity education topics were added to the 2007 permit, however, that were not in the 2001 permit, in paragraphs (iii) to (vi) as follows:

> (b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience: [¶]…[¶] iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
> iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
> v. Current advancements in BMP technologies.
> vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

Thus, the Commission finds that part D.5.b.(1)(b)(iii) - (vi) of the 2007 permit is a new program or higher level of service.

Part D.5.b.(1)(c) of the 2007 permit (Municipal Industrial/Commercial Activities) requires the following:

> (c) Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at

> least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

The 2001 permit included (in F.4.b.) the topic "How to conduct a stormwater inspection" but did not specify that the training was to be annual, and did not require the training to cover inspection and enforcement procedures, BMP Implementation, or reviewing monitoring data. Thus, the Commission finds that part D.5.(b)(1)(c) is a new program or higher level of service.

Part D.5.b.(1)(d) of the 2007 permit requires the following:

> (d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

Regarding part D.5.b.(1)(d), the 2007 Fact Sheet/Technical Report states:

> A new requirement has also been added for education of activity specific BMPs for municipal personnel and contractors performing activities that generate pollutants. Education is required at all levels of municipal staff and contractors. Education is especially important for the staff in the field performing activities which might result in discharges of pollutants if proper BMPs are not used.

Because part D.5.b.(1)(d) was not in the 2001 permit, and because the Regional Board called it a "new requirement" the Commission finds that part D.5.(b)(1)(d) of the 2007 permit is a new program or higher level of service.

Part D.5.(b)(2) of the 2007 permit requires an education program for "project applicants, developers, contractors, property owners, community planning groups, and other responsible parties." Parts F.4.a and F4.b. of the 2001 permit required a similar education program for "construction site owners and developers." The Fact Sheet/Technical Report for the 2007 permit states:

> Different levels of training will be needed for planning groups, owners, developers, contractors, and construction workers, but everyone should get a general education of stormwater requirements. Education of all construction workers can prevent unintentional discharges, such as discharges by workers who are not aware that they are not allowed to wash things down the storm drains. Training for BMP installation workers is imperative because the BMPs will not fail if not properly installed and maintained. Training for field level workers can be formal or informal tail-gate format.

Thus, the Commission finds that part D.5.(b)(2) of the 2007 permit is a new program or higher level of service for project applicants, contractors, or community planning groups who are not developers or construction site owners.

The final part of the education programs in the 2007 permit is D.5.(b)(3) regarding "Residential, General Public, and School Children."

> Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers,

Received
September 15, 2011
Commission on
State Mandates

door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

The 2001 permit (part F.4.c.) stated the following:

> In addition to the topics listed in F.4.a. above, the Residential, General Public, and School Children communities shall be educated on the following topics where applicable:
>
> - Public reporting information resources
> - Residential and charity car-washing
> - Community activities (e.g., "Adopt a Storm Drain, Watershed, or Highway" Programs, citizen monitoring, creek/beach cleanups, environmental protection organization activities, etc..

The 2001 permit did not require claimants to "collaboratively conduct or participate in development … of a plan to educate residential, general public, and school children target communities." The 2001 permit also did not require the plan to "evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods." Thus, the Commission finds that part D.5.(b)(3) of the 2007 permit is a new program or higher level of service.

In sum, as to part D.5 of the 2007 permit that requires implementing educational programs, the Commission finds that the following subparts are new programs or higher levels of service:

- D.5.a.(1): Each copermittee shall educate each target community, as specified, on the following topics: erosion prevention, nonstorm waters discharge prohibitions, and BMP types: facility or activity specific, LID, source control, and treatment control.
- D.5.a.(2): Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.
- D.5.b.(1)(a): Implement an education program so that planning boards and elected officials, if applicable, have an understanding of: (i) Federal, state, and local water quality laws and regulations applicable to Development Projects; (ii) The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land developments and urbanization).
- D.5.b.(1)(a): Implement an education program so that planning and development review staffs as well as planning boards and elected officials have an understanding of: (iii) How to integrate LID BMP requirements into the local regulatory program(s) and requirements; (iv) Methods of minimizing impacts to receiving water quality resulting from development, including: [1] Storm water management plan development and review; [2] Methods to control downstream erosion impacts; [3] Identification of pollutants of concern; [4] LID BMP techniques; [5] Source control BMPs; and [6] Selection of the most effective treatment control BMPs for the pollutants of concern."
- D.5.b.(1)(b)(iii) - (vi): Implement an education program that includes annual training prior to the rainy season for its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an

understanding of the topics in parts D.5.b.(1)(b)(iii), (iv), (v), and (vi) of the permit, as follows:

> iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
>
> iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
>
> v. Current advancements in BMP technologies.
>
> vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

- D.5.(b)(1)(c) and (d) as follows:

  > Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

- Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

- D.5.(b)(2), As early in the planning and development process as possible and all through the permitting and construction process, to implement a program to educate project applicants, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) [Municipal Development Planning] and D.5.b.(1)(b) [Municipal construction Activities] above, as appropriate for the audience being educated. The education program shall also educate project applicants, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

- D.5.(b)(3), Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

II. Watershed Urban Runoff Management Program (Part E)

Part E of the permit is the Watershed Urban Runoff Management Program (WURMP). The permit (Table 4) divides the copermittees into nine watershed management areas (WMAs) by "major receiving water bodies." The 2001 permit also had a WURMP component (in part J).

A. Watershed Urban Runoff Management Program copermittee collaboration (parts E.2.f & E.2.g): These provisions require the copermittees to do the activities on pages 28-29 above, including the following:

- Collaborating with other copermittees within their watershed management areas (WMAs) to develop and implement an updated Watershed Urban Runoff Management Program for each watershed that prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards which at a minimum includes:
    - Identifying and implementing watershed activities that address the high priority water quality problems in the watershed management areas that include both watershed water quality activities[136] and watershed education activities.[137]
    - Creating a watershed activities list that includes certain specified information to be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter.
    - Implementing identified watershed activities within established schedules.
    - Collaborating to develop and implement the Watershed Urban Runoff Management Program, including frequent regularly scheduled meetings.[138]

In its October 2008 comments, the State Board asserts that the Watershed Urban Runoff Management Program activities are necessary to meet the minimum federal MEP standard. The State Board quotes the following federal regulations: "The Director may … issue distinct permits for appropriate categories of discharges … including, but not limited to … all discharges within a system that discharge to the same watershed…" (40 C.F.R. 122.26(a)(3)(ii).) The State Board also quotes more specific federal regulations:

> Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed, or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas [watersheds] which contribute storm water to the system. (40 C.F.R. § 122.26 (a)(3)(v).)
>
> The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, a

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[136] Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of the permit (Part E.2.f).

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

[138] In their February 2009 comments, the claimants also list the following activities: (1) Annual review of WURMPs to identify needed modifications and improvements (part E.2.i); (2) Develop and periodically update watershed maps (part E.2.b); (3) Develop and implement a program for encouraging collaborative watershed-based land-use planning (part E.2.d); (4) Develop and implement a collective watershed strategy (part E.2.e). These parts of the permit, however, were not pled in the test claim so the Commission makes no findings on them.

> jurisdiction-wide basis, watershed basis, or other appropriate basis;" (40 C.F.R. § 122.26 (a)(5).)
>
> Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. (40 C.F.R. § 122.26 (d)(2)(iv).)

The State Board argues that the regional board "determined that the inclusion of the requirement to formalize the Watershed Water Qualities Activities List was appropriate to further the goal of the WURMPS in achieving compliance with federal law." Based on some reports it received, the Regional Board determined that "many of the watershed water quality activities had no clear connection to the high priority water quality problems in the area of implementation." The Board determined it was therefore necessary and appropriate to require development of an implementation strategy to maximize WURMP effectiveness.

Claimants, in their February 2009 comments, point out that while cooperative agreements may be required by 40 C.F.R. § 122.26(d)(2)(i)(D), "each copermittee is only responsible for their own systems." Claimants quote another federal regulation: "Copermittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they operate." (40 C.F.R. § 122.26(a)(3)(vi).) Claimants argue that the 2007 permit:

> [R]equires the copermittees to engage in specific programmatic activities that are duplicative of the activities that were not required under the 2001 Permit and that are already required of them on a jurisdictional basis within the boundaries of the same watershed. These new requirements include no less than two watershed water quality activities and two watershed education activities per year.

Claimants also state that the permit "mandates that watershed quality activities implemented on a jurisdictional basis must exceed the baseline jurisdictional requirements under Section D of the Order." (part E.2.f.(1)(a).) According to what the claimants call these "dual baseline standards, jurisdictional and watershed, the copermittees are required to perform more and duplicative work."

The Commission finds that the permit requirements in sections E.2.f and E.2.g. are not federal mandates. As with the other requirements in the permit, the federal regulations authorize but do not require the specificity regarding whether collaboration occurs on a jurisdictional, watershed or other basis. These requirements "exceed the mandate in that federal law or regulation."[139] As in *Long Beach Unified School Dist. v. State of California*,[140] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[141] to impose these requirements.

Based on the mandatory language in the permit, the Commission finds that the following in part E are a state mandate on the copermittees:

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[139] Government Code section 17556, subdivision (c).

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

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

2. Each Copermittee shall collaborate with other Copermittees within its WMA(s) as in Table 4 [of the permit] to develop and implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below:
[¶]…[¶]

f. Watershed Activities[142]

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;
(b) A time schedule for implementation of the activity, including key milestones;
(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;

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[142] In their rebuttal comments submitted in February 2009, claimants mention part E.(3) of the permit that requires a detailed description of each activity on the Watershed Activities List. Part E.(3), however, was not in the test claim so staff makes no findings on it.

(e) A description of how the activity is consistent with the collective watershed strategy;
(f) A description of the expected benefits of implementing the activity; and
(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Copermittee Collaboration

Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

As to the issue of new program or higher level of service; the State Board, in its October 2008 comments, states:

> Although Section E.2.f. requires development and implementation of a list of Watershed Water Qualities Activities for potential implementation that was not specifically required in the 2001 Permit, the Copermittees were previously required to identify priority water quality issues and identify recommended activities to address the priority water quality problems (See 2001 Permit, section J.1 and J.2.d.)

The State Board asserts that Copermittees were already required to collaborate with other Copermittees, and that "Section E.2.g. merely adds effectiveness strategies to the collaboration requirements." ... Other requirements challenged by the Claimants exist in the 2001 Permit, but with minor wording changes (e.g., the requirement to update watershed maps, which exists in both permits).

Claimants, in their February 2009 comments, assert that parts E.2.f. and E.2.g do impose a new program or higher level of service. According to the claimants:

> Under the 2001 Permit the watershed requirements were essentially limited to mapping, assessment and identification of short and long term issues. Collaboration included mapping (J.2.a.), assessment of receiving waters (J.2.b); identification and prioritization of water quality problems (J.2.c); implementation of time schedules (J.2.d) and identification of copermittee responsibilities for each recommended activity including a time schedule.
>
> [¶]...[¶]

Received
September 15, 2011
Commission on
State Mandates

> The 2007 Permit imposes standards far beyond those listed in … the 2001 Permit …. The 2007 Permit now requires the copermittees to engage in specific programmatic activities that are duplicative of the activities that were not required under the 2001 Permit and that are already required of them on a jurisdictional basis within the boundaries of the same watershed. These new requirements include no less than two watershed water quality activities and two watershed education activities per year. The two-activity watershed requirement is a condition of all copermittees regardless of whether the activity is within their jurisdictional authority or not.
>
> In addition, while the 2007 Permit states that activities can be implemented at a regional, watershed or jurisdictional level, it mandates that watershed quality activities implemented on a jurisdictional basis must exceed the baseline jurisdictional requirements under Section D of the Order. By reason of the dual baseline standards, jurisdictional and watershed, the copermittees are required to perform more and duplicative work.

The Commission finds that E.2.f. and E.2.g of the permit are a new program or higher level of service.

As to watershed education in part E.2.f, the 2001 permit (in part J.2.g.) stated that the WURMP shall contain "A watershed based education program." The 2007 permit states that the WURMP shall include "watershed education activities" defined as "outreach and training activities that address high priority water quality problems in the WMA [Watershed Management Area(s)]." Moreover, in part E.f.(4), the 2007 permit states: "A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences." Because of this increased requirement for implementation of watershed education, the Commission finds that watershed education activities, as defined in part E.2.f, is a new program or higher level of service.

Additionally, the Commission finds that the rest of part E.2.f. is a new program or higher level of service because it includes elements not in the 2001 permit, such as:

- A definition of watershed water quality activities (part E.2.f.(1)(a)).
- Submission of a watershed activities list, with specified contents (part E.2.f.(2)).
- A detailed description of each activity on the watershed activities list, with seven specific components (part E.2.f.(3)).
- Implementation of watershed activities pursuant to established schedules, including definitions of when activities are in an active implementation phase (part E.2.f.(4)).

As to part E.2.g., although the 2001 (in parts J.1. & J.2.) and 2007 permits both require copermittee collaboration in developing and implementing the Watershed Urban Runoff Management Plan, copermittee collaboration is a new program or higher level of service because the WURMP is greatly expanded over the 2001 permit in part E.2.f as discussed above. This means that new collaboration is required to develop and implement the watershed activities in part E.2.f.

The 2007 permit (in part E.2.g) also states that "Watershed Copermittee collaboration shall include frequent regularly scheduled meetings." This requirement for meetings was not in the 2001 permit. The Fact Sheet/Technical Report states:

Received
September 15, 2011
Commission on
State Mandates

> The requirement for regularly scheduled meetings has been added based on Regional Board findings that watershed groups which hold regularly scheduled meetings (such as for San Diego Bay) typically produced better programs and work products than watershed groups that went for extended periods of time without scheduled meetings.[143]

Therefore, the Commission finds that part E.2.g. of the 2007 permit is a new program or higher level of service.

Regarding watershed water quality activities in part E.2.f, the Fact Sheet/Technical Report the Regional Board stated:

> This requirement developed over time while working with the Copermittees on their WURMP implementation under Order No. 2001-01. In October 2004 letters, the Regional Board recommended the Copermittees develop a list of Watershed Water Quality Activities for potential implementation. Following receipt of the Regional Board letters, the Copermittees created the Watershed Water Quality Activity lists. Although the Copermittees' lists needed improvement, the Regional Board found the lists to be useful planning tools that can be evaluated to identify effective and efficient Watershed Water Quality Activities. Because the lists are useful and have become a part of the WURMP implementation process, a requirement for their development has been written into the Order.

Thus, the Commission finds that part E.2.f. of the permit is a new program or higher level of service, in that it requires the following not required in the 2001 permit:

- Identification and implementation of watershed activities that address the high priority water quality problems in the WMA (Watershed Management Area), as specified (part E.2.f.(1)).
- Submission of a watershed activities list with each updated WURMP and updated annually thereafter, as specified (part E.2.f.(2)-(3)).
- Implementation of watershed activities pursuant to established schedules: no less than two watershed water quality activities and two watershed education activities in active implementation phase, as defined, per permit year (part E.2.f.(4)).

III. Regional Urban Runoff Management Program (Part F)

Part F of the permit describes the Regional Urban Runoff Management Program (RURMP). It was included because "some aspects of urban runoff management can be effectively addressed at a regional level. … However, significant flexibility has been provided to the Copermittees for new regional requirements."[144]

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[143] For an inexplicable reason, the Fact Sheet/Technical Report lists this collaboration activity under Section E.2.m of the permit rather than E.2.g.. The permit at issue has no section E.2.m.

[144] San Diego Regional Water Quality Control Board, "Fact Sheet/Technical Report for Order No. R9-2007-0001."

Received
September 15, 2011
Commission on
State Mandates

A. Copermittee collaboration – Regional Residential Education Program Development and Implementation (part F.1): Part F.1 requires the copermittees to develop and implement a Regional Residential Education Program, with specified contents (see p. 12 above). In the test claim the claimants discuss hiring a consultant to develop the educational program that "will generally educate residents on: 1) the difference between stormwater conveyance systems and sanitary sewer systems; 2) the connection of storm drains to local waterways; and 3) common residential sources of urban run-off." Claimants allege activities to comply with section F.1 of the permit that include, but are not limited to: "development of materials/branding, a regional website, regional outreach events, regional advertising and mass media, partnership development, and the development of marketing and research tools, including regional surveys to be conducted in FY 2008-09 and again in FY 2011-12."

In comments submitted in October 2008, the State Board asserts that the permit condition in section F.1. is necessary to meet the minimum federal MEP standard and that the requirement is supported by the Clean Water Act statutes and regulations. The State Board cites the following federal regulations:

> (v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.[145] [¶]...[¶]
>
> (5) The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.[146] [¶]...[¶]
>
> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]...[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[147]
>
> (iv) Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. ...[148]

In response, the claimants' February 2009 comments state that the Regional Residential Education Program is not necessary to meet the minimum federal MEP standard. The regional nature of the education program, according to the claimants, is duplicative because it imposes the

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[145] 40 Code of Federal Regulations section 122.26 (a)(3(v).

[146] 40 Code of Federal Regulations section 122.26 (a)(5).

[147] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[148] 40 Code of Federal Regulations section 122.26 (d)(iv).

education requirements at the regional and jurisdictional levels concurrently, and it exceeds federal law.

The Commission finds that the requirements in part F.1 of the permit do not constitute a federal mandate. There is no federal requirement to provide a regional educational program, so the education program, "exceed[s] the mandate in that federal law or regulation."[149] As in *Long Beach Unified School Dist. v. State of California*, the permit "requires specific actions … [that are] required acts."[150] In adopting part F.1, the state has freely chosen[151] to impose these requirements. Thus, the Commission finds that part F.1. of the permit does not constitute a federal mandate.

Based on the mandatory language on the face of the permit, the Commission finds that the permit constitutes a state mandate on the claimants to do all the following in part F.1 of the permit:

> The Regional Urban Runoff Management Program shall, at a minimum:
>
> 1. Develop and implement a Regional Residential Education Program. The program shall include:
>
> a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.
> b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a (p. 50.)

As to whether this is a new program or higher level of service, the State Board, in its October 2008 comments, states that it is not because the claimants were already implementing a residential education program at a regional level before the permit was adopted.

In claimants' February 2009 rebuttal comments, they assert that it is irrelevant whether or not the copermittees voluntarily met or exceeded the now mandatory requirements imposed by the 2007 permit because Government Code section 17565 states: "If a local agency … at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency … for those costs incurred after the operative date of the mandate."

The Commission finds that part F.1 of the permit is a new program or higher level of service. The 2001 permit required an educational component as part of the Jurisdictional Urban Runoff Management Program (part F.4) that contained a residential component, but not a Regional Residential Education Program, so the activities in this program are new. Also, the Commission agrees that whether or not claimants were engaged in an educational program is not relevant due to Government Code section 17565. The Regional Board, in requiring the regional educational program, leaves the local agencies with no choice but to comply.

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[149] Government Code section 17556, subdivision (c).

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

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

B. Copermittee collaboration (parts F.2 & F.3): Parts F.2 and F.3 (quoted on p. 11 above) require the copermittees to collaborate to develop, implement, and update as necessary a Regional Urban Runoff Management Program, to include developing the standardized fiscal analysis method required in permit part G (part F.2) and facilitating the assessment of the effectiveness of jurisdictional, watershed, and regional programs (part F.3).

In comments submitted in October 2008, the State Board asserts that the permit conditions in sections F.2 and F.3 are necessary to meet the minimum MEP standard, quoting the following federal regulation regarding municipal stormwater permits:

> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]...[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[152]

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

> (v) Permits for all or a portion of all discharges from large[153] or medium[154] municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different

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

[153] "(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or (ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. ..." [40 CFR § 122.26 (b)(4).]

[154] "(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or (ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. ..." [40 CFR § 122.26 (b)(7).]

Received
September 15, 2011
Commission on
State Mandates

> management programs for different drainage areas which contribute storm water to the system.

The State Board also asserts:

> To the extent the Clean Water Act and federal regulations do not identify all of the specificity required in Sections F.2, F.3 …, the San Diego Water Board properly exercised its discretion under federal law to include specificity so that the federal MEP standard can be achieved. The San Diego Water Board exercised this duty under federal law and therefore the provisions of the 2007 Permit were adopted as federal requirements.

In the claimants' rebuttal comments submitted in February 2009, they state that "all of the authorities cited by the State merely acknowledge the State's authority to go beyond the federal regulations."

The Commission finds that the requirements in parts F.2 and F.3. of the permit do not constitute a federal mandate. There is no federal requirement to collaborate on, develop, or implement a Regional Urban Runoff Management Program (RURMP). The Commission finds that these RURMP activities "exceed the mandate in that federal law or regulation."[155] As in *Long Beach Unified School Dist. v. State of California*,[156] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[157] to impose these requirements. Thus, the Commission finds that parts F.2 and F.3 of the permit do not constitute federal mandates.

Based on the mandatory language on the face of the permit, the Commission finds that parts F.2 and F.3 of the permit constitutes a state mandate on the claimants to do all the following:

> Collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that meets the requirements of section F of the permit, reduces the discharge of pollutants from the MS4 to the MEP, and prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. The Regional Urban Runoff Management Program shall, at a minimum: [¶]…[¶]
>
> (2) Develop the standardized fiscal analysis method required in section G of the permit, and,
>
> (3) Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.

As to whether these activities are a new program or higher level of service, the claimants state in the test claim:

> "[W]hile the 2001 Permit required the copermittees to collaborate to address common issues and promote consistency among JURMPs and WURMPs and to

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[155] Government Code section 17556, subdivision (c).

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

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

establish a management structure for this purpose, it lacked the detail, specificity and level of effort now mandated by the 2007 Permit."

In their February 2009 rebuttal comments, claimants assert that the 2001 and 2007 permits contain major substantive differences in their requirements for fiscal analyses of their jurisdictional programs.

The State Board, in its October 2008 comments, states that the 2001 permit required that "the Copermittees enter into a formal agreement to provide, at a minimum, a management structure for designating joint responsibilities, decision making, watershed management, information management of data and reports" and other collaborative arrangements to comply with the permit.

According to the State Board, parts F.2 and F.3 are not a new program or higher level of service because the copermittees "were already conducting multiple efforts on a regional level under the 2001 permit. The inclusion of the RURMP is designed to organize these efforts into one framework to improve Copermittee and Regional Board tracking of regional efforts." The State Board also asserts that the requirements were intended to reduce redundant reporting and improve efficiency and streamline regional program implementation. The State Board describes the 2007 permit as merely elaborating on and refining the 2001 requirements.

The permit itself states: "This Order contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in urban runoff to the MEP and achieve water quality standards." [Emphasis added.] The permit also describes the Regional Urban Runoff Management Plan as new.

While the 2001 permit contained requirements for a fiscal analysis (part F.8) and an assessment of effectiveness (part F.7), it did so only as components of a Jurisdictional Urban Runoff Management Program. The Regional Urban Runoff Management Program, required in part F.2 of the 2007 permit, is new. The fiscal analysis in part G is incorporated by reference into part F.2, and the effectiveness assessment is incorporated into part F.3. Thus, the Commission finds that the requirements in parts F.2 and F.3 are a new program or higher level of service.

IV. Program Effectiveness Assessment (Part I)

Part I of the permit is called "Program Effectiveness Assessment" and includes subparts for Jurisdictional (I.1), Watershed (I.2) and Regional (I.3) assessment, in addition to a Long Term Effectiveness Assessment (I.5). Of these, claimants pled subparts I.1, I.2 and I.5.

A. Jurisdictional and Watershed Program effectiveness assessment (parts I.1 & I.2): As more specifically stated on pages 22-24 above, the permit requires the copermittees to do the following:

- Annually assess the effectiveness of the Jurisdictional Urban Runoff Management Program (JURMP) that includes specifically assessing the effectiveness of specified components of the JURMP and the effectiveness of the JURMP as a whole.
- Identify measureable targeted outcomes, assessment measures, and assessment methods for each jurisdictional activity/BMP implemented, each major JURMP component, and the JURMP as a whole.

- Development and implement a plan and schedule to address the identified modifications and improvements.
- Annually report on the effectiveness assessment as implemented under each of the specified requirements.
- As a watershed group of copermittees, annually assess the effectiveness of the Watershed Urban Runoff Management Program (WURMP) implementation, including each water quality activity and watershed education activity, and the program as a whole.
- Determine source load reductions resulting from WURMP implementation and utilize water quality monitoring results and data to determine whether implementation is resulting in changes to water quality.
- As with the JURMP, annually review WURMP jurisdictional activities or BMPs to identify modifications and improvements needed to maximize the program's effectiveness, develop and implement a plan and schedule to address the identified modifications and improvements to the programs, and annually report on the program's effectiveness assessment as implemented under each of the requirements.

Regarding parts I.1.a. and I.2.a. of the permit, the Fact Sheet/Technical Report states: "The section requires both specific activities and broader programs to be assessed since the effectiveness of jurisdictional [or watershed] efforts may be evident only when considered at different scales."[158]

The State Board, in its comments submitted in October 2008, cites section 402(p)(3(B)(ii)-(iii) of the Clean Water Act, as well as 40 C.F.R. sections 122.26(d)(2)(i)(B)-(C), (E) and (F) and subdivision (d)(2)(iv) of the same section to show the "broad federal authorities relied upon by the San Diego Water Board to support Section I … [that] … support inclusion of the JURMP and WURMP effectiveness assessments under federal law." The State Board also quotes section 122.26(d)(2)(v) that the copermittees must include in part 2 of their application for a permit:

> *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

The State Board also says that "under 40 C.F.R. section 122.42(c), applicants must provide annual reports on the progress of their storm water management programs. The federal law behind the JURMP and WURMP effectiveness assessment requirements were discussed at great length in the 2001 Permit Fact Sheet."[159] The State Board quotes a lengthy portion of the 2001

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[158] Fact Sheet/Technical Report for Order No. R9-2007-0001, Parts I.1.a. and I.2.a.. Two identical paragraphs describe the JURMP on page 319 and the WURMP on page 320.

[159] 40 C.F.R. section 122.42(c) states:

> *Municipal separate storm sewer systems.* The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director under §122.26(a)(1)(v) of this part must

Received
September 15, 2011
Commission on
State Mandates

Fact Sheet, which states that the U.S. EPA requires applicants to submit estimated reductions in pollutant loads expected to result from implemented controls and describe known impacts of storm water controls on groundwater. The 2001 Fact Sheet also includes "Throughout the permit term, the municipality must submit refinements to its assessment or additional direct measurements of program effectiveness in its annual report." It also lists a number of U.S. EPA suggestions, recommendations, and encouraged actions.

The State Board also quotes at length from the 2007 Permit Fact Sheet/Technical Report regarding why the effectiveness assessments are required under the permit, including the need for them and the benefits of including them. According to the State Board, the federal authorities support including the effectiveness assessments, and the Regional Board appropriately exercised discretion under federal law to include them, finding them necessary to implement the MEP standard. Thus, the State Board asserts that sections I.1 and I.2 do not exceed federal law.

The claimants, in their February 2009 comments, state that neither the broad nor the specific legal authority cited in the permit Fact Sheet "contains the above-referenced mandates required under the 2007 Permit." Claimants characterize the federal regulations as only requiring "program descriptions, estimated reductions, known impacts, and an annual report on progress. Federal law does not mandate the specific activities mandated by the 2007 Permit." Claimants also argue that the permit requirements are not necessary to meet the federal MEP standard, and point out that the 2001 Permit Fact Sheet cited by the State Board describes actions recommended or encouraged by the U.S. EPA, but not required. As claimant says: "they simply authorize applicants to go beyond minimum federal requirements." Claimants also quote the State Board's comment on "the need for and benefits of assessment requirements," noting that needs and benefits "constitute an insufficient basis for the imposition of a mandated requirement without subvention."

Although the federal regulations require assessment of controls and annual reports, they do not require the detailed assessment in the 2007 permit. The regulations do not require, for example, assessments of the effectiveness of each significant jurisdictional activity/BMP or watershed

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submit an annual report by the anniversary of the date of the issuance of the permit for such system. The report shall include:

(1) The status of implementing the components of the storm water management program that are established as permit conditions;
(2) Proposed changes to the storm water management programs that are established as permit condition. Such proposed changes shall be consistent with §122.26(d)(2)(iii) of this part; and
(3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under §122.26(d)(2)(iv) and (d)(2)(v) of this part;
(4) A summary of data, including monitoring data, that is accumulated throughout the reporting year;
(5) Annual expenditures and budget for year following each annual report;
(6) A summary describing the number and nature of enforcement actions, inspections, and public education programs;
(7) Identification of water quality improvements or degradation.

quality activity, or of the implementation of each major component of the JURMP or WURMP, or identification of modifications and improvements to maximize the JURMP or WURMP effectiveness. These requirements, "exceed the mandate in that federal law or regulation."[160] As in *Long Beach Unified School Dist. v. State of California*,[161] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[162] to impose these requirements. Thus, the Commission finds that parts I.1 and I.2 of the permit are not federal mandates.

Based on the mandatory language on the face of the permit, the Commission finds that parts I.1 and I.2 of the permit are a state mandate on the copermittees to do all of the following:

> 1. Jurisdictional
>
> a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:
>
> (1) Specifically assess the effectiveness of each of the following:
>
> (a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;
> (b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[163] Detection and Elimination, and Education); and
> (c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.
>
> (2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.
>
> (3) Utilize outcome levels 1-6[164] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.
>
> (4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.
>
> (5) Utilize Implementation Assessment,[165] Water Quality Assessment,[166] and Integrated Assessment,[167] where applicable and feasible.

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[160] Government Code section 17556, subdivision (c).

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

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

[163] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[164] See footnote 50, page 21.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[168] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;
(b) Each Watershed Education Activity implemented; and
(c) Implementation of the Watershed Urban Runoff Management Program as a whole.

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

[166] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[167] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

[168] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists where the hydrologic units are and major receiving water bodies.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

(3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

(4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

(5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

(6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

(7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.[169] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

[169] Section A is "Prohibitions and Receiving Water Limitations."

The State Board, in its October 2008 comments, states that the program effectiveness assessment is not a new program or higher level of service because the 2001 permit included a JURMP (in part F.7) and WURMP (in part J) effectiveness assessment requirements.

The claimants, in their February 2009 comments, state as follows:

> The 2001 Permit only required the copermittees to develop a long term strategy for assessing the effectiveness of their individual JURMP using specific and indirect measurements to track the long term progress of their individual JURMPs towards achieving water quality. [part F.7.a. of the 2001 permit.] The 2001 Permit also only mandated that the long term strategy developed by the copermittees include an assessment of the effectiveness of their JURMP in an annual report using the direct and indirect assessment measurements and methods developed in the long-term strategy. [part F.7. of the 2001 permit.]

Part F.7 of the 2001 permit required developing the following on the topic of "Assessment of Jurisdictional URMP Effectiveness Component."

> a. As part of its individual Jurisdictional URMP, each Copermittee shall develop a long-term strategy for assessing the effectiveness of its individual Jurisdictional URMP. The long-term assessment strategy shall identify specific direct and indirect measurements that each Copermittee will use to track the long-term progress of its individual Jurisdictional URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.
>
> b. As part of its individual Jurisdictional URMP Annual Report, each Copermittee shall include an assessment of the effectiveness of its Jurisdictional URMP using the direct and indirect assessment measurements and methods developed in its long-term assessment strategy.

The 2007 permit requires more detail in its assessments than the 2001 permit. The 2007 permit requires annual assessments and using outcome levels, among other things, to assess the effectiveness of (a) each significant jurisdictional activity/BMP, (b) implementation of each major component of the JURMP, and (c) implementation of the JURMP as a whole. The 2001 permit did not require assessments at these three levels. And for example, outcome level 4 in the 2007 permit is required for measuring load reductions.[170] This is a higher level of service than "pollutant loading estimations" to be used as an effectiveness strategy in the 2001 permit.[171] Therefore, the Commission finds that section I.1 of the permit (Jurisdictional URMP effectiveness assessment) is a new program or higher level of service.

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[170] There are six Effectiveness Assessments incorporated into part I.1.a.(3) of the permit and are defined in Attachment C. One of them is "Effectiveness Assessment Level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed."

[171] See Fact Sheet/Technical Report for Order No. R9-2007-0001.

The assessment provisions of the Watershed Urban Runoff Management Program are in part J.2 of the 2001 permit, which requires each copermittee to develop and implement a Watershed URMP that contains, among other things:

> b. An assessment of the water quality of all receiving waters in the watershed based upon (1) existing water quality data; and (2) annual watershed water quality monitoring that satisfies the watershed monitoring requirements of Attachment B.
>
> [¶]…[¶]
>
> i. Long-term strategy for assessing the effectiveness of the Watershed URMP. The long-term assessment strategy shall identify specific direct and indirect measurements that will track the long-term progress of the Watershed URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.

As with the JURMP, the 2001 permit required a "long-term strategy for assessing the effectiveness of the Watershed URMP" whereas the 2007 permit requires the annual assessment of more specific criteria: (a) each Watershed Water Quality Activity implemented; (b) Each Watershed Education Activity implemented; and (c) Implementation of the Watershed Urban Runoff Management program as a whole. And the 2007 permit requires assessing these activities using the same six effectiveness outcome levels as for the JURMP (defined in Attachment C), that were not in the 2001 permit.[172]

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[172] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

Received
September 15, 2011
Commission on
State Mandates

Therefore, the Commission finds that section I.2. of the permit (the Watershed URMP effectiveness assessment) is a new program or higher level of service.

B. Long Term Effectiveness Assessment (part I.5): As stated on pages 19-20 above, part I.5 requires the copermittees to collaborate to develop a Long Term Effectiveness Assessment (LTEA) that evaluates the copermittee programs on a jurisdictional, watershed, and regional level, and that emphasizes watershed assessment. The LTEA must build on the results of the August 2005 Baseline LTEA, and must be submitted to the Regional Board no later than 210 days before the permit expires. The LTEA must address the Regional objectives listed in part I.3 of the permit, as well as assess the effectiveness of the Receiving Waters Monitoring Program, and address outcome levels 1-6 as specified in attachment C of the permit.

In its October 2008 comments on the test claim, the State Board says that the LTEA requirement was imposed "so that the San Diego Water Board could properly evaluate the Copermittees' storm water program during the reapplication process." The State Board asserts that the LTEA provision is a federal mandate, citing 40 C.F.R. section 122.26, subdivisions (d)(2)(iv) and (v), in which (v) states that a permit application must include:

> *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

According to the State Board, "Even if the requirements to develop an LTEA are not specifically required by the federal regulations, the general discussion of the federal MEP standard is applicable here and supports the San Diego Water Board's determination that the region-wide LTEAs are necessary to meet the federal MEP standard."

In their February 2009 rebuttal comments, the claimants state:

> The program effectiveness component of the 2007 Permit mandates Jurisdictional (I.1), Watershed (I.2), Regional (I.3), Total Maximum Daily Loads ("TMDL") and BMP Implementation (I.4) and Long-term Effectiveness Assessment (I.5) requirements. This Section mandates multiple layers of program assessment, review and reporting. Such duplicative and collaborative efforts were not required under the 2001 Permit and are not required by federal law.

Claimants assert that there is no federal authority that states that the regional, jurisdictional and watershed program effectiveness training requirements are required to meet the minimum federal MEP standards. Claimants also state that permits in other jurisdictions do not have LTEA requirements. According to the claimants, "while portions of the federal regulations cited by the State permit region-wide or watershed-wide cooperation, there is no mandatory requirement for multiple layers of program effectiveness assessment."

Although the federal regulations require assessment of controls, they do not require the detailed assessment in the 2007 permit. They do not require, for example, collaboration with other copermittees, addressing specified objectives or outcome levels, or addressing jurisdictional, watershed, and regional programs. These requirements "exceed the mandate in that federal law

or regulation."[173] As in *Long Beach Unified School Dist. v. State of California*,[174] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[175] to impose these requirements. Thus, the Commission finds that part I.5 of the permit is not a federal mandate.

Because of the mandatory language on the face of the permit, the Commission finds that part I.5 of the permit is a state mandate for the claimants to do all of the following:

5. Long-term Effectiveness Assessment

a. Each Copermittee shall collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)[176] of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of

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[173] Government Code section 17556, subdivision (c).

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

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

[176] Part I.3.a.(6) of the permit states: At a minimum, the annual effectiveness assessment shall: (6) Include evaluation of whether the Copermittees' jurisdictional, watershed, and regional effectiveness assessments are meeting the following objectives: (a) Assessment of watershed health and identification of water quality issues and concerns. (b) Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns. (c) Evaluation of the need to address additional pollutant sources not already included in Copermittee programs. (d) Assessment of progress in implementing Copermittee programs and activities. (e) Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources. (f) Assessment of changes in discharge and receiving water quality. (g) Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality. (h) Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

Received
September 15, 2011
Commission on
State Mandates

> constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.
>
> e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

The next issue is whether the LTEA (part I.5) is a new program or higher level of service. The State Board, in its October 2008 comments, state as follows:

> The LTEA does not impose a new program or higher level of service. Rather, it requires the Copermittees to conduct a long term effectiveness assessment prior to submitting an application for reissuance of the Order in the next permit term and is necessary to support proposed changes to the Copermittees' programs."

The claimants, in their February 2009 comments, argue that the LTEA requirement in part I.5 does impose a new program or higher level of service. According to the claimants:

> Section F.7 of the 2001 Permit only required individual copermittees to develop long term effectiveness assessments for their Jurisdictional Urban Runoff Management Plan ("JURMP"). ... The 2001 Permit did not require the copermittees to collaborate to develop an overarching LTEA for regional, jurisdictional and watershed programs, and did not require the submission of a LTEA by a date certain in advance of the Permit expiration.

The Commission finds that the LTEA is a new program or higher level of service. The 2001 permit required JURMP assessment (in part F.7) and WURMP (in part J.2) as quoted above in the discussion on parts I.1 and I.2., but not an LTEA. The Fact Sheet/Technical Report for the 2007 permit states:

> Section I.5 (Long-Term Effectiveness Assessment) requires the Copermittees to conduct a Long-Term Effectiveness Assessment prior to their submittal of an application for reissuance of the Order. The Long-Term Effectiveness Assessment is necessary to provide support for the Copermittees' proposed changes to their programs in their ROWD. It can also serve as the basis for changes to the Order's requirements.

The Commission finds that the LTEA (part I.5) is a new program or higher level of service for three reasons. First, the scope of the assessment in the 2001 permit addresses only the JURMP and WURMP rather than "jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment" as in the 2007 permit (see the analysis of I.1 and I.2 above). Second, the 2001 permit did not require collaborating with all other copermittees on assessment. Third, the 2001 permit contains much less detail on what to include in the assessment, such as, for example, the eight regional objectives listed in I.3.a.(6), incorporated by reference in part I.5. Also, the LTEA must assess the "effectiveness of the Receiving Waters Monitoring Program ... [and] shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods." These methods were not required under the 2001 permit.

V. All Copermittee Collaboration (Part L)

Part L, labeled "All Permittee Collaboration," requires the copermittees to collaborate to address common issues and plan and coordinate activities, including developing a Memorandum of

Received
September 15, 2011
Commission on
State Mandates

Understanding (MOU), as specified. The Copermittees entered into an MOU effective in January 2008, which is attached to the test claim. The Copermittees allege activities involved with working body support and working body participation.

In comments submitted in October 2008, the State Board asserts that the permit condition in part L is necessary to meet the minimum MEP standard, quoting the following federal regulation regarding municipal stormwater permits:

> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]...[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[177]

The Commission finds that there is no federal mandate to develop a management structure (memorandum of understanding, or MOU) as required in part L of the 2007 permit. The federal regulation most on point requires an applicant (claimant) to demonstrate adequate legal authority "which authorizes or enables the applicant at a minimum to: [¶]...[¶] (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;"[178] All the federal regulations address is authority to establish an interagency agreement or memorandum of understanding, but do not require it to be implemented or specify its contents beyond "controlling ... the contribution of pollutants from one portion of the municipal system to another portion of the municipal system."

By contrast, part L of the permit requires the copermittees to collaborate, promote consistency among JURMP and WURMP and plan and coordinate activities required under the permit. It also requires joint execution and submission to the Regional Board an MOU with a minimum of seven specified requirements.

Thus, this permit activity "exceed[s] the mandate in that federal law or regulation."[179] As in *Long Beach Unified School Dist. v. State of California*,[180] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[181] to impose these requirements. Thus, the Commission finds that part L of the permit does not impose a federal mandate.

Based on the mandatory language in the permit, the Commission finds that part L of the permit is a state mandate on the claimants to do the following:

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[177] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[178] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[179] Government Code section 17556, subdivision (c).

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

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

1. Collaborate with all other Copermittees regulated under this Order to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.

(a) Jointly execute and submit to the Regional Board no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement that at a minimum:

(1) Identifies and defines the responsibilities of the Principal Permittee[182] and Lead Watershed Permittees;[183]

(2) Identifies Copermittees and defines their individual and joint responsibilities, including watershed responsibilities;

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

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

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

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

(7) Includes any and all other collaborative arrangements for compliance with this order.

The State Board, in its October 2008 comments, asserts that the management structure framework in part L of the 2007 permit is not a new program or higher level of service because:

> The 2001 permit required significant collaboration to address common issues and promote consistency across management programs [and] development of a management structure through execution of a formal agreement, meeting minimum specifications. It also required standardized reporting, including fiscal analysis.

The State Board also argues there is "minimal substantive difference" between the 2001 and 2007 permits in their requirements to establish "a formal cooperative arrangement and to implement regional urban runoff management activities. The 2007 Permit merely elaborates on and refines the 2001 requirements."

In its February 2009 rebuttal comments, the claimants assert that the 2001 and 2007 permits contain major substantive differences in their requirements for fiscal analyses of their jurisdictional programs.

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[182] The Principal Permittee is the County of San Diego.

[183] According to the permit: "Watershed Copermittees shall identify the Lead Watershed Permittee for their WMA [Watershed Management Area]."

Part L.1 of the 2007 permit, the first paragraph in L requiring collaboration, is identical to part N of the 2001 permit. The Commission finds, however, that the collaboration is a new program or higher level of service because it now applies to all the activities that are found to be a new program or higher level of service in the analysis above (i.e, not in the 2001 permit) including the Regional Urban Runoff Management Program.

Part L.1.a, regarding the MOU or formal agreement, is similar but not identical to part N of the 2001 permit. Both permits require adoption of a "Memorandum of Understanding [MOU], Joint Powers Authority, or other instrument of formal agreement." The 2001 permit, in part N.1.a, required the MOU to provide a management structure with the following contents: "designation of joint responsibilities, decision making, watershed activities, information management of data and reports, including the requirements under this Order; and any and all other collaborative arrangements for compliance with this Order."

By contrast, the 2007 permit, requires the MOU to be submitted to the Regional Board within 180 days after adoption of the permit and requires that the MOU, at a minimum:

(1) Identifies and defines the responsibilities of the principal Permittee and Lead Watershed Permittees;

(2) Identifies Copermittees and defines their individual and joint responsibilities;

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

(4) Establishes standards for conducting meetings, decision-making, and cost-sharing;

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

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

(7) Includes any and all other collaborative arrangements for compliance with this order.

The contents of the MOU specified in the 2001 permit, although stated with less specificity, are the same as those in the 2007 permit for numbers (1)-(2) and (7) above. Both permits require the MOU to contain "designation of joint responsibilities" and "collaborative arrangements for compliance with this order." Thus, the Commission finds that jointly executing and submitting those parts of the MOU to the Regional Board is not a new program or higher level of service.

The Commission finds that part L.1.a of the permit is a new program or higher level of service for all copermittees to do the following:

- Collaborate with all other Copermittees to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under the permit.
- Jointly execute and submit to the Regional Board, no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement which at a minimum: (3) Establishes a management structure to promote consistency and develop and implement regional activities; (4) Establishes standards for conducting meetings, decision-making, and cost-sharing; (5) Provides guidelines for

committee and workgroup structure and responsibilities; and (6) Lays out a process for addressing copermittee non-compliance with the formal agreement.

Summary of Issue 1: The Commission finds that the following parts of the 2007 permit are a state-mandated, new program or higher level of service.

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

- Collaborate with other copermittees to develop and implement a hydromodification management plan, as specified (D.1.g.), for private priority development projects. Reimbursement is not required for this activity for municipal priority development projects.
- Develop and submit an updated Model SUSMP that defines minimum Low-impact Development and other BMPs as specified (D.1.d.(7)-(8)), for private priority development projects. Reimbursement is not required for this activity for municipal priority development projects.
- Street sweeping (D.3.a.(5)) and reporting on street sweeping (J.3.a(3)x-xv);
- Conveyance system cleaning (D.3.a.(3)(b)(iii)) and reporting on conveyance system cleaning (J.3.a.(3)(c)(iv)-(viii));
- Educational component (D.5).
    - Educate each specified target community on the following topics: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID, source control, and treatment control (D.5.a.(1));
    - Educational programs shall emphasize underserved target audiences, high-risk behaviors, and 'allowable' behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources (D.5.a.(2));
    - Implement an education program that includes annual training only for planning boards and elected officials, if applicable, to have an understanding of the topics in (i) and (ii) (D.5.b.(1)(a)(i) & (ii));
    - Implement an education program so that its planning and development review staffs (and Planning Boards and Election Officials, if applicable) have an understanding of the topics in (iii) and (iv) as specified (D.5.b.(1)(a)(iii) & (iv));
    - Implement an education program that includes annual training prior to the rainy season so that [the Copermittee's] construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience: the topics in (iii) to (vi), as specified (D.5.b.(1)(b)(iii) & (iv));
        - Municipal Industrial/Commercial Activities (D.5.b.(1)(c));
        - Municipal Other Activities (D.5.b.(1)(d));
        - New Development and Construction Education (D.5.(b)(2));
        - Residential, General Public, and School Children Education (D.5.(b)(3)).

II. Watershed Urban Runoff Management Program (Parts E.2.f & E.2.g.)

- Identify and implement the Watershed activities as specified (E.2.f.).
- Collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings. (E.2.g.)

III. Regional Urban Runoff Management Program (Parts F.1, F.2 & F.3)

- Include developing and implementing a Regional Residential Education Program development and implementation in the RURMP, as specified (F.1.).
- Include developing the standardized fiscal analysis method required in permit part G in the RURMP (F.2.).
- Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs in the RURMP (F.3.).

IV. Program Effectiveness Assessment (Parts I.1, I.2 & I.5)

- Annually assess the effectiveness of each copermittee's JURMP, as specified (I.1.).
- Annually assess the effectiveness of each watershed group's WURMP (I.2.).
- Collaborate with the other copermittees to develop a Long-term Effectiveness Assessment, as specified, and submit it to the Regional Board as specified (I.5.).

V. All Permittee Collaboration (Part L)

- Collaborate with all other copermittees to address common issues, promote consistency among the JURMP and WURMP, and to plan and coordinate activities required under the permit.
- Jointly execute and submit to the Regional Board, no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement as specified (L.1.a. (3)-(5)).

Any further reference to the test claim activities is limited to these parts of the permit found to be a new program or higher level of service.

Issue 2: Do the test claim activities impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

The final issue is whether the permit provisions impose costs mandated by the state,[184] and whether any statutory exceptions listed in Government Code section 17556 apply to the test claim. Government Code section 17514 defines "cost mandated by the state" as follows:

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

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

Government Code section 17564 requires reimbursement claims to exceed $1000 to be eligible for reimbursement. In the test claim, the County of San Diego itemized the costs of complying with the permit conditions as follows:

Activity	Cost FY 2007-08
Regional Urban Runoff Management Program -Copermittee collaboration (F.2, F.3, L)	$260,031.09
Copermittee collaboration, Regional Residential Education, Program Development and Implementation (F.1)	$131,250.00
Jurisdictional Urban Runoff Management Program (JURMP) -hydromodification (D.1.g)	$630,000.00
JURMP Standard Urban Storm Water Mitigation Plans -low impact development (D.1.d)	$52,200.00
Long Term Effectiveness Assessment (I.5)	$210,000.00
Street Sweeping (D.3.a.(5) Equipment, Staffing, Contract	$3,477,190.00
Conveyance System Cleaning (D.3.a.(3)) and Reporting (J.2.a.(3)(c) iv – vii.	$3,456,087.00
Program Effectiveness Assessment (I.1 & I.2)	$392,363.00
Educational Surveys and Tests (D.5)	$62,617.00
Watershed Urban Runoff Management Program -Copermittee collaboration (E.2.f., E.2.g)	$1,632,893.00
Total	$10,304,631.09

Claimants submitted documentation in February 2010 that show the 2008-2009 cost for the permit activities is $18,014,213. These figures, along with those in the test-claim narrative and declarations submitted by the San Diego County and 18 cities,[185] illustrate that the costs to comply with the permit activities exceed $1,000. The Commission, however, cannot find "costs mandated by the state" within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, which is discussed below.

A. Claimants did not request the test claim activities within the meaning of Government Code section 17556, subdivision (a).

The first issue is whether the claimants requested or proposed the activities in the permit. The Department of Finance and the State Board both assert that claimants did so in their Report of

[185] The County and city declarations are attached to the test claim.

Received
September 15, 2011
Commission on
State Mandates

Waste Discharge. As discussed above, the claimants were required to submit a ROWD and Stormwater Quality Management Plan before the permit was issued.[186]

Government Code section 17556, subdivision (a), provides that the Commission shall not find costs mandated by the state if:

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

Based on the language of the statute, section 17556, subdivision (a), does not apply because the permit is not a statute, the claimants did not request "legislative authority" to implement the permit, and the record lacks any resolutions adopted by the claimants. Therefore, the Commission finds that the claimants did not request the activities in the permit within the meaning of Government Code section 17556, subdivision (a).

B. Claimants have fee authority under Government Code section 17556, subdivision (d), for the test claim activities that do not require voter approval under Proposition 218

Government Code section 17556, subdivision (d), states:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency … if, after a hearing, the commission finds any one of the following: [¶]…[¶] (d) The local agency … has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

The California Supreme Court upheld the constitutionality of Government Code section 17556, subdivision (d), in *County of Fresno v. State of California.*[187] The court, in holding that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes, stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly

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[186] Water Code section 13376; 40 Code of Federal Regulations, section 122.21 (a). The Federal regulation applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state-program provision) by reference. Also see the 2007 permit, page 2, part A.

[187] *County of Fresno v. State of California, supra,* 53 Cal.3d 482.

> declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*
>
> In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that "The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Considered within its context, the section effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.[188]

In another case about subdivision (d) of section 17556, *Connell v. Superior Court,*[189] the dispute was whether local agencies had sufficient fee authority for a mandate involving increased purity of reclaimed wastewater used for certain types of irrigation. The court cited statutory fee authority for the reclaimed wastewater, and noted that the water districts did not dispute their fee authority. Rather, the water districts argued that they lacked "sufficient" fee authority in that it was not economically feasible to levy fees sufficient to pay the mandated costs. In finding the fee authority issue is a question of law, the court stated that Government Code section 17556, subdivision (d), is clear and unambiguous, in that its plain language precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." The court rejected the districts' argument that "authority" as used in the statute should be construed as a "practical ability in light of surrounding economic circumstances" because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute (Wat. Code, § 35470) limited the authority of the districts to levy fees "sufficient" to cover their costs. Thus, the court concluded that the plain language of section 17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.[190]

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

[189] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382.

[190] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 398-402.

Received
September 15, 2011
Commission on
State Mandates

1. **Claimants' have regulatory fee authority (within the meaning of Gov. Code, § 17556, subd. (d)) under the police power sufficient to pay for the mandated activities that do not require voter approval under Proposition 218: the hydromodification plan and low-impact development.**

In its October 2008 comments, the State Board asserted that the claimants have fee authority to pay for the permit activities. Although the Board recognizes "limitations on assessing fees and surcharges under California law … [concerning] the percentage of voters who must approve the assessment" the Board points to examples of local agencies (Cities of Los Angeles, San Clemente, and Palo Alto) that have successfully adopted an assessment. The State Board also argues that the cities' trash collection responsibilities may also include street sweeping and conveyance system cleaning for which the city could charge fees, and that developer fees could be charged for hydromodification and low impact development.

Claimants, in comments submitted in February 2009, state that they cannot unilaterally impose a fee to recover the cost to comply with the 2007 permit on water or sewer bills sent to residents because of *Howard Jarvis Taxpayer Assoc. v. City of Salinas,*[191] in which the court invalidated a stormwater management utility fee imposed by the city on all owners of developed parcels in the city. The court held that article XIII D (Proposition 218) of the California Constitution "required the city to subject the proposed storm drainage fee to a vote of the property owners or the voting residents of the affected area."[192] As to the argument that claimants can put the fee to a vote in their jurisdictions, claimants state as follows:

> Articles XIII C and XIII D, which were added to the Constitution by Proposition 218, regulate the imposition of general and special taxes as well as the imposition of special assessments and property related fees. In each of these cases the question of whether to impose a tax, special assessment or a property related fee must be submitted to and approved by the voters. And, in the case of a special tax, and in certain instances the imposition of a fee or charge, the tax or fee must be approved by a two-thirds vote of the resident voters. The State fails to cite any authority that requires the copermittees to first submit the question of whether to impose a tax or fee to the voters and have them reject the proposition. Such a requirement would render all mandate claims moot, without first submitting the question of whether to impose a tax or assessment to a vote of the electorate.

The issue of local fee authority for municipal stormwater permit activities in this permit cannot be answered without discussing regulatory fee authority under the police power and the limitations on that authority via the voter-approval requirement in article XIII D of the California Constitution (Proposition 218).

Case law has recognized three general categories of local agency fees or assessments: (1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power.[193] The regulatory and development fees are discussed below in the context of

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

[192] *Id.* at page 1358-1359.

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

XIII D (Proposition 218) that would allow the claimants to impose fees for the activities in the test claim related to development.

Regulatory fee authority under the police power: The law on local government fee authority begins with article XI, section 7, of the California Constitution, which states: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Article XI, section 7, includes the authority to impose fees, and courts have held that "the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution."[194]

Water pollution prevention is also a valid exercise of government police power.[195]

In *Sinclair Paint v. State Board of Equalization*,[196] the California Supreme Court upheld a fee on manufacturers of paint that funded a child lead-poisoning program that provided evaluation, screening, and medically necessary follow-up services for children who were deemed potential victims of lead poisoning. The program was entirely supported by fees assessed on manufacturers or other persons contributing to environmental lead contamination. In upholding the fee, the court ruled that it was a regulatory fee imposed under the police power and not a special tax requiring a two-thirds vote under article XIII A, section 4, of the California Constitution. The court stated:

> From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less "regulatory" in nature than the initial permit or licensing programs that allowed them to operate.
>
> Viewed as a mitigating effects measure, [the fee] is comparable in character to several police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.[197] [Emphasis added.]

Regulatory fees also help to prevent or mitigate pollution, as the Court said: "imposition of 'mitigating effects' fees in a substantial amount ... also 'regulates' future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products."[198] The court also recognized that regulatory fees do not depend on government-conferred benefits or privileges.[199]

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[194] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 662, in which a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without a two-thirds affirmative vote of the county electors.

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

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

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

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

[199] *Id.* at page 875.

Although the holding in *Sinclair Paint* applied to a state-wide fee, the court's language (treating "ordinances" the same as "statutes") recognizes that local agencies also have police power to impose regulatory fees, and it relied on local government police power cases in its analysis.[200]

Other cases have defined a regulatory fee as an imposition that funds a regulatory program[201] or that distributes the collective cost of a regulation"[202] and is "enacted for purposes broader than the privilege to use a service or to obtain a permit. ...the regulatory program is for the protection of the health and safety of the public."[203] Courts will uphold regulatory fees if they do not exceed the reasonable cost of providing services necessary to the activity on which the fee is based and are not levied for an unrelated revenue purpose.

In upholding regulatory fees for environmental review by the California Department of Fish and Game, the court of appeal summarized the following rules on regulatory fees:

> A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation. [Citations omitted.] Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement. [Citations omitted.] Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. [Citations omitted.] Legislators "need only apply sound judgment and consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee.[204] [Emphasis added.]

In *Tahoe Keys Property Owner's Assoc. v. State Water Resources Control Board*,[205] the court refused to issue a preliminary injunction against collecting a pollution mitigation fee of $4000 for each lot developed in the Tahoe Keys subdivision of Lake Tahoe. The fees were to be used for mitigation projects designed to achieve a net reduction in nutrients generated by the Tahoe Keys development. The court said: "on the face of the regulation, there appears to be a sufficient

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[200] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 873. The Court stated: "Because of the close, 'interlocking' relationship between the various sections of article XIII A (Citation omitted) we believe these "special tax" cases [under article XIII A, § 3, state taxes] may be helpful, though not conclusive, in deciding the case before us. The reasons why particular fees are, or are not, "special taxes" under article XIII A, section 4, [local government taxes] may apply equally to section 3 cases."

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

[202] *Id.* at 952.

[203] *Ibid.*

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

[205] *Tahoe Keys Property Owner's Assn. v. State Water Resources Control Board* (1993) 23 Cal.App.4th 1459.

nexus between the effect of the regulation and the objectives it was supposed to advance to support the regulatory scheme [mitigation of pollution in Lake Tahoe]."[206]

A variety of local agency regulatory fees have been upheld for various programs, including: processing subdivision, zoning, and other land-use applications,[207] art in public places,[208] remedying substandard housing,[209] recycling,[210] administrative hearings under a rent-control ordinance,[211] signage,[212] air pollution mitigation,[213] and replacing converted residential hotel units.[214] Fees on developers for environmental mitigation under the California Environmental Quality Act have also been upheld.[215]

Given the variety of examples where regulatory fees have been upheld, and the broad range of costs to which they may be applied (including those for 'administration'), the claimants have fee authority under the police power to impose fees for the permit activities that are a state-mandated new program or higher level of service. But a determination as to whether the claimants' fee authority is sufficient, within the meaning of Government Code section 17556, subdivision (d), to pay for the mandated activities and deny the test claim, cannot be made without analysis of the limitations on the fee authority imposed by Proposition 218.

Regulatory fee authority is limited by voter approval under Proposition 218: With some exceptions, local government fees or assessments that are incident to property ownership are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 in 1996. Article XIII D defines a fee as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including a user fee or charge for a property-related service." It defines an assessment as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property [and] includes, but is not limited to, "special assessment,' 'benefit assessment,' 'maintenance assessment,' and 'special assessment tax.'"

Among other procedures, new or increased property-related fees require a majority-vote of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners (art. XIII D, § 6, subd. (c)). Assessments must also be approved by owners of the affected parcels (art. XIII D, § 4, subd.(d)). Expressly exempt from voter

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[206] *Id.* at page 1480.

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

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

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

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

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

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

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

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

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

approval, however, are property-related fees for sewer, water, or refuse collection services (art. XIII D, § 6, subd. (c)).

In 2002, an appellate court in *Howard Jarvis Taxpayers Association v. City of Salinas, supra,* 98 Cal.App.4th 1351, found that a city's charges on developed parcels to fund stormwater management were property-related fees, and were not covered by Proposition 218's exemption for "sewer" or "water" services. This means that an election would be required to charge stormwater fees if they are imposed "as an incident of property ownership."

The issue of whether a local agency has sufficient fee authority for the mandated activities under Government Code section 17556, subdivision (d), in light of the voter approval requirement for fees under article XIII D (Proposition 218) is one of first impression for the Commission.

The Commission finds that a local agency does not have sufficient fee authority within the meaning of Government Code section 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "The local agency … has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee without the consent of the voters or property owners.

Additionally, it is possible that the local agency's voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate. Denying reimbursement under these circumstances would violate the purpose of article XIII B, section 6, which is to "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[216]

In its January 2010 comments on the draft staff analysis, the State Board disagrees that "the requirement to subject new or increased fees to these voting or protest requirements strips the claimants of 'fee authority' within the meaning of Government Code section 17556, subdivision (d)." The State Board cites *Connell v. Superior Court,*[217] in which the water districts argued that they lacked "sufficient" fee authority because it was not economically feasible for them to levy fees that were sufficient to pay the mandated costs. The *Connell* court determined that "the plain language of the statute [Gov. Code, § 17556, subd. (d)] precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program."[218] The State Board equates the Proposition 218 voting requirement with the economic impracticability faced by the water districts in *Connell.*

The claimants disagree, citing a lack of authority that requires them to first submit the question of whether to impose a tax or fee to the voters and have them reject the proposition. According

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[216] *County of San Diego, supra,* 15 Cal.4th 68, 81.

[217] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382.

[218] *Id.* at page 401.

to the claimants, such a requirement would render all mandate claims moot, without first submitting the question of whether to impose a tax or assessment to a vote of the electorate.

The Commission disagrees with the State Board. The Proposition 218 election requirement is not like the economic hurdle to fees in *Connell*. Absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d). The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one. Without voter or property owner approval, the local agency lacks the "authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program."[219]

In fact, the fee at issue in the *Connell* case (Wat. Code, § 35470) was amended by the Legislature in 2007 to conform to Proposition 218. Specifically, the Water Code statute now requires compliance with "the "notice, protest, and hearing procedures in Section 53753 of the Government Code."[220] This Government Code statute implements Proposition 218.

For these reasons, the Commission finds that local agencies do not have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d) to deny the test claim for those activities that would condition the fee or assessment on voter or property-owner approval under Proposition 218 (article XIII D). The Commission finds that Proposition 218 applies to all the activities in this test claim (except for the hydromodification and LID activities that are related to priority development projects discussed below) so that they impose "costs mandated by the state" (within the meaning of Gov. Code, § 17556, subd. (d)). To the extent that property-owner or voter-approved fees or assessments are imposed to pay for any of the permit activities found above to be a state-mandated new program or higher level of service, the fee or assessment would be identified as offsetting revenue in the parameters and guidelines to offset the claimant's costs in performing those activities.

Fees imposed for two of the test-claim activities, however, i.e., for the hydromodification management plan and low-impact development, would not be subject to voter approval under Proposition 218, as discussed below.

Fees as a condition of property development are not subject to Proposition 218: Proposition 218 does not apply to development fees, including those imposed on activities in part D of the permit. Article XIII D expressly states that it shall not be construed to "affect existing laws relating to the imposition of fees or charges as a condition of property development."[221]

Moreover, the California Supreme Court has ruled that fees imposed "as an incident to property ownership" are subject to Proposition 218, but fees that result from the owner's voluntary

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[219] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 401.

[220] Water Code section 35470, as amended by Statutes 2007, chapter 27. Section 53753 of the Government Code requires compliance with "the procedures and approval process set forth in Section 4 of Article XIII D of the California Constitution" for assessments.

[221] California Constitution, article XIII D, section 1, subdivision (b).

decision to seek a government benefit are not.[222] Thus, fees imposed as a result of the owner's voluntary decision to undertake a development project are not subject to Proposition 218, because they are not merely incident to property ownership.[223]

The final issue, therefore, is whether claimants may impose fees that are sufficient within the meaning of Government Code section 17556, subdivision (d), to pay for the activities in the permit related to development: the hydromodification management plan (part D.1.g), and low-impact development (part D.1.d.(7)&(8)). The Commission finds claimants have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d), and that these activities do not impose costs mandated by the state and are not reimbursable.

Hydromodification management plan: Part D.1 of the permit describes the development planning component of the JURMP. Part D.1.g. requires each copermittee to collaborate with other copermittees to develop and implement and report on developing a hydromodification management plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects, as specified. As discussed above, the HMP is a state-mandated new program or higher level of service for only private priority development projects. The purpose of the HMP is:

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

According to the permit, priority development projects are:

> a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

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[222] In *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, the court held that water service fees were subject to Proposition 218, but that water connection fees were not. In *Apartment Assoc. of Los Angeles County v.City of Los Angeles, supra,* 24 Cal.4th 830, 839-840, the court held that apartment inspection fees were not subject to Proposition 218 because they were not imposed on property owners as such, but in their capacity as landlords.

[223] A recent report by the Office of the Legislative Analyst concurs with this conclusion: "Local governments finance stormwater clean–up services from revenues raised from a variety of fees and, less frequently, through taxes. Property owner fees for stormwater services typically require approval by two–thirds of the voters, or a majority of property owners. Developer fees and fees imposed on businesses that contribute to urban runoff, in contrast, are not restricted by Proposition 218 and may be approved by a vote of the governing body. Taxes for stormwater services require approval by two–thirds of the electorate." Office of the Legislative Analyst. *California's Water: An LAO Primer* (October 22, 2008) page 56. [Emphasis added.] See: <http://www.lao.ca.gov/2008/rsrc/water_primer/ water_primer_102208.pdf> as of October 22, 2008.

The priority development project categories listed in part D.1.d.(2) are:

(a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments.

(b) Commercial developments greater than one acre. [as specified]

(c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.).

(d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.

(e) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except … hydromodification requirement D.1.g.

(f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater.

(g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands.

(h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce.

(i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles.

(j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

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The Commission finds that claimants have authority to impose fees for complying with the HMP activities in permit part D.1.g. for priority development projects, and their authority is sufficient within the meaning of Government Code section 17556, subdivision (d), in that the fee would not be subject to Proposition 218 voter approval. These activities involve collaborating with other copermittees to develop and implement a hydromodification management plan, and reporting on it. Because regulatory fees, pursuant to article XI, section 7 of the California Constitution, could be imposed on these priority development projects to pay for the costs of HMP, the Commission finds that permit part D.1.g. does not impose costs mandated by the state.

Low impact development: Low impact development is defined in Attachment C of the permit as a "storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions." The purpose of LID is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects." LID best management practices include draining a portion of impervious areas into pervious areas prior to discharge into the storm drain, and constructing portions of priority development projects with permeable surfaces.

Part D.1.d.(7) requires updating the Standard Urban Storm Water Mitigation Plans (SUSMP) to include low impact development requirements, as specified, including BMP requirements that meet or exceed the requirements of sections D.1.d.(4)[224] and D.1.d.(5).[225] Both D.1.d.(4) and D.1.d.(5) are the LID requirement implemented at priority development projects.

Part D.1.d.(8) requires permittees to develop and submit an updated model SUSMP that defines minimum low impact development and other BMP requirements to incorporate into the permittees local SUSMPs for application to priority development projects.

The Commission finds that claimants have authority to impose fees for complying with the LID activities in parts D.1.d.(7) and D.1.d.(8) of the permit, and their authority is sufficient within the meaning of Government Code section 17556, subdivision (d), in that they are not subject to Proposition 218 voter approval. Because regulatory fees, pursuant to article XI, section 7 of the California Constitution, could be imposed on the priority development projects to pay for the costs associated with LID, the Commission finds that permit parts D.1.d.(7) and D.1.d.(8) do not impose costs mandated by the state.

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[224] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

[225] Part D.1.d.(5), regarding "Source control BMP Requirements" requires permittees to require each Priority Development Project to implement source control BMPs that must "Minimize storm water pollutants of concern in urban runoff" and include five other specific criteria.

2. Claimants also have fee authority regulated by the Mitigation Fee Act that is sufficient (within the meaning of Gov. Code, § 17556, subd. (d)) to pay for the hydromodification and low-impact development permit activities.

Development fees are also an exercise of the local police power under article XI, section 7 of the California Constitution.[226] A fee is considered a development fee if it is exacted in return for building permits or other governmental privileges so long as the amount of the fee bears a reasonable relation to the development's probable costs to the community and benefits to the developer.[227] Development fees are not restricted by Proposition 218 as discussed above.

Fees on developers as conditions of permit approval are governed by the Mitigation Fee Act (Gov. Code, §§ 66000-66025) which defines a "fee" as:

> [A] monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include ... fees for processing applications for governmental regulatory actions or approvals ...."[228] [Emphasis added.]

Public facilities are defined in the Act as "public improvements, public services, and community amenities."[229]

When a local agency imposes or increases a fee as a condition of development approval, it must do all of the following: (1) Identify the purpose of the fee; (2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. (3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed; and, (4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project upon which the fee is imposed. (Gov. Code, § 66001, subd. (a),)

The city or county must also determine whether there is a reasonable relationship between the specific amount of the fee and the costs of building, expanding, or upgrading public facilities. These determinations, known as nexus studies, are in writing and must be updated whenever new fees are imposed or existing fees are increased.[230] A fee imposed "as a condition of approval of

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

[227] *Sinclair Paint, supra,* 15 Cal.4th at page 875.

[228] Government Code section 66000, subdivision (b).

[229] Government Code section 66000, subdivision (d).

[230] Government Code section 66001, subdivision (b). The Act also requires cities to segregate fee revenues from other municipal funds and to refund them if they are not spent within five years. Any person may request an audit to determine whether any fee or charge levied by the city or county exceeds the amount reasonably necessary to cover the cost of the service provided (Gov. Code, §66006, subd. (d)). Under Government Code section 66014, fees charged for zoning changes, use permits, building permits, and similar processing fees are subject to the same nexus requirements as development fees. Lastly, under California Government Code

a proposed development or development project" is limited to the estimated reasonable cost of providing the service or facility.[231] This is in contrast to regulatory fees, which do not depend on government-conferred benefits or privileges.[232]

The Mitigation Fee Act defines a "development project" as "any project undertaken for the purpose of development ... includ[ing] a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate." (Gov. Code, § 66000, subd. (a).)

A fee does not become a development fee simply because it is made in connection with a development project. Approval of the development must be conditioned on the payment of the fee. The Mitigation Fee Act is limited to situations where the fee or exaction is imposed as a condition of approval of a development project.[233]

Because local agencies may make development of priority development projects conditional on the payment of a fee, the Commission finds that the claimants have fee authority, governed by the Mitigation Fee Act, that is sufficient within the meaning of Government Code section 17556, subdivision (d), to pay for the hydromodification management plan and low-impact development activities. As discussed below, HMP and LID are "public facilities," which the Mitigation Fee Act defines as "public improvements, public services, and community amenities."[234]

The County of San Diego, in its January 2010 comments on the draft staff analysis, disagrees that it can impose a fee for the hydromodification plan (HMP) activities in the permit, stating that development and implementation of the HMP does not constitute a "public facility."

The Commission disagrees. The purpose of the permit is to prevent or abate pollution in waterways and beaches in San Diego County. More specifically, the purpose of the HMP is:

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such increased rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

All these stated purposes of the HMP provide public services or improvements, or community amenities within the meaning of the Act.[235] Moreover, the California Supreme Court stated that the Act "concerns itself with development fees; that is, fees imposed on development projects in

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section 66020, agencies collecting fees must provide project applicants with a statement of the amounts and purposes of all fees at the time of fee imposition or project approval.

[231] Government Code section 66005, subdivision (a).

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

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

[234] Government Code section 66000, subdivision (d).

[235] Government Code section 66000, subdivision (d).

order to finance public improvements or programs that bear a 'reasonable relationship' to the development at issue."[236] The HMP is such a program.

Similarly, the purposes of LID are to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects" and to reduce stormwater runoff from priority development projects. These activities are public services or improvements that fall within the Act's definition of public facility.

The County also argues that under the Mitigation Fee Act, the local agency must determine that there is "a reasonable relationship between the fee's use and the type of development project on which the fee is imposed." The County argues that there is no reasonable relationship between the costs incurred by claimants to develop and implement the HMP and a particular development project on which the fee might be imposed.

Again, the Commission disagrees. Every time a developer proposes a project that falls within one of the "priority development project" categories listed above, and the developer has "not yet begun grading or construction activities at the time any updated SUSMP or hydromodification requirement commences," the local agency may impose a fee subject to the Mitigation Fee Act. The fee would be for the costs of developing and implementing the HMP to "manage increases in runoff discharge rates and durations from all Priority Development Projects [that] cause ... impacts to beneficial uses and stream habitat due to increased erosive force." The local agency may also impose a fee on priority development projects to comply with LID, the purpose of which is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects" and to reduce stormwater runoff.

Finally, the County argues that assessing fees on a private developer who submits a project for approval to recover the costs of reviewing and approving a particular project is "specifically excluded from the definition of 'fee' under the Act." The definition of fee in the Act states that it "does not include ... fees for processing applications for governmental regulatory actions or approvals ...." (Gov. Code, § 66000, subd. (b).)

The Commission disagrees that an HMP fee would be for "processing applications for governmental regulatory actions or approvals." Rather, it would be for permit approval of priority development projects, and used to implement the HMP and LID requirements. In *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 698, the California Supreme Court distinguished between regulatory fees that implement state and local building safety standards under the Health and Safety Code and developer fees subject to the Mitigation Fee Act by stating: "These regulatory fees fund a program that supervises how, not whether, a developer may build." Thus, the Commission finds that the developer fees may be imposed for permit approval for priority development projects if the permit is conditional on payment of the fee, and the fee is used for HMP and LID compliance.

In sum, the Commission finds that the claimants have fee authority governed by the Mitigation Fee Act that is sufficient (within the meaning of Gov. Code, § 17556, subd. (d), to pay for the following parts of the permit that are related to development: the hydromodification management plan (part D.1.g) and updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (part D.1.d.(7)&(8)).

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

3. Claimants' fee authority under Public Resources Code section 40059, or via benefit assessments, is not sufficient to pay for street sweeping, and Government Code section 17556, subdivision (d), does not apply to reporting on street sweeping.

Street sweeping is one test claim activity that is typically funded by local agency fees or assessments. Fees and assessments are both governed by Proposition 218.

The permit (in part D.3.a.5) requires a program to sweep "improved (possessing a curb and gutter) municipal roads, streets, highways, and paring facilities" at intervals depending on whether they are identified as consistently generating the highest volumes, moderate volumes, or low volumes of trash and/or debris. Reporting on street sweeping, such as curb-miles swept and tons of material collected, is also required (part J.3.a.(3)(c)x-xv).

Some local agencies collect fees for street sweeping for their refuse fund, such as the City of Pasadena.[237] Other local agencies, e.g., the County of Fresno[238] and the City of La Quinta,[239] collect an assessment for street sweeping as a street maintenance activity. Both approaches are discussed below in light of the procedural requirements under Proposition 218.

Fees for street sweeping as refuse collection/solid waste handling: Article XI, section 7 of the California Constitution states: "A county or city may make and enforce within its limits all local, police, sanitary or other ordinances and regulations not in conflict with general laws." Local agency fees for refuse collection are authorized by Public Resources Code section 40059, which states:

> (a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following:
>
> (1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services. [Emphasis added.]

"Solid waste" is defined in Public Resources Code section 40191 as:

> [A]ll putrescible and nonputrescible solid, semisolid, and liquid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, demolition and construction wastes, abandoned vehicles and parts thereof, discarded home and industrial appliances, dewatered, treated, or chemically fixed sewage sludge

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[237] City of Pasadena, Agenda Report, Resolution Nos. 8942 and 8943, April 27, 2009, "Public Hearing: Amendment to the General Fee Schedule to Increase the Residential Refuse Collection Fees and Solid Waste Franchise Fees." One of the findings in the resolution is: "Whereas, street sweeping is a refuse collection service involving solely the collection, removal and disposal of solid waste from public rights of way, and is, therefore, properly allocated to the Refuse Fund."

[238] County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

[239] City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

> which is not hazardous waste, manure, vegetable or animal solid and semisolid wastes and other discarded solid and semisolid wastes.[240]

"Solid waste handling" is defined in Public Resources Code section 40195 as "the collection, transportation, storage, transfer, or processing of solid wastes." Given the nature of material swept from city streets, street sweeping falls under the rubric of 'solid waste handling.'

Under Proposition 218, "refuse collection" is expressly exempted from the voter-approval requirement (article XIII D, § 6, subd. (c).). Although "refuse collection" has no definition in article XIII D, the plain meaning of refuse[241] collection is the same as solid waste handling, as the dictionary definition of "refuse" and the statutory definition of "solid waste" both refer to rubbish and trash as synonyms. Refuse is collected via solid waste handling.

To impose or increase refuse collection fees, the local agency must provide mailed written notice to each parcel owner on which the fee will be imposed, and conduct a public hearing not less than 45 days after mailing the notice. If written protests against the proposed fee are presented by a majority of the parcel owners, the local agency may not impose or increase the fee (article XIII D, § 6, subd. (a)(2)). In addition, revenues are: (1) not to exceed the funds required to provide the service, (2) shall not be used for any other purpose than to provide the property-related service, and the amount of the fee on a parcel shall not exceed the proportional cost of the service attributable to the parcel. And the service must be actually used by or immediately available to the property owner (article XIII D, § 6, subd. (b)).

Government Code, section 17556, subdivision (d), does not apply to street sweeping because the fee is contingent on the outcome of a written protest by a majority of the parcel owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "The local agency … has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee if it is protested by a majority of parcel owners.

Additionally, it is possible that a majority of land owners in the local agency may never allow the proposed fee, but the local agency would still be required to comply with the state mandate. This would violate the purpose of article XIII B, section 6, which is to "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[242]

Thus, the Commission finds that fee authority under Public Resources Code section 40059 is not sufficient to pay for the mandated program or increased level of service in permit parts D.3.a.5 (street sweeping). Therefore, the Commission finds that street sweeping imposes costs mandated by the state and is reimbursable.

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[240] This definition also excludes hazardous waste, radioactive waste and medical waste, as defined.

[241] "Refuse" is defined as " Items or material discarded or rejected as useless or worthless; trash or rubbish." <http://dictionary.reference.com/browse/refuse> as of November 23, 2009.

[242] *County of San Diego, supra,* 15 Cal.4th 68, 81.

Any proposed fees that are not blocked by a majority of parcel owners for street sweeping must be identified as offsetting revenue in the parameters and guidelines.

Fees for street sweeping reports: Proposition 218 does not contain an express exemption on voter approval for reporting on street sweeping, only for "refuse collection." Moreover, Proposition 218 (art. XIII D, § 6, subd. (b)(4)) states: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." The permit does not require the street sweeping reports be available to property owners, only that the reports be submitted to the Regional Board. For these reasons, the Commission finds that Government Code section 17556, subdivision (d), does not apply to reporting on street sweeping, so that part J.3.a.(3)(c)x-xv of the permit imposes costs mandated by the state and is reimbursable.

Assessments for street operation and maintenance: As mentioned above, some local agencies collect an assessment for street sweeping, e.g., the County of Fresno[243] and the City of La Quinta.[244] Assessments are defined as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property. 'Assessment' includes, but is not limited to, 'special assessment,' 'benefit assessment,' 'maintenance assessment' and 'special assessment tax.'" (article XIII D, § 2, subd. (b).) The terms "maintenance and operation" of "streets" and "drainage systems," although used in article XIII D, are not defined in it. The plain meaning of maintenance of streets and drainage systems, however, would include street sweeping because "maintenance" means "the work of keeping something in proper condition; upkeep."[245] Clean streets are used not only for transportation, but for conveying storm water to storm drains.

The Supreme Court defined special assessments as follows:

> A special assessment is a "'compulsory charge placed by the state upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein....' " [Citation.]' [Citation.] In this regard, a special assessment is 'levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement.' [Citation.] 'The rationale of special assessment[s] is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public.[246]

The Supreme Court summarized the constitutional procedures for creating an assessment district.

> Under Proposition 218's procedures, local agencies must give the record owners of all assessed parcels written notice of the proposed assessment, a voting ballot, and a statement disclosing that a majority protest will prevent the assessment's

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[243] County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

[244] City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

[245] <http://dictionary.reference.com/browse/maintenance> as of December 7, 2009.

[246] *Silicon Valley Taxpayers Ass'n. v. Santa Clara Open Space Authority* (2008) 44 Cal.4th 431, 442.

> passage. (Art. XIII D, § 4, subds. (c), (d).) The proposed assessment must be "supported by a detailed engineer's report." (Art. XIII D, § 4, subd. (b).) At a noticed public hearing, the agencies must consider all protests, and they "shall not impose an assessment if there is a majority protest." (Art. XIII D, § 4, subd. (e).) Voting must be weighted "according to the proportional financial obligation of the affected property." (*Ibid.*)[247]

Proposition 218 dictated that as of July 1, 1997, existing assessments were to comply with its procedural requirements, but an exception was created for "any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control." (art. XIII D, § 5, subd. (a), emphasis added.) This means that the procedural requirements of Proposition 218 apply only to increases in assessments for street sweeping that were imposed after Proposition 218 was enacted.[248]

Absent any evidence in the record that assessments imposed before July 1, 1997 for street sweeping are sufficient to pay for the street sweeping specified in part D.3.a. of the permit, the Commission cannot find that assessments imposed before that date would pay for the costs mandated by the state for street sweeping within the meaning of Government Code section 17556, subdivision (d).

Should a local agency determine that its existing assessments are not sufficient to pay for the mandated street sweeping, it can raise assessments by following the article XIII D (Proposition 218) procedures detailed above. Those procedures, however, include an election and a protest, both of which were found above to extinguish local fee authority sufficient to pay for the mandate and to block the application of Government Code section 17556, subdivision (d).

Thus, to the extent that the claimants impose or increase assessments to pay for the street sweeping, they would be identified as offsetting revenue in the parameters and guidelines.

4. Claimants' fee or assessment authority under Health and Safety Code section 5471 is not sufficient to pay for conveyance-system cleaning, and Government Code section 17556, subdivision (d), does not apply to reporting on conveyance-system cleaning

Conveyance-system cleaning for operation and maintenance of the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc.) is required in the permit (part D.3.a.(3)). Specifically, claimants are required to clean in a timely manner "Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity…. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner." Claimants are also required to report on the number of catch basins and inlets inspected and cleaned (J.3.a.(3)(c)iv-viii).

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[247] *Silicon Valley Taxpayers Ass'n v. Santa Clara Open Space Authority, supra,* 44 Cal.4th 431, 438.

[248] See also *Howard Jarvis Taxpayers Ass'n. v. City of Riverside* (1999) 73 Cal.App.4th, 679, holding that a preexisting streetlighting assessment is 'exempt under Proposition 218.'

Local agencies have fee authority under Health and Safety Code section 5471 to charge fees for storm drainage maintenance and operation as follows:

> [A]ny entity[249] shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system. ... Revenues derived under the provisions in this section, shall be used only for the acquisition, construction, reconstruction, maintenance, and operation of water systems and sanitation, storm drainage, or sewerage facilities .... [Emphasis added.]

This plain meaning of this statutory fee for storm drain operation and maintenance would include conveyance-system cleaning as required in the permit (part D.3.a.(3)(iii)), which the permit specifies as cleaning "catch basins or storm drain inlets." This cleaning is within the operation and maintenance of the storm drains.

The statutory fee, adopted in 1953, is now subject to the procedural requirements of Proposition 218. As it states in subdivision (d) of Health and Safety Code section 5471:

> If the procedures set forth in this section as it read at the time a standby charge was established were followed, the entity may, by ordinance adopted by a two-thirds vote of the members of the legislative body thereof, continue the charge pursuant to this section in successive years at the same rate. If new, increased, or extended assessments are proposed, the entity shall comply with the notice, protest, and hearing procedures in Section 53753 of the Government Code [the codification of the Proposition 218 procedural requirements].

Proposition 218 does not exempt from voting requirements fees for storm drain maintenance like it does for "water, sewer, and refuse collection" in section 6 (c) of article XIII D. In fact, in *Howard Jarvis Taxpayers Ass'n. v. City of Salinas* (2002) 98 Cal.App.4th 1351, the court invalidated a local storm drain fee and held that the exemption from an election for sewer fees does not include storm drainage fees. As to new or increased assessments imposed for storm drainage operation and maintenance, they would be subject to the same election requirement of Proposition 218 (art. XIII D, § 4, subd. (e)) as for other assessments.

Therefore, the Commission finds that local agencies do not have sufficient authority under section 5471 of the Health and Safety Code to impose fees or assessments (under Gov. Code § 17556, subd. (d)) for conveyance system cleaning as required by part D.3.a.(3)(iii) of the permit or reporting as required by part J.3.a.(3)(c)iv-viii of the permit.

Fees or assessments for conveyance-system reports: The Commission also finds that local agencies do not have fee or assessment authority for reporting on conveyance-system (in part J.3.a.(3)(c)iv-viii) on the number of catch basins and inlets inspected and cleaned. Fees or

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[249] Entity is defined to include "counties, cities and counties, cities, sanitary districts, county sanitation districts, sewer maintenance districts, and other public corporations and districts authorized to acquire, construct, maintain and operate sanitary sewers and sewerage systems." Health and Safety Code section 5470, subdivision (e).

Received
September 15, 2011
Commission on
State Mandates

assessments imposed for this reporting would be subject to a vote of parcel owners. Moreover, Proposition 218 (art. XIII D, § 6, subd. (b)(4)) states: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." The permit does not require the reports on conveyance- system cleaning be available to property owners, only that the reports be submitted to the Regional Board. For these reasons, the Commission finds that Government Code section 17556, subdivision (d), does not apply to reporting on conveyance-system cleaning, and that part J.3.a.(3)(c)iv-viii of the permit imposes costs mandated by the state within the meaning of Government Code section 17556, subdivision (d), and is reimbursable.

Any revenue from existing assessments, or assessments obtained after voter approval, for conveyance system cleaning would be included in the parameters and guidelines as offsets to reimbursement.

C. Claimants have potential fee authority and offsetting revenue if they comply with the requirements of Senate Bill 310 (Stats. 2009, ch. 577)

Effective January 2010, Senate Bill 310 (Stats. 2009, ch. 577) was enacted to add Water Code provisions authorizing local agencies to adopt watershed improvement plans.

SB 310 is intended to establish multiple watershed-based pilot programs.[250] The bill creates the California Watershed Improvement Act of 2009 (commencing with Wat. Code, § 16000). Pursuant to Water Code section 16101, each county, city, or special district that is a copermittee under a NPDES permit ***may*** develop either individually or jointly a watershed improvement plan. The process for developing a watershed improvement plan is to be conducted consistent with all applicable open meeting laws. Each county, city, or special district, or combination thereof, is to notify the appropriate Regional Board of its intention to develop a watershed improvement plan.

The watershed improvement plan is voluntary – it is not necessarily the same watershed activities required by the permit in the test claim.

SB 310 includes the following local agency fee authority:

> 16103. (a) In addition to making use of other financing mechanisms that are available to local agencies to fund watershed improvement plans and plan measures and facilities, a county, city, special district, or combination thereof may impose fees on activities that generate or contribute to runoff, stormwater, or surface runoff pollution, to pay the costs of the preparation of a watershed improvement plan, and the implementation of a watershed improvement plan if all of the following requirements are met:
>
> (1) The Regional Board has approved the watershed improvement plan.
>
> (2) The entity or entities that develop the watershed improvement plan make a finding, supported by substantial evidence, that the fee is reasonably related to the cost of mitigating the actual or anticipated past, present, or future adverse effects of the activities of the feepayer. "Activities," for the purposes of this paragraph,

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

means the operations and existing structures and improvements subject to regulation under an NPDES permit for municipal separate storm sewer systems.

(3) The fee is not imposed solely as an incident of property ownership.

(b) A county, city, special district, or combination thereof may plan, design, implement, construct, operate, and maintain controls and facilities to improve water quality, including controls and facilities related to the infiltration, retention and reuse, diversion, interception, filtration, or collection of surface runoff, including urban runoff, stormwater, and other forms of runoff, the treatment of pollutants in runoff or other waters subject to water quality regulatory requirements, the return of diverted and treated waters to receiving water bodies, the enhance-ment of beneficial uses of waters of the state, or the beneficial use or reuse of diverted waters.

(c) The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter.

However, Water Code section 16102, subdivision (d), states: "A regional board may, if it deems appropriate, utilize provisions of the approved watershed improvement plan (approved under this new act) to promote compliance with one of more of the regional board's regulatory plans or programs." Subdivision (e) states "Unless a regional board incorporates the provisions of the watershed improvement plan into waste discharge requirements issued to a permittee, the implementation of a watershed improvement plan by a permittee shall not be deemed to be in compliance with those waste discharge requirements."

Therefore, the Commission finds that Water Code section 16103 may only provide offsetting revenue for this test claim to the extent that a local agency voluntarily complies with Water Code section 16101, the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

D. The holding in *San Diego Unified School Dist. v. Commission on State Mandates* does not apply to the test claim activities.

The State Board's January 2010 comments on the draft staff analysis cite *San Diego Unified v. Commission on States Mandates,*[251] arguing that the permit in this test claim, like the pupil expulsion hearings, are intended to implement a federal law, and has costs that are, in context, de minimis. In *San Diego Unified School District,* the California Supreme Court held costs for hearing procedures and notice are not reimbursable for pupil expulsions that are discretionary under state law. The court found that these hearing procedures are incidental to federal due process requirements and the costs are de minimis, and thus not reimbursable.

The Commission disagrees. The permit in this case does not meet the criteria in the *San Diego Unified School District* case. Unlike the discretionary expulsions in *San Diego Unified School District,* the permit imposes state-mandated activities. And although the permit is intended to implement the federal Clean Water Act, there is no evidence or indication that its costs are de minimis. Claimants submitted declarations of costs totaling over $10 million for fiscal year

[251] *San Diego Unified School Dist., supra,* 33 Cal.4th 859.

2007-2008 alone.[252] Claimants further submitted documentation of 2008-2009 costs of over $18 million. The State Board offers no evidence or argument to refute these cost declarations, so the Commission finds that permit activities (except for LID and HMP discussed above) impose costs mandated by the state that are not de minimis.

Summary: To recap fee authority under issue 2, the Commission finds that, due to the fee authority under the police power generally, and as governed by the Mitigation Fee Act, there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556 for the following parts of the permit that have a reasonable relationship to property development:

- Hydromodification Management Plan (part D.1.g);
- Updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (parts D.1.d.(7) & D.1.d.(8));

The Commission also finds that the claimants' fee or assessment authority is not sufficient within the meaning of Government Code section 17556, subdivision (d), and that there are costs mandated by the state within the meaning of Government Code section 17514 for all the activities in the permit, including:

- The fee authority in Public Resources Code section 40059 for the permit activities in parts D.3.a.5 (street sweeping) and J.3.a.(3)(c)x-xv (reporting on street sweeping);
- The fee authority in Health and Safety Code section 5471, for the permit activities in part D.3.a.(3)(iii) (conveyance system cleaning) or part J.3.a.(3)(c)iv-viii (reporting on conveyance system cleaning) of the permit.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines for this test claim:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;
- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Effective January 1, 2010, fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101 by developing a watershed improvement plan pursuant to Statutes 2009, chapter 577, and the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

[252] The County and city declarations are attached to the test claim.

CONCLUSION

For the reasons discussed above, the Commission finds that parts of 2007 permit issued by the California Regional Quality Control Board, San Diego Region (Order No. R9-2007-001, NPDES No. CAS0108758), are a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the claimants to perform the following activities.

The term of the permit is from January 24, 2007 – January 23, 2012.[253] The permit terms and conditions are automatically continued, however, pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits are complied with.[254]

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

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

> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
>
> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

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

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[253] According to attachment B of the permit: "*Effective Date.* This Order shall become effective on the date of its adoption provided the USEPA has no objection…." "(q) *Expiration.* This Order expires five years after adoption."

[254] According to attachment B of the permit: "(r) *Continuation of Expired Order* [23 CCR 2235.4]. After this Order expires, the terms and conditions of this Order are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits (40 CFR 122.6) are complied with."

x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
xiii. Identification of the total distance of curb-miles swept.
xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
xv. Amount of material (tons) collected from street and parking lot sweeping.

Conveyance system cleaning (D.3.a.(3)):

(a) Implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.

(b) Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include: [¶]…[¶]

iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner.

Conveyance system cleaning reporting (J.3.a.(3)(c)(iv)-(viii)): Update and revise the copermittees' JURMPs to contain:

iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.

v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.

vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.

viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

Educational component (part D.5): To implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:

- Municipal Departments and Personnel
- Construction Site Owners and Developers
- Industrial Owners and Operators
- Commercial Owners and Operators
- Residential Community, General Public, and School Children

a.(1) Each Copermittee shall educate each target community on the following topics where appropriate: (i) Erosion prevention, (ii) Non storm water discharge prohibitions, and (iii) BMP types: facility or activity specific, LID,-source control, and treatment control.

a.(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its Planning Boards and Elected Officials, if applicable, have an understanding of:

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:

[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year [except for staff who solely inspect new development]. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

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

Each Copermittee shall collaborate with other Copermittees within its WMA(s) [Watershed Management Area] as in Table 4 [of the permit] to develop and

implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below: [¶]...[¶]

[Paragraphs (a) through (e) were not part of the test claim.]

f. Watershed Activities

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;

(b) A time schedule for implementation of the activity, including key milestones;

(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;

(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;

(e) A description of how the activity is consistent with the collective watershed strategy;

(f) A description of the expected benefits of implementing the activity; and

(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

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

The Regional Urban Runoff Management Program shall, at a minimum:

Each copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that meets the requirements of section F of the permit, reduces the discharge of pollutants from the MS4 to the MEP, and prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. The Regional Urban Runoff Management Program shall, at a minimum: [¶]…[¶]

1. Develop and implement a Regional Residential Education Program. The program shall include:

a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.

b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a.

2. Develop the standardized fiscal analysis method required in section G of the permit, and,

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

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

1. Jurisdictional

a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;

(b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[255] Detection and Elimination, and Education); and

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

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.

(3) Utilize outcome levels 1-6[256] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

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[255] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[256] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

(4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(5) Utilize Implementation Assessment,[257] Water Quality Assessment,[258] and Integrated Assessment,[259] where applicable and feasible.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[260] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

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

[258] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[259] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

[260] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists where the hydrologic units are and major receiving water bodies.

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;

(b) Each Watershed Education Activity implemented; and

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

2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban

Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.[261] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

[261] Section A is "Prohibitions and Receiving Water Limitations."

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

Long Term Effectiveness Assessment (I.5):

a. Collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)[262] of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

1. Collaborate with all other Copermittees regulated under the permit to address common issues, promote consistency among Jurisdictional Urban Runoff

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[262] Part I.3.a.(6) of the permit states: At a minimum, the annual effectiveness assessment shall: (6) Include evaluation of whether the Copermittees' jurisdictional, watershed, and regional effectiveness assessments are meeting the following objectives: (a) Assessment of watershed health and identification of water quality issues and concerns. (b) Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns. (c) Evaluation of the need to address additional pollutant sources not already included in Copermittee programs. (d) Assessment of progress in implementing Copermittee programs and activities. (e) Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources. (f) Assessment of changes in discharge and receiving water quality. (g) Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality. (h) Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.

V. All Copermittee Collaboration (part L)

(a) Collaborate with all other Copermittees to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under the permit.

Jointly execute and submit to the Regional Board no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement that at a minimum: [¶]...[¶]

3. Establishes a management structure to promote consistency and develop and implement regional activities;
4. Establishes standards for conducting meetings, decisions-making, and cost-sharing.
5. Provides guidelines for committee and workgroup structure and responsibilities;
6. Lays out a process for addressing Copermittee non-compliance with the formal agreement.

The Commission finds that due to the fee authority under the police power (Cal. Const. art. XI, § 7) and as governed by the Mitigation Fee Act, there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556 for the following parts of the permit that have a reasonable relationship to property development:

- Hydromodification Management Plan (part D.1.g);
- Updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (parts D.1.d.(7) & D.1.d.(8));

The Commission also finds that the claimants' fee or assessment authority is not sufficient within the meaning of Government Code section 17556, subdivision (d), and that there are costs mandated by the state within the meaning of Government Code section 17514 for all the activities in the permit, including:

- The fee authority in Public Resources Code section 40059 for the permit activities in parts D.3.a.5 (street sweeping) and J.3.a.(3)(c)x-xv (reporting on street sweeping);
- The fee authority in Health and Safety Code section 5471, for the permit activities in part D.3.a.(3)(iii) (conveyance system cleaning) or part J.3.a.(3)(c)iv-viii (reporting on conveyance system cleaning) of the permit.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines for this test claim:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code

section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;

- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101, the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

TAB NO. 18

Effective: July 29, 2008

United States Code Annotated Currentness
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter IV. Permits and Licenses (Refs & Annos)
§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit

program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any re-

visions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals.

A State may return to the Administrator administration, [FN1] and the Administrator may withdraw under paragraph (3) of this subsection approval, of--

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after

completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

(e) Waiver of notification requirement

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(j) Public information

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement

(1) Agricultural return flows

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(m) Additional pretreatment of conventional pollutants not required

To the extent a treatment works (as defined in section 1292 of this title) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 1314(a)(4) of this title into such treatment works other than pretreatment required to assure compliance with pretreatment stand-

ards under subsection (b)(8) of this section and section 1317(b)(1) of this title. Nothing in this subsection shall affect the Administrator's authority under sections 1317 and 1319 of this title, affect State and local authority under sections 1317(b)(4) and 1370 of this title, relieve such treatment works of its obligations to meet requirements established under this chapter, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program

(1) State submission

The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage

A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b) of this section.

(3) Approval of major category partial permit programs

The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if--

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section.

(4) Approval of major component partial permit programs

The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) of this section if--

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section; and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) of this section by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all

reasonable efforts to assume such administration by such date.

(o) Anti-backsliding

(1) General prohibition

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314(b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title.

(2) Exceptions

A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if--

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B) of this section;

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 1311(c), 1311(g), 1311(h), 1311(i), 1311(k), 1311(n), or 1326(a) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

(3) Limitations

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers--

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of--

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows

(1) Requirement for permits, orders, and decrees

Each permit, order, or decree issued pursuant to this chapter after December 21, 2000 for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").

(2) Water quality and designated use review guidance

Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report

Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels

No permit shall be required under this chapter by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck run-off, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

CREDIT(S)

(June 30, 1948, c. 758, Title IV, § 402, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 880, and amended Dec. 27, 1977, Pub.L. 95-217, §§ 33(c), 50, 54(c)(1), 65, 66, 91 Stat. 1577, 1588, 1591, 1599, 1600; Feb. 4, 1987, Pub.L. 100-4, Title IV, §§ 401 to 404(a), (c), formerly (d), 405, 101 Stat. 65 to 67, 69; Oct. 31, 1992, Pub.L. 102-580, Title III, § 364, 106 Stat. 4862; Dec. 21, 1995, Pub.L. 104-66, Title II, § 2021(e)(2), 109 Stat. 727; Dec. 21, 2000, Pub.L. 106-554, § 1(a)(4) [Div. B, Title I, § 112(a)], 114 Stat. 2763, 2763A-224; July 29, 2008, Pub.L. 110-288, § 2, 122 Stat. 2650.)

[FN1] So in original.

Current through P.L. 112-28 approved 8-12-11

END OF DOCUMENT

TAB NO. 19

Effective: June 12, 2006

Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter D. Water Programs
Part 122. EPA Administered Permit Programs: the National Pollutant Discharge Elimination System (Refs & Annos)
Subpart B. Permit Application and Special NPDES Program Requirements
§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

<For statute(s) affecting validity, see: The Clean Water Act, 33 USCA § 1251 et seq.>

(a) Permit requirement.

(1) Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit except:

(i) A discharge with respect to which a permit has been issued prior to February 4, 1987;

(ii) A discharge associated with industrial activity (see § 122.26(a)(4));

(iii) A discharge from a large municipal separate storm sewer system;

(iv) A discharge from a medium municipal separate storm sewer system;

(v) A discharge which the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. This designation may include a discharge from any conveyance or system of conveyances used for collecting and conveying storm water runoff or a system of discharges from municipal separate storm sewers, except for those discharges from conveyances which do not require a permit under paragraph (a)(2) of this section or agricultural storm water runoff which is exempted from the definition of point source at § 122.2.

The Director may designate discharges from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination the Director may consider the following factors:

(A) The location of the discharge with respect to waters of the United States as defined at 40 CFR 122.2.

(B) The size of the discharge;

(C) The quantity and nature of the pollutants discharged to waters of the United States; and

(D) Other relevant factors.

(2) The Director may not require a permit for discharges of storm water runoff from the following:

(i) Mining operations composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or that have not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations, except in accordance with paragraph (c)(1)(iv) of this section.

(ii) All field activities or operations associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities, in-

cluding activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities, except in accordance with paragraph (c)(1)(iii) of this section. Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities are not subject to the provisions of paragraph (c)(1)(iii)(C) of this section.

Note to paragraph (a)(2)(ii): EPA encourages operators of oil and gas field activities or operations to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water both during and after construction activities to help ensure protection of surface water quality during storm events. Appropriate controls would be those suitable to the site conditions and consistent with generally accepted engineering design criteria and manufacturer specifications. Selection of BMPs could also be affected by seasonal or climate conditions.

(3) Large and medium municipal separate storm sewer systems.

(i) Permits must be obtained for all discharges from large and medium municipal separate storm sewer systems.

(ii) The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or medium municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.

(iii) The operator of a discharge from a municipal separate storm sewer which is part of a large or medium municipal separate storm sewer system must either:

(A) Participate in a permit application (to be a permittee or a co-permittee) with one or more other operators of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system;

(B) Submit a distinct permit application which only covers discharges from the municipal separate storm sewers for which the operator is responsible; or

(C) A regional authority may be responsible for submitting a permit application under the following guidelines:

(1) The regional authority together with co-applicants shall have authority over a storm water management program that is in existence, or shall be in existence at the time part 1 of the application is due;

(2) The permit applicant or co-applicants shall establish their ability to make a timely submission of part 1 and part 2 of the municipal application;

(3) Each of the operators of municipal separate storm sewers within the systems described in paragraphs (b)(4)(i), (ii), and (iii) or (b)(7)(i), (ii), and (iii) of this section, that are under the purview of the designated regional authority, shall comply with the application requirements of paragraph (d) of this section.

(iv) One permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The Director may issue one system-wide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medi-

um municipal separate storm sewer systems.

(v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.

(vi) Co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators.

(4) Discharges through large and medium municipal separate storm sewer systems. In addition to meeting the requirements of paragraph (c) of this section, an operator of a storm water discharge associated with industrial activity which discharges through a large or medium municipal separate storm sewer system shall submit, to the operator of the municipal separate storm sewer system receiving the discharge no later than May 15, 1991, or 180 days prior to commencing such discharge: the name of the facility; a contact person and phone number; the location of the discharge; a description, including Standard Industrial Classification, which best reflects the principal products or services provided by each facility; and any existing NPDES permit number.

(5) Other municipal separate storm sewers. The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.

(6) Non-municipal separate storm sewers. For storm water discharges associated with industrial activity from point sources which discharge through a non-municipal or non-publicly owned separate storm sewer system, the Director, in his discretion, may issue: a single NPDES permit, with each discharger a co-permittee to a permit issued to the operator of the portion of the system that discharges into waters of the United States; or, individual permits to each discharger of storm water associated with industrial activity through the non-municipal conveyance system.

(i) All storm water discharges associated with industrial activity that discharge through a storm water discharge system that is not a municipal separate storm sewer must be covered by an individual permit, or a permit issued to the operator of the portion of the system that discharges to waters of the United States, with each discharger to the non-municipal conveyance a co-permittee to that permit.

(ii) Where there is more than one operator of a single system of such conveyances, all operators of storm water discharges associated with industrial activity must submit applications.

(iii) Any permit covering more than one operator shall identify the effluent limitations, or other permit conditions, if any, that apply to each operator.

(7) Combined sewer systems. Conveyances that discharge storm water runoff combined with municipal sewage are point sources that must obtain NPDES permits in accordance with the procedures of § 122.21 and are not subject to the provisions of this section.

(8) Whether a discharge from a municipal separate storm sewer is or is not subject to regulation under this section shall have no bearing on whether the owner or operator of the discharge is eligible for funding under title II, title III or title VI of the Clean Water Act. See 40 CFR part 35, subpart I, appendix A(b)H.2.j.

(9)(i) On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if:

(A) The discharge is from a small MS4 required to be regulated pursuant to § 122.32;

(B) The discharge is a storm water discharge associated with small construction activity pursuant to paragraph (b)(15) of this section;

(C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutant(s) of concern; or

(D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(ii) Operators of small MS4s designated pursuant to paragraphs (a)(9)(i)(A), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with §§ 122.33 through 122.35. Operators of non-municipal sources designated pursuant to paragraphs (a)(9)(i)(B), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with paragraph (c)(1) of this section.

(iii) Operators of storm water discharges designated pursuant to paragraphs (a)(9)(i)(C) and (a)(9)(i)(D) of this section shall apply to the Director for a permit within 180 days of receipt of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter).

(b) Definitions.

(1) Co-permittee means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator.

(2) Illicit discharge means any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.

(3) Incorporated place means the District of Columbia, or a city, town, township, or village that is incorporated under the laws of the State in which it is located.

(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or

(ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(4)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; and

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a large municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraph (b)(4)(i), (ii), (iii) of this section.

(5) Major municipal separate storm sewer outfall (or "major outfall") means a municipal separate storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent (discharge from a single conveyance other than circular pipe which is associated with a drainage area of more than 50 acres); or for municipal separate storm sewers that receive storm water from lands zoned for industrial activity (based on comprehensive zoning plans or the equivalent), an outfall that discharges from a single pipe with an inside diameter of 12 inches or more or from its equivalent (discharge from other than a circular pipe associated with a drainage area of 2 acres or more).

(6) Major outfall means a major municipal separate storm sewer outfall.

(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or

(ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(7)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; or

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a medium municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraphs (b)(7) (i), (ii), (iii) of this section.

(8) Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law)

having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

(9) Outfall means a point source as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

(10) Overburden means any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations.

(11) Runoff coefficient means the fraction of total rainfall that will appear at a conveyance as runoff.

(12) Significant materials includes, but is not limited to: raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production; hazardous substances designated under section 101(14) of CERCLA; any chemical the facility is required to report pursuant to section 313 of title III of SARA; fertilizers; pesticides; and waste products such as ashes, slag and sludge that have the potential to be released with storm water discharges.

(13) Storm water means storm water runoff, snow melt runoff, and surface runoff and drainage.

(14) Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at part 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. For the purposes of this paragraph, material handling activities include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas. Industrial facilities (including industrial facilities that are federally, State, or municipally owned or operated that meet the description of the facilities listed in paragraphs (b)(14)(i) through (xi) of this section) include those facilities designated under the provisions of para-

graph (a)(1)(v) of this section. The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14):

(i) Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards which are exempted under category (xi) in paragraph (b)(14) of this section);

(ii) Facilities classified as Standard Industrial Classifications 24 (except 2434), 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373;

(iii) Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under 40 CFR 434.11(1) because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990) and oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations; (inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator; inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim);

(iv) Hazardous waste treatment, storage, or disposal facilities, including those that are operating under interim status or a permit under subtitle C of RCRA;

(v) Landfills, land application sites, and open dumps that receive or have received any industrial wastes (waste that is received from any of the facilities described under this subsection) including those that are subject to regulation under subtitle D of RCRA;

(vi) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093;

(vii) Steam electric power generating facilities, including coal handling sites;

(viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221–25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)–(vii) or (ix)–(xi) of this section are associated with industrial activity;

(ix) Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that are located within the confines of the facility, with a design flow of 1.0 mgd or more, or required to have an approved pretreatment program under 40 CFR part 403. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with section 405 of the CWA;

(x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;

(xi) Facilities under Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, and 4221–25;

(15) Storm water discharge associated with small construction activity means the discharge of storm water from:

(i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where:

(A) The value of the rainfall erosivity factor ("R" in the Revised Universal Soil Loss Equation) is less than five during the period of construction activity. The rainfall erosivity factor is determined in accordance with Chapter 2 of Agriculture Handbook Number 703, Predicting Soil Erosion by Water: A Guide to Conservation Planning With the Revised Universal Soil Loss Equation (RUSLE), pages 21–64, dated January 1997. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C 552(a) and 1 CFR part 51. Copies may be obtained from EPA's Water Resource Center, Mail Code RC4100, 1200 Pennsylvania Ave., NW., Washington, DC 20460. A copy is also available for inspection at the U.S. EPA Water Docket, 1200 Pennsylvania Ave., NW., Washington, DC 20460, or the Office of the Federal Register, 800 N. Capitol Street N.W. Suite 700, Washington, DC. An operator must certify to the Director that the construction activity will take place during a period when the value of the rainfall erosivity factor is less than five; or

(B) Storm water controls are not needed based on a "total maximum daily load" (TMDL) approved or established by EPA that addresses the pollutant(s) of concern or, for non-impaired waters that do not require TMDLs, an equivalent analysis that determines allocations for small construction sites for the pollutant(s) of concern or that determines that such allocations are not needed to protect water quality based on consideration of existing in-stream concentrations, expected growth in pollutant contributions from all sources, and a margin of safety. For the purpose of this paragraph, the pollutant(s) of concern include sediment or a parameter that addresses sediment (such as total suspended solids, turbidity or siltation) and any other pollutant that has been identified as a cause of impairment of any water body that will receive a discharge from the construction activity. The operator must certify to the Director that the construction activity will take place, and storm water discharges will occur, within the drainage area addressed by the TMDL or equivalent analysis.

(ii) Any other construction activity designated by the Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants to waters of

the United States.

Exhibit 1 to § 122.26(b)(15).--Summary of Coverage of "Storm Water Discharges Associated with Small Construction Activity" Under the NPDES Storm Water Program

Automatic Designation: Required Nationwide Coverage	· Construction activities that result in a land disturbance of equal to or greater than one acre and less than five acres. · Construction activities disturbing less than one acre if part of a larger common plan of development or sale with a planned disturbance of equal to or greater than one acre and less than five acres. (see § 122.26(b)(15)(i).)
Potential Designation: Optional Evaluation and Designation by the NPDES Permitting Authority or EPA Regional Administrator.	· Construction activities that result in a land disturbance of less than one acre based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants. (see § 122.26(b)(15)(ii).)
Potential Waiver: Waiver from Requirements as Determined by the NPDES Permitting Authority.	Any automatically designated construction activity where the operator certifies: (1) A rainfall erosivity factor of less than five, or (2) That the activity will occur within an area where controls are not needed based on a TMDL or, for non-impaired waters that do not require a TMDL, an equivalent analysis for the pollutant(s) of concern. (see § 122.26(b)(15)(i).)

(16) Small municipal separate storm sewer system means all separate storm sewers that are:

(i) Owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States.

(ii) Not defined as "large" or "medium" municipal separate storm sewer systems pursuant to paragraphs (b)(4) and (b)(7) of this section, or designated under paragraph (a)(1)(v) of this section.

(iii) This term includes systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings.

(17) Small MS4 means a small municipal separate storm sewer system.

(18) Municipal separate storm sewer system means all separate storm sewers that are defined as "large" or "medium" or "small" municipal separate storm sewer systems pursuant to paragraphs (b)(4), (b)(7), and (b)(16) of this section, or designated under paragraph (a)(1)(v) of this section.

(19) MS4 means a municipal separate storm sewer system.

(20) Uncontrolled sanitary landfill means a landfill or open dump, whether in operation or closed, that does not meet the requirements for runon or runoff controls established pursuant to subtitle D of the Solid Waste Disposal Act.

(c) Application requirements for storm water discharges associated with industrial activity and storm water discharges associated with small construction activity--

(1) Individual application. Dischargers of storm water associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit. Facilities that are required to obtain an individual permit, or any discharge of storm water which the Director is evaluating for designation (see 124.52(c) of this chapter) under paragraph (a)(1)(v) of this section and is not a municipal storm sewer, shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of this paragraph.

(i) Except as provided in § 122.26(c)(1)(ii)–(iv), the operator of a storm water discharge associated with industrial activity subject to this section shall provide:

(A) A site map showing topography (or indicating the outline of drainage areas served by the outfall(s) covered in the application if a topographic map is unavailable) of the facility including: each of its drainage and discharge structures; the drainage area of each storm water outfall; paved areas and buildings within the drainage area of each storm water outfall, each past or present area used for outdoor storage or disposal of significant materials, each existing structural control measure to reduce pollutants in storm water runoff, materials loading and access areas, areas where pesticides, herbicides, soil conditioners and fertilizers are applied, each of its hazardous waste treatment, storage or disposal facilities (including each area not required to have a RCRA permit which is used for accumulating hazardous waste under 40 CFR 262.34); each well where fluids from the facility are injected underground; springs, and other surface water bodies which receive storm water discharges from the facility;

(B) An estimate of the area of impervious surfaces (including paved areas and building roofs) and the total area drained by each outfall (within a mile radius of the facility) and a narrative description of the following: Significant materials that in the three years prior to the submittal of this application have been treated, stored or disposed in a manner to allow exposure to storm water; method of treatment, storage or disposal of such materials; materials management practices employed, in the three years prior to the submittal of this application, to minimize contact by these materials with storm water runoff; materials loading and access areas; the location, manner and frequency in which pesticides, herbicides, soil conditioners and fertilizers are applied; the location and a description of existing structural and nonstructural control measures to reduce pollutants in storm water runoff; and a description of the treatment the storm water receives, including the ultimate disposal of any solid or fluid wastes other than by discharge;

(C) A certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested or evaluated for the presence of non-storm water discharges which are not covered by a NPDES permit; tests for such non-storm water discharges may include smoke tests, fluorometric dye tests, analysis of accurate schematics, as well as other appropriate tests. The certification shall include a description of the method used, the date of any testing, and the on-site drainage points

that were directly observed during a test;

(D) Existing information regarding significant leaks or spills of toxic or hazardous pollutants at the facility that have taken place within the three years prior to the submittal of this application;

(E) Quantitative data based on samples collected during storm events and collected in accordance with § 122.21 of this part from all outfalls containing a storm water discharge associated with industrial activity for the following parameters:

(1) Any pollutant limited in an effluent guideline to which the facility is subject;

(2) Any pollutant listed in the facility's NPDES permit for its process wastewater (if the facility is operating under an existing NPDES permit);

(3) Oil and grease, pH, BOD5, COD, TSS, total phosphorus, total Kjeldahl nitrogen, and nitrate plus nitrite nitrogen;

(4) Any information on the discharge required under § 122.21(g)(7)(vi) and (vii);

(5) Flow measurements or estimates of the flow rate, and the total amount of discharge for the storm event(s) sampled, and the method of flow measurement or estimation; and

(6) The date and duration (in hours) of the storm event(s) sampled, rainfall measurements or estimates of the storm event (in inches) which generated the sampled runoff and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event (in hours);

(F) Operators of a discharge which is composed entirely of storm water are exempt from the requirements of § 122.21(g)(2), (g)(3), (g)(4), (g)(5), (g)(7)(iii), (g)(7)(iv), (g)(7)(v), and (g)(7)(viii); and

(G) Operators of new sources or new discharges (as defined in § 122.2 of this part) which are composed in part or entirely of storm water must include estimates for the pollutants or parameters listed in paragraph (c)(1)(i)(E) of this section instead of actual sampling data, along with the source of each estimate. Operators of new sources or new discharges composed in part or entirely of storm water must provide quantitative data for the parameters listed in paragraph (c)(1)(i)(E) of this section within two years after commencement of discharge, unless such data has already been reported under the monitoring requirements of the NPDES permit for the discharge. Operators of a new source or new discharge which is composed entirely of storm water are exempt from the requirements of § 122.21 (k)(3)(ii), (k)(3)(iii), and (k)(5).

(ii) An operator of an existing or new storm water discharge that is associated with industrial activity solely under paragraph (b)(14)(x) of this section or is associated with small construction activity solely under paragraph (b)(15) of this section, is exempt from the requirements of § 122.21(g) and paragraph (c)(1)(i) of this section. Such operator shall provide a narrative description of:

(A) The location (including a map) and the nature of the construction activity;

(B) The total area of the site and the area of the site that is expected to undergo excavation during the life of the permit;

(C) Proposed measures, including best management practices, to control pollutants in storm water discharges during construction, including a brief description of applicable State and local erosion and sediment control requirements;

(D) Proposed measures to control pollutants in storm water discharges that will occur after construction operations have been completed, including a brief description of applicable State or local erosion and sediment control requirements;

(E) An estimate of the runoff coefficient of the site and the increase in impervious area after the construction addressed in the permit application is completed, the nature of fill material and existing data describing the soil or the quality of the discharge; and

(F) The name of the receiving water.

(iii) The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with paragraph (c)(1)(i) of this section, unless the facility:

(A) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at anytime since November 16, 1987; or

(B) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or

(C) Contributes to a violation of a water quality standard.

(iv) The operator of an existing or new discharge composed entirely of storm water from a mining operation is not required to submit a permit application unless the discharge has come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.

(v) Applicants shall provide such other information the Director may reasonably require under § 122.21(g)(13) of this part to determine whether to issue a permit and may require any facility subject to paragraph (c)(1)(ii) of this section to comply with paragraph (c)(1)(i) of this section.

(2) [Reserved]

(d) Application requirements for large and medium municipal separate storm sewer discharges. The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include;

(1) Part 1. Part 1 of the application shall consist of;

(i) General information. The applicants' name, address, telephone number of contact person, ownership status and status as a State or local government entity.

(ii) Legal authority. A description of existing legal authority to control discharges to the municipal separate storm sewer system. When existing legal authority is not sufficient to meet the criteria provided in paragraph (d)(2)(i) of this section, the description shall list additional authorities as will be necessary to meet the criteria and shall include a schedule and commitment to seek such additional authority that will be needed to meet the criteria.

(iii) Source identification.

(A) A description of the historic use of ordinances, guidance or other controls which limited the discharge of non-storm water discharges to any Publicly Owned Treatment Works serving the same area as the municipal separate storm sewer system.

(B) A USGS 7.5 minute topographic map (or equivalent topographic map with a scale between 1:10,000 and 1:24,000 if cost effective) extending one mile beyond the service boundaries of the municipal storm sewer system covered by the permit application. The following information shall be provided:

(1) The location of known municipal storm sewer system outfalls discharging to waters of the United States;

(2) A description of the land use activities (e.g. divisions indicating undeveloped, residential, commercial, agricultural and industrial uses) accompanied with estimates of population densities and projected growth for a ten year period within the drainage area served by the separate storm sewer. For each land use type, an estimate of an average runoff coefficient shall be provided;

(3) The location and a description of the activities of the facility of each currently operating or closed municipal landfill or other treatment, storage or disposal facility for municipal waste;

(4) The location and the permit number of any known discharge to the municipal storm sewer that has been issued a NPDES permit;

(5) The location of major structural controls for storm water discharge (retention basins, detention basins, major infiltration devices, etc.); and

(6) The identification of publicly owned parks, recreational areas, and other open lands.

(iv) Discharge characterization.

(A) Monthly mean rain and snow fall estimates (or summary of weather bureau data) and the monthly average number of storm events.

(B) Existing quantitative data describing the volume and quality of discharges from the municipal storm sewer, including a description of the outfalls sampled, sampling procedures and analytical methods used.

(C) A list of water bodies that receive discharges from the municipal separate storm sewer system, including downstream segments, lakes and estuaries, where pollutants from the

system discharges may accumulate and cause water degradation and a brief description of known water quality impacts. At a minimum, the description of impacts shall include a description of whether the water bodies receiving such discharges have been:

(1) Assessed and reported in section 305(b) reports submitted by the State, the basis for the assessment (evaluated or monitored), a summary of designated use support and attainment of Clean Water Act (CWA) goals (fishable and swimmable waters), and causes of nonsupport of designated uses;

(2) Listed under section 304(l)(1)(A)(i), section 304(l)(1)(A)(ii), or section 304(l)(1)(B) of the CWA that is not expected to meet water quality standards or water quality goals;

(3) Listed in State Nonpoint Source Assessments required by section 319(a) of the CWA that, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain water quality standards due to storm sewers, construction, highway maintenance and runoff from municipal landfills and municipal sludge adding significant pollution (or contributing to a violation of water quality standards);

(4) Identified and classified according to eutrophic condition of publicly owned lakes listed in State reports required under section 314(a) of the CWA (include the following: A description of those publicly owned lakes for which uses are known to be impaired; a description of procedures, processes and methods to control the discharge of pollutants from municipal separate storm sewers into such lakes; and a description of methods and procedures to restore the quality of such lakes);

(5) Areas of concern of the Great Lakes identified by the International Joint Commission;

(6) Designated estuaries under the National Estuary Program under section 320 of the CWA;

(7) Recognized by the applicant as highly valued or sensitive waters;

(8) Defined by the State or U.S. Fish and Wildlife Services's National Wetlands Inventory as wetlands; and

(9) Found to have pollutants in bottom sediments, fish tissue or biosurvey data.

(D) Field screening. Results of a field screening analysis for illicit connections and illegal dumping for either selected field screening points or major outfalls covered in the permit application. At a minimum, a screening analysis shall include a narrative description, for either each field screening point or major outfall, of visual observations made during dry weather periods. If any flow is observed, two grab samples shall be collected during a 24 hour period with a minimum period of four hours between samples. For all such samples, a narrative description of the color, odor, turbidity, the presence of an oil sheen or surface scum as well as any other relevant observations regarding the potential presence of non-storm water discharges or illegal dumping shall be provided. In addition, a narrative description of the results of a field analysis using suitable methods to estimate pH, total chlorine, total copper, total phenol, and detergents (or surfact-

ants) shall be provided along with a description of the flow rate. Where the field analysis does not involve analytical methods approved under 40 CFR part 136, the applicant shall provide a description of the method used including the name of the manufacturer of the test method along with the range and accuracy of the test. Field screening points shall be either major outfalls or other outfall points (or any other point of access such as manholes) randomly located throughout the storm sewer system by placing a grid over a drainage system map and identifying those cells of the grid which contain a segment of the storm sewer system or major outfall. The field screening points shall be established using the following guidelines and criteria:

(1) A grid system consisting of perpendicular north-south and east-west lines spaced 1/4 mile apart shall be overlaid on a map of the municipal storm sewer system, creating a series of cells;

(2) All cells that contain a segment of the storm sewer system shall be identified; one field screening point shall be selected in each cell; major outfalls may be used as field screening points;

(3) Field screening points should be located downstream of any sources of suspected illegal or illicit activity;

(4) Field screening points shall be located to the degree practicable at the farthest manhole or other accessible location downstream in the system, within each cell; however, safety of personnel and accessibility of the location should be considered in making this determination;

(5) Hydrological conditions; total drainage area of the site; population density of the site; traffic density; age of the structures or buildings in the area; history of the area; and land use types;

(6) For medium municipal separate storm sewer systems, no more than 250 cells need to have identified field screening points; in large municipal separate storm sewer systems, no more than 500 cells need to have identified field screening points; cells established by the grid that contain no storm sewer segments will be eliminated from consideration; if fewer than 250 cells in medium municipal sewers are created, and fewer than 500 in large systems are created by the overlay on the municipal sewer map, then all those cells which contain a segment of the sewer system shall be subject to field screening (unless access to the separate storm sewer system is impossible); and

(7) Large or medium municipal separate storm sewer systems which are unable to utilize the procedures described in paragraphs (d)(1)(iv)(D) (1) through (6) of this section, because a sufficiently detailed map of the separate storm sewer systems is unavailable, shall field screen no more than 500 or 250 major outfalls respectively (or all major outfalls in the system, if less); in such circumstances, the applicant shall establish a grid system consisting of north-south and east-west lines spaced 1/4 mile apart as an overlay to the boundaries of the municipal storm sewer system, thereby creating a series of cells; the applicant will then select major outfalls in as many cells as possible until at least 500 major outfalls (large municipalities) or 250 major outfalls (medium municipalities) are selected; a field screening analysis shall be under-

taken at these major outfalls.

(E) Characterization plan. Information and a proposed program to meet the requirements of paragraph (d)(2)(iii) of this section. Such description shall include: the location of outfalls or field screening points appropriate for representative data collection under paragraph (d)(2)(iii)(A) of this section, a description of why the outfall or field screening point is representative, the seasons during which sampling is intended, a description of the sampling equipment. The proposed location of outfalls or field screening points for such sampling should reflect water quality concerns (see paragraph (d)(1)(iv)(C) of this section) to the extent practicable.

(v) Management programs.

(A) A description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls, that are currently being implemented. Such controls may include, but are not limited to: Procedures to control pollution resulting from construction activities; floodplain management controls; wetland protection measures; best management practices for new subdivisions; and emergency spill response programs. The description may address controls established under State law as well as local requirements.

(B) A description of the existing program to identify illicit connections to the municipal storm sewer system. The description should include inspection procedures and methods for detecting and preventing illicit discharges, and describe areas where this program has been implemented.

(vi) Fiscal resources.

(A) A description of the financial resources currently available to the municipality to complete part 2 of the permit application. A description of the municipality's budget for existing storm water programs, including an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for storm water programs.

(2) Part 2. Part 2 of the application shall consist of:

(i) Adequate legal authority. A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to:

(A) Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;

(B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;

(C) Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water;

(D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system

to another portion of the municipal system;

(E) Require compliance with conditions in ordinances, permits, contracts or orders; and

(F) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

(ii) Source identification. The location of any major outfall that discharges to waters of the United States that was not reported under paragraph (d)(1)(iii)(B)(1) of this section. Provide an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by each facility which may discharge, to the municipal separate storm sewer, storm water associated with industrial activity;

(iii) Characterization data. When "quantitative data" for a pollutant are required under paragraph (d)(2)(iii)(A)(3) of this section, the applicant must collect a sample of effluent in accordance with § 122.21(g)(7) and analyze it for the pollutant in accordance with analytical methods approved under part 136 of this chapter. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. The applicant must provide information characterizing the quality and quantity of discharges covered in the permit application, including:

(A) Quantitative data from representative outfalls designated by the Director (based on information received in part 1 of the application, the Director shall designate between five and ten outfalls or field screening points as representative of the commercial, residential and industrial land use activities of the drainage area contributing to the system or, where there are less than five outfalls covered in the application, the Director shall designate all outfalls) developed as follows:

(1) For each outfall or field screening point designated under this subparagraph, samples shall be collected of storm water discharges from three storm events occurring at least one month apart in accordance with the requirements at § 122.21(g)(7) (the Director may allow exemptions to sampling three storm events when climatic conditions create good cause for such exemptions);

(2) A narrative description shall be provided of the date and duration of the storm event(s) sampled, rainfall estimates of the storm event which generated the sampled discharge and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event;

(3) For samples collected and described under paragraphs (d)(2)(iii)(A)(1) and (A)(2) of this section, quantitative data shall be provided for: the organic pollutants listed in Table II; the pollutants listed in Table III (toxic metals, cyanide, and total phenols) of appendix D of 40 CFR part 122, and for the following pollutants:

Total suspended solids (TSS)

Total dissolved solids (TDS)

COD

BOD_5

Oil and grease

Fecal coliform

Fecal streptococcus

pH

Total Kjeldahl nitrogen

Nitrate plus nitrite

Dissolved phosphorus

Total ammonia plus organic nitrogen

Total phosphorus

(4) Additional limited quantitative data required by the Director for determining permit conditions (the Director may require that quantitative data shall be provided for additional parameters, and may establish sampling conditions such as the location, season of sample collection, form of precipitation (snow melt, rainfall) and other parameters necessary to insure representativeness);

(B) Estimates of the annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls and the event mean concentration of the cumulative discharges to waters of the United States from all identified municipal outfalls during a storm event (as described under § 122.21(c)(7)) for BOD_5, COD, TSS, dissolved solids, total nitrogen, total ammonia plus organic nitrogen, total phosphorus, dissolved phosphorus, cadmium, copper, lead, and zinc. Estimates shall be accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modelling, data analysis, and calculation methods;

(C) A proposed schedule to provide estimates for each major outfall identified in either paragraph (d)(2)(ii) or (d)(1)(iii)(B)(1) of this section of the seasonal pollutant load and of the event mean concentration of a representative storm for any constituent detected in any sample required under paragraph (d)(2)(iii)(A) of this section; and

(D) A proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment.

(iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be con-

sidered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include:

(1) A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers;

(2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. (Controls to reduce pollutants in discharges from municipal separate storm sewers containing construction site runoff are addressed in paragraph (d)(2)(iv)(D) of this section;

(3) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities;

(4) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible;

(5) A description of a program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, which shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges (this program can be coordinated with the program developed under paragraph (d)(2)(iv)(C) of this section); and

(6) A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

(B) A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall in-

clude:

(1) A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States);

(2) A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens;

(3) A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water (such procedures may include: sampling procedures for constituents such as fecal coliform, fecal streptococcus, surfactants (MBAS), residual chlorine, fluorides and potassium; testing with fluorometric dyes; or conducting in storm sewer inspections where safety and other considerations allow. Such description shall include the location of storm sewers that have been identified for such evaluation);

(4) A description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer;

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

(6) A description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and

(7) A description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary;

(C) A description of a program to monitor and control pollutants in storm water discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund

Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

(1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges;

(2) Describe a monitoring program for storm water discharges associated with the industrial facilities identified in paragraph (d)(2)(iv)(C) of this section, to be implemented during the term of the permit, including the submission of quantitative data on the following constituents: Any pollutants limited in effluent guidelines subcategories, where applicable; any pollutant listed in an existing NPDES permit for a facility; oil and grease, COD, pH, BOD_5, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen, and any information on discharges required under § 122.21(g)(7)(vi) and (vii).

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system, which shall include:

(1) A description of procedures for site planning which incorporate consideration of potential water quality impacts;

(2) A description of requirements for non-structural and structural best management practices;

(3) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and

(4) A description of appropriate educational and training measures for construction site operators.

(v) Assessment of controls. Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

(vi) Fiscal analysis. For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2) (iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

(vii) Where more than one legal entity submits an application, the application shall contain a description of the roles and responsibilities of each legal entity and procedures to ensure effective coordination.

(viii) Where requirements under paragraph (d)(1)(iv)(E), (d)(2)(ii), (d)(2)(iii)(B) and (d)(2)(iv) of this section are not practicable or are not applicable, the Director may exclude any operator of a discharge from a municipal separate storm sewer which is designated under paragraph (a)(1)(v), (b)(4)(ii) or (b)(7)(ii) of this section from such re-

quirements. The Director shall not exclude the operator of a discharge from a municipal separate storm sewer identified in appendix F, G, H or I of part 122, from any of the permit application requirements under this paragraph except where authorized under this section.

(e) Application deadlines. Any operator of a point source required to obtain a permit under this section that does not have an effective NPDES permit authorizing discharges from its storm water outfalls shall submit an application in accordance with the following deadlines:

(1) Storm water discharges associated with industrial activity.

(i) Except as provided in paragraph (e)(1)(ii) of this section, for any storm water discharge associated with industrial activity identified in paragraphs (b)(14)(i) through (xi) of this section, that is not part of a group application as described in paragraph (c)(2) of this section or that is not authorized by a storm water general permit, a permit application made pursuant to paragraph (c) of this section must be submitted to the Director by October 1, 1992;

(ii) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 that is not authorized by a general or individual permit, other than an airport, powerplant, or uncontrolled sanitary landfill, the permit application must be submitted to the Director by March 10, 2003.

(2) For any group application submitted in accordance with paragraph (c)(2) of this section:

(i) Part 1.

(A) Except as provided in paragraph (e)(2)(i)(B) of this section, part 1 of the application shall be submitted to the Director, Office of Wastewater Enforcement and Compliance by September 30, 1991;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 18, 1992.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

(ii) Based on information in the part 1 application, the Director will approve or deny the members in the group application within 60 days after receiving part 1 of the group application.

(iii) Part 2.

(A) Except as provided in paragraph (e)(2)(iii)(B) of this section, part 2 of the application shall be submitted to the Director, Office of Wastewater Enforcement and Compliance by October 1, 1992;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 17, 1993.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are

reserved.

(iv) Rejected facilities.

(A) Except as provided in paragraph (e)(2)(iv)(B) of this section, facilities that are rejected as members of the group shall submit an individual application (or obtain coverage under an applicable general permit) no later than 12 months after the date of receipt of the notice of rejection or October 1, 1992, whichever comes first.

(B) Facilities that are owned or operated by a municipality and that are rejected as members of part 1 group application shall submit an individual application no later than 180 days after the date of receipt of the notice of rejection or October 1, 1992, whichever is later.

(v) A facility listed under paragraph (b)(14) (i)–(xi) of this section may add on to a group application submitted in accordance with paragraph (e)(2)(i) of this section at the discretion of the Office of Water Enforcement and Permits, and only upon a showing of good cause by the facility and the group applicant; the request for the addition of the facility shall be made no later than February 18,1992; the addition of the facility shall not cause the percentage of the facilities that are required to submit quantitative data to be less than 10%, unless there are over 100 facilities in the group that are submitting quantitative data; approval to become part of group application must be obtained from the group or the trade association representing the individual facilities.

(3) For any discharge from a large municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by November 18, 1991;

(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application;

(iii) Part 2 of the application shall be submitted to the Director by November 16, 1992.

(4) For any discharge from a medium municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by May 18, 1992.

(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application.

(iii) Part 2 of the application shall be submitted to the Director by May 17, 1993.

(5) A permit application shall be submitted to the Director within 180 days of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter), for:

(i) A storm water discharge that the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines that the discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States (see paragraphs (a)(1)(v) and (b)(15)(ii) of this section);

(ii) A storm water discharge subject to paragraph (c)(1)(v) of this section.

(6) Facilities with existing NPDES permits for storm water discharges associated with industrial activity shall maintain existing permits. Facilities with permits for storm water discharges associated with industrial activity which expire on or after May 18, 1992 shall submit a new application in accordance with the requirements of 40 CFR 122.21 and 40 CFR 122.26(c) (Form 1, Form 2F, and other applicable Forms) 180 days before the expiration of such permits.

(7) The Director shall issue or deny permits for discharges composed entirely of storm water under this section in accordance with the following schedule:

(i)(A) Except as provided in paragraph (e)(7)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than October 1, 1993, or, for new sources or existing sources which fail to submit a complete permit application by October 1, 1992, one year after receipt of a complete permit application;

(B) For any municipality with a population of less than 250,000 which submits a timely Part I group application under paragraph (e)(2)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than May 17, 1994, or, for any such municipality which fails to submit a complete Part II group permit application by May 17, 1993, one year after receipt of a complete permit application;

(ii) The Director shall issue or deny permits for large municipal separate storm sewer systems no later than November 16, 1993, or, for new sources or existing sources which fail to submit a complete permit application by November 16, 1992, one year after receipt of a complete permit application;

(iii) The Director shall issue or deny permits for medium municipal separate storm sewer systems no later than May 17, 1994, or, for new sources or existing sources which fail to submit a complete permit application by May 17, 1993, one year after receipt of a complete permit application.

(8) For any storm water discharge associated with small construction activities identified in paragraph (b)(15)(i) of this section, see § 122.21(c)(1). Discharges from these sources require permit authorization by March 10, 2003, unless designated for coverage before then.

(9) For any discharge from a regulated small MS4, the permit application made under § 122.33 must be submitted to the Director by:

(i) March 10, 2003 if designated under § 122.32(a)(1) unless your MS4 serves a jurisdiction with a population under 10,000 and the NPDES permitting authority has established a phasing schedule under § 123.35(d)(3) (see § 122.33(c)(1)); or

(ii) Within 180 days of notice, unless the NPDES permitting authority grants a later date, if designated under § 122.32(a)(2) (see § 122.33(c)(2)).

(f) Petitions.

(1) Any operator of a municipal separate storm sewer system may petition the Director to require a separate NPDES permit (or a permit issued under an approved NPDES State program) for any discharge into the municipal separate storm sewer system.

(2) Any person may petition the Director to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a viola-

tion of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) The owner or operator of a municipal separate storm sewer system may petition the Director to reduce the Census estimates of the population served by such separate system to account for storm water discharged to combined sewers as defined by 40 CFR 35.2005(b)(11) that is treated in a publicly owned treatment works. In municipalities in which combined sewers are operated, the Census estimates of population may be reduced proportional to the fraction, based on estimated lengths, of the length of combined sewers over the sum of the length of combined sewers and municipal separate storm sewers where an applicant has submitted the NPDES permit number associated with each discharge point and a map indicating areas served by combined sewers and the location of any combined sewer overflow discharge point.

(4) Any person may petition the Director for the designation of a large, medium, or small municipal separate storm sewer system as defined by paragraph (b)(4)(iv), (b)(7)(iv), or (b)(16) of this section.

(5) The Director shall make a final determination on any petition received under this section within 90 days after receiving the petition with the exception of petitions to designate a small MS4 in which case the Director shall make a final determination on the petition within 180 days after its receipt.

(g) Conditional exclusion for "no exposure" of industrial activities and materials to storm water. Discharges composed entirely of storm water are not storm water discharges associated with industrial activity if there is "no exposure" of industrial materials and activities to rain, snow, snowmelt and/or runoff, and the discharger satisfies the conditions in paragraphs (g)(1) through (g)(4) of this section. "No exposure" means that all industrial materials and activities are protected by a storm resistant shelter to prevent exposure to rain, snow, snowmelt, and/or runoff. Industrial materials or activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products. Material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product or waste product.

(1) Qualification. To qualify for this exclusion, the operator of the discharge must:

(i) Provide a storm resistant shelter to protect industrial materials and activities from exposure to rain, snow, snow melt, and runoff;

(ii) Complete and sign (according to § 122.22) a certification that there are no discharges of storm water contaminated by exposure to industrial materials and activities from the entire facility, except as provided in paragraph (g)(2) of this section;

(iii) Submit the signed certification to the NPDES permitting authority once every five years;

(iv) Allow the Director to inspect the facility to determine compliance with the "no exposure" conditions;

(v) Allow the Director to make any "no exposure" inspection reports available to the public upon request; and

(vi) For facilities that discharge through an MS4, upon request, submit a copy of the certification of "no exposure" to the MS4 operator, as well as allow inspection and public reporting by the MS4 operator.

(2) Industrial materials and activities not requiring storm resistant shelter. To qualify for this exclusion, storm resistant shelter is not required for:

(i) Drums, barrels, tanks, and similar containers that are tightly sealed, provided those containers are not deteriorated and do not leak ("Sealed" means banded or otherwise secured and without operational taps or valves);

(ii) Adequately maintained vehicles used in material handling; and

(iii) Final products, other than products that would be mobilized in storm water discharge (e.g., rock salt).

(3) Limitations.

(i) Storm water discharges from construction activities identified in paragraphs (b)(14)(x) and (b)(15) are not eligible for this conditional exclusion.

(ii) This conditional exclusion from the requirement for an NPDES permit is available on a facility-wide basis only, not for individual outfalls. If a facility has some discharges of storm water that would otherwise be "no exposure" discharges, individual permit requirements should be adjusted accordingly.

(iii) If circumstances change and industrial materials or activities become exposed to rain, snow, snow melt, and/or runoff, the conditions for this exclusion no longer apply. In such cases, the discharge becomes subject to enforcement for unpermitted discharge. Any conditionally exempt discharger who anticipates changes in circumstances should apply for and obtain permit authorization prior to the change of circumstances.

(iv) Notwithstanding the provisions of this paragraph, the NPDES permitting authority retains the authority to require permit authorization (and deny this exclusion) upon making a determination that the discharge causes, has a reasonable potential to cause, or contributes to an instream excursion above an applicable water quality standard, including designated uses.

(4) Certification. The no exposure certification must require the submission of the following information, at a minimum, to aid the NPDES permitting authority in determining if the facility qualifies for the no exposure exclusion:

(i) The legal name, address and phone number of the discharger (see § 122.21(b));

(ii) The facility name and address, the county name and the latitude and longitude where the facility is located;

(iii) The certification must indicate that none of the following materials or activities are, or will be in the foreseeable future, exposed to precipitation:

(A) Using, storing or cleaning industrial machinery or equipment, and areas where residuals from using, storing or cleaning industrial machinery or equipment remain and are exposed to storm water;

(B) Materials or residuals on the ground or in storm water inlets from spills/leaks;

(C) Materials or products from past industrial activity;

(D) Material handling equipment (except adequately maintained vehicles);

(E) Materials or products during loading/unloading or transporting activities;

(F) Materials or products stored outdoors (except final products intended for outside use, e.g., new cars, where exposure to storm water does not result in the discharge of pollutants);

(G) Materials contained in open, deteriorated or leaking storage drums, barrels, tanks, and similar containers;

(H) Materials or products handled/stored on roads or railways owned or maintained by the discharger;

(I) Waste material (except waste in covered, non-leaking containers, e.g., dumpsters);

(J) Application or disposal of process wastewater (unless otherwise permitted); and

(K) Particulate matter or visible deposits of residuals from roof stacks/vents not otherwise regulated, i.e., under an air quality control permit, and evident in the storm water outflow;

(iv) All "no exposure" certifications must include the following certification statement, and be signed in accordance with the signatory requirements of § 122.22: "I certify under penalty of law that I have read and understand the eligibility requirements for claiming a condition of "no exposure" and obtaining an exclusion from NPDES storm water permitting; and that there are no discharges of storm water contaminated by exposure to industrial activities or materials from the industrial facility identified in this document (except as allowed under paragraph (g)(2)) of this section. I understand that I am obligated to submit a no exposure certification form once every five years to the NPDES permitting authority and, if requested, to the operator of the local MS4 into which this facility discharges (where applicable). I understand that I must allow the NPDES permitting authority, or MS4 operator where the discharge is into the local MS4, to perform inspections to confirm the condition of no exposure and to make such inspection reports publicly available upon request. I understand that I must obtain coverage under an NPDES permit prior to any point source discharge of storm water from the facility. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly involved in gathering the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

[54 FR 255, Jan. 4, 1989; 55 FR 48063, Nov. 16, 1990; 56 FR 12100. March 21, 1991; 56 FR 56554, Nov. 5, 1991; 57 FR 11412, April 2, 1992; 57 FR 60447, Dec. 18, 1992; 60 FR 17956, April 7, 1995; 60 FR 40235, Aug. 7, 1995; 64 FR 68838, Dec. 8, 1999; 65 FR 30907, May 15, 2000; 68 FR 11329, March 10, 2003; 70 FR 11563, March 9, 2005; 71 FR 33639, June 12, 2006]

SOURCE: 45 FR 33418, May 19, 1980, as amended at 48 FR 14153, Apr. 1, 1983, unless otherwise noted.

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 et seq.

40 C. F. R. § 122.26, 40 CFR § 122.26

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TAB NO. 20

C

Effective: April 11, 2007

Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter D. Water Programs
Part 122. EPA Administered Permit Programs: the National Pollutant Discharge Elimination System (Refs & Annos)
Subpart C. Permit Conditions
§ 122.41 Conditions applicable to all permits (applicable to state programs, see § 123.25).

The following conditions apply to all NPDES permits. Additional conditions applicable to NPDES permits are in § 122.42. All conditions applicable to NPDES permits shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations (or the corresponding approved State regulations) must be given in the permit.

(a) Duty to comply. The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.

(1) The permittee shall comply with effluent standards or prohibitions established under section 307(a) of the Clean Water Act for toxic pollutants and with standards for sewage sludge use or disposal established under section 405(d) of the CWA within the time provided in the regulations that establish these standards or prohibitions or standards for sewage sludge use or disposal, even if the permit has not yet been modified to incorporate the requirement.

(2) The Clean Water Act provides that any person who violates section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any such sections in a permit issued under section 402, or any requirement imposed in a pretreatment program approved under sections 402(a)(3) or 402(b)(8) of the Act, is subject to a civil penalty not to exceed $25,000 per day for each violation. The Clean Water Act provides that any person who negligently violates sections 301, 302, 306, 307, 308, 318, or 405 of the Act, or any condition or limitation implementing any of such sections in a permit issued under section 402 of the Act, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of the Act, is subject to criminal penalties of $2,500 to $25,000 per day of violation, or imprisonment of not more than 1 year, or both. In the case of a second or subsequent conviction for a negligent violation, a person shall be subject to criminal penalties of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or both. Any person who knowingly violates such sections, or such conditions or limitations is subject to criminal penalties of $5,000 to $50,000 per day of violation, or imprisonment for not more than 3 years, or both. In the case of a second or subsequent conviction for a knowing violation, a person shall be subject to criminal penalties of not more than $100,000 per day of violation, or imprisonment of not more than 6 years, or both. Any person who knowingly violates section 301, 302, 303, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of the Act, and who

knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. In the case of a second or subsequent conviction for a knowing endangerment violation, a person shall be subject to a fine of not more than $500,000 or by imprisonment of not more than 30 years, or both. An organization, as defined in section 309(c)(3)(B)(iii) of the CWA, shall, upon conviction of violating the imminent danger provision, be subject to a fine of not more than $1,000,000 and can be fined up to $2,000,000 for second or subsequent convictions.

(3) Any person may be assessed an administrative penalty by the Administrator for violating section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act. Administrative penalties for Class I violations are not to exceed $10,000 per violation, with the maximum amount of any Class I penalty assessed not to exceed $25,000. Penalties for Class II violations are not to exceed $10,000 per day for each day during which the violation continues, with the maximum amount of any Class II penalty not to exceed $125,000.

(b) Duty to reapply. If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit.

(c) Need to halt or reduce activity not a defense. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

(d) Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

(e) Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

(f) Permit actions. This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

(g) Property rights. This permit does not convey any property rights of any sort, or any exclusive privilege.

(h) Duty to provide information. The permittee shall furnish to the Director, within a reasonable time, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit or to determine compliance with this permit. The permittee shall also furnish to the Director upon request, copies of records required to be kept by this permit.

(i) Inspection and entry. The permittee shall allow the Director, or an authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of credentials and other documents as may be required by law, to:

(1) Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

(2) Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

(3) Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

(4) Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location.

(j) Monitoring and records.

(1) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

(2) Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years (or longer as required by 40 CFR Part 503), the permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.

(3) Records of monitoring information shall include:

(i) The date, exact place, and time of sampling or measurements;

(ii) The individual(s) who performed the sampling or measurements;

(iii) The date(s) analyses were performed;

(iv) The individual(s) who performed the analyses;

(v) The analytical techniques or methods used; and

(vi) The results of such analyses.

(4) Monitoring must be conducted according to test procedures approved under 40 CFR Part 136 unless another method is required under 40 CFR subchapters N or O.

(5) The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or both. If a

conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or both.

(k) Signatory requirements.

(1) All applications, reports, or information submitted to the Director shall be signed and certified. (See § 122.22)

(2) The CWA provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both.

(l) Reporting requirements.--

(1) Planned changes. The permittee shall give notice to the Director as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when:

(i) The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source in § 122.29(b); or

(ii) The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants which are subject neither to effluent limitations in the permit, nor to notification requirements under § 122.42(a)(1).

(iii) The alteration or addition results in a significant change in the permittee's sludge use or disposal practices, and such alteration, addition, or change may justify the application of permit conditions that are different from or absent in the existing permit, including notification of additional use or disposal sites not reported during the permit application process or not reported pursuant to an approved land application plan;

(2) Anticipated noncompliance. The permitted shall give advance notice to the Director of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

(3) Transfers. This permit is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the Clean Water Act. (See § 122.61; in some cases, modification or revocation and reissuance is mandatory.)

(4) Monitoring reports. Monitoring results shall be reported at the intervals specified elsewhere in this permit.

(i) Monitoring results must be reported on a Discharge Monitoring Report (DMR) or forms provided or specified by the Director for reporting results of monitoring of sludge use or disposal practices.

(ii) If the permittee monitors any pollutant more frequently than required by the permit us-

ing test procedures approved under 40 CFR Part 136, or another method required for an industry-specific waste stream under 40 CFR subchapters N or O, the results of such monitoring shall be included in the calculation and reporting of the data submitted in the DMR or sludge reporting form specified by the Director.

(iii) Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the Director in the permit.

(5) Compliance schedules. Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date.

(6) Twenty-four hour reporting.

(i) The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance had not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

(ii) The following shall be included as information which must be reported within 24 hours under this paragraph.

(A) Any unanticipated bypass which exceeds any effluent limitation in the permit. (See § 122.41(g).

(B) Any upset which exceeds any effluent limitation in the permit.

(C) Violation of a maximum daily discharge limitation for any of the pollutants listed by the Director in the permit to be reported within 24 hours. (See § 122.44(g) .)

(iii) The Director may waive the written report on a case-by-case basis for reports under paragraph (1)(6)(ii) of this section if the oral report has been received within 24 hours.

(7) Other noncompliance. The permittee shall report all instances of noncompliance not reported under paragraphs (1)(4), (5), and (6) of this section, at the time monitoring reports are submitted. The reports shall contain the information listed in paragraph (1)(6) of this section.

(8) Other information: Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the Director, it shall promptly submit such facts or information.

(m) Bypass--

(1) Definitions.

(i) "Bypass" means the intentional diversion of

waste streams from any portion of a treatment facility.

(ii) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

(2) Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also it for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs (m)(3) and (m)(4) of this section.

(3) Notice--

(i) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten days before the date of the bypass.

(ii) Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in paragraph (1)(6) of this section (24–hour notice).

(4) Prohibition of bypass.

(i) Bypass is prohibited, and the Director may take enforcement action against a permittee for bypass, unless:

(A) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(B) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

(C) The permittee submitted notices as required under paragraph (m)(3) of this section.

(ii) The Director may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph (m)(4)(i) of this section.

(n) Upset--

(1) Definition. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

(2) Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit effluent limitations if the requirements of paragraph (n)(3) of this section are met. No determination made during administrative re-

view of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

(3) Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

(i) An upset occurred and that the permittee can identify the cause(s) of the upset;

(ii) The permitted facility was at the time being properly operated; and

(iii) The permittee submitted notice of the upset as required in paragraph (1)(6)(ii)(B) of this section (24 hour notice).

(iv) The permittee complied with any remedial measures required under paragraph (d) of this section.

(4) Burden of proof. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

(Clean Water Act (33 U.S.C. 1251 et seq.), Safe Drinking Water Act (42 U.S.C. 300f et seq.), Clean Air Act (42 U.S.C. 7401 et seq.), Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.))

Editorial Note: In paragraphs (j)(2), (4) and (l)(4)(ii), there are references to 40 CFR part 503. These references are to a proposed rule which was published at 54 FR 5746, Feb. 6, 1989. There is currently no part 503 in the Code of Federal Regulations.

[48 FR 39620, Sept. 1, 1983; 49 FR 38049, Sept. 26, 1984; 50 FR 4514, Jan. 31, 1985; 50 FR 6941, Feb. 19, 1985; 54 FR 255, Jan. 4, 1989; 54 FR 18783, May 2, 1989; 58 FR 18016, April 7, 1993; 65 FR 30908, May 15, 2000; 72 FR 11211, March 12, 2007]

SOURCE: 45 FR 33418, May 19, 1980, as amended at 48 FR 14153, Apr. 1, 1983, unless otherwise noted.

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 et seq.

40 C. F. R. § 122.41, 40 CFR § 122.41

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TAB NO. 21

C

Effective: April 11, 2007

Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter D. Water Programs
Part 122. EPA Administered Permit Programs: the National Pollutant Discharge Elimination System (Refs & Annos)
Subpart C. Permit Conditions
§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

In addition to the conditions established under § 122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable.

(a)(1) Technology-based effluent limitations and standards based on: effluent limitations and standards promulgated under section 301 of the CWA, or new source performance standards promulgated under section 306 of CWA, on case-by-case effluent limitations determined under section 402(a)(1) of CWA, or a combination of the three, in accordance with § 125.3 of this chapter. For new sources or new dischargers, these technology based limitations and standards are subject to the provisions of § 122.29(d) (protection period).

(2) Monitoring waivers for certain guideline-listed pollutants.

(i) The Director may authorize a discharger subject to technology-based effluent limitations guidelines and standards in an NPDES permit to forego sampling of a pollutant found at 40 CFR Subchapter N of this chapter if the discharger has demonstrated through sampling and other technical factors that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger.

(ii) This waiver is good only for the term of the permit and is not available during the term of the first permit issued to a discharger.

(iii) Any request for this waiver must be submitted when applying for a reissued permit or modification of a reissued permit. The request must demonstrate through sampling or other technical information, including information generated during an earlier permit term that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger.

(iv) Any grant of the monitoring waiver must be included in the permit as an express permit condition and the reasons supporting the grant must be documented in the permit's fact sheet or statement of basis.

(v) This provision does not supersede certification processes and requirements already established in existing effluent limitations guidelines and standards.

(b)(1) Other effluent limitations and standards under sections 301, 302, 303, 307, 318, and 405 of CWA. If any applicable toxic effluent standard or prohibition (including any schedule of compliance

specified in such effluent standard or prohibition) is promulgated under section 307(a) of CWA for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the Director shall institute proceedings under these regulations to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition. See also § 122.41(a).

(2) Standards for sewage sludge use or disposal under section 405(d) of the CWA unless those standards have been included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act, Part C of Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act of 1972, or the Clean Air Act, or under State permit programs approved by the Administrator. When there are no applicable standards for sewage sludge use or disposal, the permit may include requirements developed on a case-by-case basis to protect public health and the environment from any adverse effects which may occur from toxic pollutants in sewage sludge. If any applicable standard for sewage sludge use or disposal is promulgated under section 405(d) of the CWA and that standard is more stringent than any limitation on the pollutant or practice in the permit, the Director may initiate proceedings under these regulations to modify or revoke and reissue the permit to conform to the standard for sewage sludge use or disposal.

(3) Requirements applicable to cooling water intake structures under section 316(b) of the CWA, in accordance with part 125, subparts I, J, and N of this chapter.

(c) Reopener clause: For any permit issued to a treatment works treating domestic sewage (including "sludge-only facilities"), the Director shall include a reopener clause to incorporate any applicable standard for sewage sludge use or disposal promulgated under section 405(d) of the CWA. The Director may promptly modify or revoke and reissue any permit containing the reopener clause required by this paragraph if the standard for sewage sludge use or disposal is more stringent than any requirements for sludge use or disposal in the permit, or controls a pollutant or practice not limited in the permit.

(d) Water quality standards and State requirements: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318, and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

(i) Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

(ii) When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

(iii) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.

(iv) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the numeric criterion for whole effluent toxicity, the permit must contain effluent limits for whole effluent toxicity.

(v) Except as provided in this subparagraph, when the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, toxicity testing data, or other information, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity. Limits on whole effluent toxicity are not necessary where the permitting authority demonstrates in the fact sheet or statement of basis of the NPDES permit, using the procedures in paragraph (d)(1)(ii) of this section, that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative State water quality standards.

(vi) Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limits using one or more of the following options:

(A) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, October 1983, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents; or

(B) Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 304(a) of the CWA, supplemented where necessary by other relevant information; or

(C) Establish effluent limitations on an indicator parameter for the pollutant of concern, provided:

(1) The permit identifies which pollutants are intended to be controlled by the use of the effluent limitation;

(2) The fact sheet required by § 124.56 sets forth the basis for the limit, including a finding that compliance with the effluent limit on the indicator parameter will result in controls on the

pollutant of concern which are sufficient to attain and maintain applicable water quality standards;

(3) The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards; and

(4) The permit contains a reopener clause allowing the permitting authority to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards.

(vii) When developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that:

(A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and

(B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.

(2) Attain or maintain a specified water quality through water quality related effluent limits established under section 302 of CWA;

(3) Conform to the conditions to a State certification under section 401 of the CWA that meets the requirements of § 124.53 when EPA is the permitting authority. If a State certification is stayed by a court of competent jurisdiction or an appropriate State board or agency, EPA shall notify the State that the Agency will deem certification waived unless a finally effective State certification is received within sixty days from the date of the notice. If the State does not forward a finally effective certification within the sixty day period, EPA shall include conditions in the permit that may be necessary to meet EPA's obligation under section 301(b)(1)(C) of the CWA;

(4) Conform to applicable water quality requirements under section 401(a)(2) of CWA when the discharge affects a State other than the certifying State;

(5) Incorporate any more stringent limitations, treatment standards, or schedule of compliance requirements established under Federal or State law or regulations in accordance with section 301(b)(1)(C) of CWA;

(6) Ensure consistency with the requirements of a Water Quality Management plan approved by EPA under section 208(b) of CWA;

(7) Incorporate section 403(c) criteria under Part 125, Subpart M, for ocean discharges;

(8) Incorporate alternative effluent limitations or standards where warranted by "fundamentally different factors," under 40 CFR Part 125, Subpart D;

(9) Incorporate any other appropriate requirements, conditions, or limitations (other than effluent limitations) into a new source permit to the extent allowed by the National Environ-

mental Policy Act, 42 U.S.C. 4321 et seq. and section 511 of the CWA, when EPA is the permit issuing authority. (See § 122.29(c)).

(e) Technology–based controls for toxic pollutants. Limitations established under paragraphs (a), (b), or (d) of this section, to control pollutants meeting the criteria listed in paragraph (e)(1) of this section. Limitations will be established in accordance with paragraph (e)(2) of this section. An explanation of the development of these limitations shall be included in the fact sheet under § 124.56(b)(1)(i).

(1) Limitations must control all toxic pollutants which the Director determines (based on information reported in a permit application under § 122.21(g)(7) or in a notification under § 122.42(a)(1) or on other information) are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c) of this chapter; or

(2) The requirement that the limitations control the pollutants meeting the criteria of paragraphs (e)(1) of this section will be satisfied by:

(i) Limitations on those pollutants; or

(ii) Limitations on other pollutants which, in the judgment of the Director, will provide treatment of the pollutants under paragraph (e)(1) of this section to the levels required by § 125.3(c).

(f) Notification level. A "notification level" which exceeds the notification level of § 122.42(a)(1)(i), (ii), or (iii), upon a petition from the permittee or on the Director's initiative. This new notification level may not exceed the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c).

(g) Twenty-four hour reporting. Pollutants for which the permittee must report violations of maximum daily discharge limitations under § 122.41 (1)(6)(ii)(C) (24–hour reporting) shall be listed in the permit. This list shall include any toxic pollutant or hazardous substance, or any pollutant specifically identified as the method to control a toxic pollutant or hazardous substance.

(h) Durations for permits, as set forth in § 122.46.

(i) Monitoring requirements. In addition to § 122.48 , the following monitoring requirements:

(1) To assure compliance with permit limitations, requirements to monitor:

(i) The mass (or other measurement specified in the permit) for each pollutant limited in the permit;

(ii) The volume of effluent discharged from each outfall;

(iii) Other measurements as appropriate including pollutants in internal waste streams under § 122.45(i); pollutants in intake water for net limitations under § 122.45(f); frequency, rate of discharge, etc., for noncontinuous discharges under § 122.45(e); pollutants subject to notification requirements under § 122.42(a); and pollutants in sewage sludge or other monitoring as specified in 40 CFR Part 503; or as determined to be necessary on a case-by-case basis pursuant to section 405(d)(4) of the CWA.

(iv) According to test procedures approved under 40 CFR Part 136 for the analyses of pollut-

ants or another method is required under 40 CFR subchapters N or O. In the case of pollutants for which there are no approved methods under 40 CFR Part 136 or otherwise required under 40 CFR subchapters N or O, monitoring must be conducted according to a test procedure specified in the permit for such pollutants.

(2) Except as provided in paragraphs (i)(4) and (i)(5) of this section, requirements to report monitoring results shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year. For sewage sludge use or disposal practices, requirements to monitor and report results shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the sewage sludge use or disposal practice; minimally this shall be as specified in 40 CFR part 503 (where applicable), but in no case less than once a year.

(3) Requirements to report monitoring results for storm water discharges associated with industrial activity which are subject to an effluent limitation guideline shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.

(4) Requirements to report monitoring results for storm water discharges associated with industrial activity (other than those addressed in paragraph (i)(3) of this section) shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge. At a minimum, a permit for such a discharge must require:

(i) The discharger to conduct an annual inspection of the facility site to identify areas contributing to a storm water discharge associated with industrial activity and evaluate whether measures to reduce pollutant loadings identified in a storm water pollution prevention plan are adequate and properly implemented in accordance with the terms of the permit or whether additional control measures are needed;

(ii) The discharger to maintain for a period of three years a record summarizing the results of the inspection and a certification that the facility is in compliance with the plan and the permit, and identifying any incidents of noncompliance;

(iii) Such report and certification be signed in accordance with § 122.22; and

(iv) Permits for storm water discharges associated with industrial activity from inactive mining operations may, where annual inspections are impracticable, require certification once every three years by a Registered Professional Engineer that the facility is in compliance with the permit, or alternative requirements.

(5) Permits which do not require the submittal of monitoring result reports at least annually shall require that the permittee report all instances of noncompliance not reported under § 122.41(l) (1), (4), (5), and (6) at least annually.

(j) Pretreatment program for POTWs. Requirements for POTWs to:

(1) Identify, in terms of character and volume of pollutants, any Significant Industrial Users discharging into the POTW subject to Pretreatment Standards under section 307(b) of CWA and 40 CFR part 403.

(2)(i) Submit a local program when required by

and in accordance with 40 CFR part 403 to assure compliance with pretreatment standards to the extent applicable under section 307(b). The local program shall be incorporated into the permit as described in 40 CFR part 403. The program must require all indirect dischargers to the POTW to comply with the reporting requirements of 40 CFR part 403.

(ii) Provide a written technical evaluation of the need to revise local limits under 40 CFR 403.5(c)(1), following permit issuance or reissuance.

(3) For POTWs which are "sludge-only facilities," a requirement to develop a pretreatment program under 40 CFR Part 403 when the Director determines that a pretreatment program is necessary to assure compliance with Section 405(d) of the CWA.

(k) Best management practices (BMPs) to control or abate the discharge of pollutants when:

(1) Authorized under section 304(e) of the CWA for the control of toxic pollutants and hazardous substances from ancillary industrial activities;

(2) Authorized under section 402(p) of the CWA for the control of storm water discharges;

(3) Numeric effluent limitations are infeasible; or

(4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA.

Note to paragraph (k)(4): Additional technical information on BMPs and the elements of BMPs is contained in the following documents: Guidance Manual for Developing Best Management Practices (BMPs), October 1993, EPA No. 833/B–93–004, NTIS No. PB 94–178324, ERIC No. W498); Storm Water Management for Construction Activities: Developing Pollution Prevention Plans and Best Management Practices, September 1992, EPA No. 832/R–92–005, NTIS No. PB 92–235951, ERIC No. N482); Storm Water Management for Construction Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA No. 833/R–92–001, NTIS No. PB 93–223550; ERIC No. W139; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices, September 1992; EPA 832/R–92–006, NTIS No. PB 92–235969, ERIC No. N477; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA 833/R–92–002, NTIS No. PB 94–133782; ERIC No. W492. Copies of those documents (or directions on how to obtain them) can be obtained by contacting either the Office of Water Resource Center (using the EPA document number as a reference) at (202) 260–7786; or the Educational Resources Information Center (ERIC) (using the ERIC number as a reference) at (800) 276–0462. Updates of these documents or additional BMP documents may also be available. A list of EPA BMP guidance documents is available on the OWM Home Page at http://www.epa.gov/owm. In addition, States may have BMP guidance documents.

These EPA guidance documents are listed here only for informational purposes; they are not binding and EPA does not intend that these guidance documents have any mandatory, regulatory effect by virtue of their listing in this note.

(l) Reissued permits.

(1) Except as provided in paragraph (l)(2) of

this section when a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 122.62.)

(2) In the case of effluent limitations established on the basis of Section 402(a)(1)(B) of the CWA, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.

(i) Exceptions--A permit with respect to which paragraph (l)(2) of this section applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant, if--

(A) Material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(1) Information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(2) The Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under section 402(a)(1)(b);

(C) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) The permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a); or

(E) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

(ii) Limitations. In no event may a permit with respect to which paragraph (l)(2) of this section applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 applicable to such waters.

(m) Privately owned treatment works. For a privately owned treatment works, any conditions expressly applicable to any user, as a limited copermittee, that may be necessary in the permit issued to the treatment works to ensure compliance with applicable requirements under this part. Alternatively, the Director may issue separate permits to the treatment works and to its users, or may require a separate permit application from any user. The Director's decision to issue a permit with no conditions applicable to any user, to impose conditions on one or more users, to issue separate permits, or to require separate applications, and the basis for that decision, shall be stated in the fact sheet for the draft permit for the treatment works.

(n) Grants. Any conditions imposed in grants made by the Administrator to POWs under sections 201 and 204 of CWA which are reasonably necessary for the achievement of effluent limitations under section 301 of CWA.

(o) Sewage sludge. Requirements under section 405 of CWA governing the disposal of sewage sludge from publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established, in accordance with any applicable regulations.

(p) Coast Guard. When a permit is issued to a facility that may operate at certain times as a means of transportation over water, a condition that the discharge shall comply with any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, that establish specifications for safe transportation, handling, carriage, and storage of pollutants.

(q) Navigation. Any conditions that the Secretary of the Army considers necessary to ensure that navigation and anchorage will not be substantially impaired, in accordance with § 124.59 of this chapter.

(r) Great Lakes. When a permit is issued to a facility that discharges into the Great Lakes System (as defined in 40 CFR 132.2), conditions promulgated by the State, Tribe, or EPA pursuant to 40 CFR part 132.

(s) Qualifying State, Tribal, or local programs.

(1) For storm water discharges associated with small construction activity identified in § 122.26(b)(15), the Director may include permit conditions that incorporate qualifying State, Tribal, or local erosion and sediment control program requirements by reference. Where a qualifying State, Tribal, or local program does not include one or more of the elements in this paragraph (s)(1), then the Director must include those elements as conditions in the permit. A qualifying State, Tribal, or local erosion and sediment control program is one that includes:

(i) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices;

(ii) Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;

(iii) Requirements for construction site operators to develop and implement a storm water pollution prevention plan. (A storm water pollution prevention plan includes site descriptions, descriptions of appropriate control measures, copies of approved State, Tribal or local requirements, maintenance procedures, inspection procedures, and identification of non-storm water discharges); and

(iv) Requirements to submit a site plan for review that incorporates consideration of potential water quality impacts.

(2) For storm water discharges from construction activity identified in § 122.26(b)(14)(x), the Director may include permit conditions that incorporate qualifying State, Tribal, or local erosion and sediment control program requirements by reference. A qualifying State, Tribal or local erosion and sediment control program is one that includes the elements listed in paragraph (s)(1) of this section and any additional requirements necessary to achieve the applicable technology-based standards of "best available technology" and "best conventional technology" based on the best professional judgment of the permit writer.

[49 FR 31842, Aug. 8, 1984; 49 FR 38049, Sept. 26, 1984; 50 FR 6940, Feb. 19, 1985; 50 FR 7912, Feb. 27, 1985; 54 FR 256, Jan. 4, 1989; 54 FR 18783, May 2, 1989; 54 FR 23895, 23896, June 2, 1989; 57 FR 11413, April 2, 1992; 57 FR 33049, July 24, 1992; 58 FR 18016, April 7, 1993; 60 FR 15386, March 23, 1995; 64 FR 42469, Aug. 4, 1999; 64 FR 43426, Aug. 10, 1999; 64 FR 68847, Dec. 8, 1999; 65 FR 30908, May 15, 2000; 65 FR 43661, July 13, 2000; 66 FR 53048, Oct. 18, 2001; 66 FR 65337, Dec. 18, 2001; 68 FR 13608, March 19, 2003; 69 FR 41682, July 9, 2004; 70 FR 60191, Oct. 14, 2005; 71 FR 35040, June 16, 2006; 72 FR 11212, March 12, 2007]

SOURCE: 45 FR 33418, May 19, 1980, as amended at 48 FR 14153, Apr. 1, 1983, unless otherwise noted.

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 et seq.

40 C. F. R. § 122.44, 40 CFR § 122.44

Current through September 1; 76 FR 54687

END OF DOCUMENT

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State Mandates

TAB NO. 22

C

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter D. Water Programs
Part 122. EPA Administered Permit Programs: the National Pollutant Discharge Elimination System (Refs & Annos)
Subpart C. Permit Conditions
→ § 122.48 Requirements for recording and reporting of monitoring results (applicable to State programs, see § 123.25).

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.

[50 FR 6940, Feb. 19, 1985; 58 FR 18016, April 7, 1993]

SOURCE: 45 FR 33418, May 19, 1980, as amended at 48 FR 14153, Apr. 1, 1983, unless otherwise noted.

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 et seq.

40 C. F. R. § 122.48, 40 CFR § 122.48

Current through September 1; 76 FR 54687

END OF DOCUMENT

TAB NO. 23

C

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter D. Water Programs
Part 130. Water Quality Planning and Management (Refs & Annos)
§ 130.2 Definitions.

(a) The Act. The Clean Water Act, as amended, 33 U.S.C. 1251 et seq.

(b) Indian Tribe. Any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

(c) Pollution. The man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(d) Water quality standards (WQS). Provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.

(e) Load or Loading. An amount of matter or thermal energy that is introduced into a receiving water; to introduce matter or thermal energy into a receiving water. Loading may be either man-caused (pollutant loading) or natural (natural background loading).

(f) Loading capacity. The greatest amount of loading that a water can receive without violating water quality standards.

(g) 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.

(h) 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.

(i) 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.

(j) Water quality limited segment. Any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards,

even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act.

(k) Water quality management (WQM) plan. A State or areawide waste treatment management plan developed and updated in accordance with the provisions of sections 205(j), 208 and 303 of the Act and this regulation.

(l) Areawide agency. An agency designated under section 208 of the Act, which has responsibilities for WQM planning within a specified area of a State.

(m) Best Management Practice (BMP). Methods, measures or practices selected by an agency to meet its nonpoint source control needs. BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures. BMPs can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters.

(n) Designated management agency (DMA). An agency identified by a WQM plan and designated by the Governor to implement specific control recommendations.

[54 FR 14359, April 11, 1989; 65 FR 43662, July 13, 2000; 68 FR 13608, March 19, 2003]

SOURCE: 50 FR 1779, Jan. 11, 1985; 66 FR 53048 , Oct. 18, 2001; 68 FR 13608, March 19, 2003, unless otherwise noted.

AUTHORITY: 33 U.S.C. 1251 et seq.

40 C. F. R. § 130.2, 40 CFR § 130.2

Current through September 1; 76 FR 54687

TAB NO. 24

MS4s, as they would to other point sources.

EPA does not presume that water quality will be protected if a small MS4 elects not to implement all of the six minimum measures and instead applies for alternative permit limits under § 122.26(d). Operators of such small MS4s that apply for alternative permit limits under § 122.26(d) must supply additional information through individual permit applications so that the permit writer can determine whether the proposed program reduces pollutants to the MEP and whether any other provisions are appropriate to protect water quality and satisfy the appropriate water quality requirements of the Clean Water Act.

iii. *Maximum Extent Practicable.* Maximum extent practicable (MEP) is the statutory standard that establishes the level of pollutant reductions that operators of regulated MS4s must achieve. The CWA requires that NPDES permits for discharges from MS4s "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods." CWA Section 402(p)(3)(B)(iii). This section also calls for "such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants." EPA interprets this standard to apply to all MS4s, including both existing regulated (large and medium) MS4s, as well as the small MS4s regulated under today's rule.

For regulated small MS4s under today's rule, authorization to discharge may be under either a general permit or individual permit, but EPA anticipates and expects that general permits will be the most common permit mechanism. The general permit will explain the steps necessary to obtain permit authorization. Compliance with the conditions of the general permit and the series of steps associated with identification and implementation of the minimum control measures will satisfy the MEP standard. Implementation of the MEP standard under today's rule will typically require the permittee to develop and implement appropriate BMPs to satisfy each of the required six minimum control measures.

In issuing the general permit, the NPDES permitting authority will establish requirements for each of the minimum control measures. Permits typically will require small MS4 permittees to identify in their NOI the BMPs to be performed and to develop the measurable goals by which implementation of the BMPs can be assessed. Upon receipt of the NOI from a small MS4 operator, the NPDES permitting authority will have the opportunity to review the NOI to verify that the identified BMPs and measurable goals are consistent with the requirement to reduce pollutants under the MEP standard, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act. If necessary, the NPDES permitting authority may ask the permittee to revise their mix of BMPs, for example, to better reflect the MEP pollution reduction requirement. Where the NPDES permit is not written to implement the minimum control measures specified under § 122.34(b), for example in the case of an individual permit under § 122.33(b)(2)(ii), the MEP standard will be applied based on the best professional judgment of the permit writer.

Commenters argued that MEP is, as yet, an undefined term and that EPA needs to further clarify the MEP standards by providing a regulatory definition that includes recognition of cost considerations and technical feasibility. Commenters argued that, without a definition, the regulatory community is not adequately on notice regarding the standard with which they need to comply. EPA disagrees that affected MS4 permittees will lack notice of the applicable standard. The framework for the small MS4 permits described in this notice provides EPA's interpretation of the standard and how it should be applied.

EPA has intentionally not provided a precise definition of MEP to allow maximum flexibility in MS4 permitting. MS4s need the flexibility to optimize reductions in storm water pollutants on a location-by-location basis. EPA envisions that this evaluative process will consider such factors as conditions of receiving waters, specific local concerns, and other aspects included in a comprehensive watershed plan. Other factors may include MS4 size, climate, implementation schedules, current ability to finance the program, beneficial uses of receiving water, hydrology, geology, and capacity to perform operation and maintenance.

The pollutant reductions that represent MEP may be different for each small MS4, given the unique local hydrologic and geologic concerns that may exist and the differing possible pollutant control strategies. Therefore, each permittee will determine appropriate BMPs to satisfy each of the six minimum control measures through an evaluative process. Permit writers may evaluate small MS4 operator's proposed storm water management controls to determine whether reduction of pollutants to the MEP can be achieved with the identified BMPs.

EPA envisions application of the MEP standard as an iterative process. MEP should continually adapt to current conditions and BMP effectiveness and should strive to attain water quality standards. Successive iterations of the mix of BMPs and measurable goals will be driven by the objective of assuring maintenance of water quality standards. If, after implementing the six minimum control measures there is still water quality impairment associated with discharges from the MS4, after successive permit terms the permittee will need to expand or better tailor its BMPs within the scope of the six minimum control measures for each subsequent permit. EPA envisions that this process may take two to three permit terms.

One commenter observed that MEP is not static and that if the six minimum control measures are not achieving the necessary water quality improvements, then an MS4 should be expected to revise and, if necessary, expand its program. This concept, it is argued, must be clearly part of the definition of MEP and thus incorporated into the binding and operative aspects of the rule. As is explained above, EPA believes that it is. The iterative process described above is intended to be sensitive to water quality concerns. EPA believes that today's rule contains provisions to implement an approach that is consistent with this comment.

b. Program Requirements'Minimum Control Measures

A regulated small MS4 operator must develop and implement a storm water management program designed to reduce the discharge of pollutants from their MS4 to protect water quality. The storm water management program must include the following six minimum measures.

i. Public Education and Outreach on Storm Water Impacts. Under today's final rule, operators of small MS4s must implement a public education program to distribute educational materials to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps to reduce storm water pollution. The public education program should inform individuals and households about the problem and the steps they can take to reduce or prevent storm water pollution.

EPA believes that as the public gains a greater understanding of the storm water program, the MS4 is likely to gain

Received
September 15, 2011
Commission on
State Mandates

TAB NO. 25

RULES and REGULATIONS

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 122, 123, 124, and 130

[WH-FRL-7470-2]

RIN 2040-AD84

Withdrawal of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation

Wednesday, March 19, 2003

***13608** AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: Today's action withdraws the final rule entitled "Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation ("the July 2000 rule") published in the Federal Register on July 13, 2000. The July 2000 rule amended and clarified existing regulations implementing a section of the Clean Water Act (CWA) that requires States to identify waters that are not meeting applicable water quality standards and to establish pollutant budgets, called Total Maximum Daily Loads (TMDLs), to restore the quality of those waters. The July 2000 rule also amended EPA's National Pollutant Discharge Elimination System ("NPDES") regulations to include provisions addressing implementation of TMDLs through NPDES permits. The July 2000 rule has never become effective; it is currently scheduled to take effect on April 30, 2003. Today, EPA is withdrawing the July 2000 rule, rather than allow it to go into effect, because EPA believes that significant changes would need to be made to the July 2000 rule before it could represent a workable framework for an efficient and effective TMDL program. Furthermore, EPA needs additional time beyond April 30, 2003, to decide whether and how to revise the currently-effective regulations implementing the TMDL program in a way that will best achieve the goals of the CWA. The withdrawal of the July 2000 rule will not impede ongoing implementation of the existing TMDL program. Regulations that EPA promulgated in 1985 and amended in 1992 remain in effect for the TMDL program. EPA has been working steadily to identify regulatory and nonregulatory options to improve the TMDL program and is reviewing its ongoing implementation of the existing program with a view toward continuous improvement and possible regulatory changes in light of stakeholder input and recommendations.

DATES: The July 2000 rule amending 40 CFR parts 9, 122, 123, 124 and 130, published on July 13, 2000, at 65 FR 43586, is withdrawn as of April 18, 2003. This rule is considered final for purposes of judicial review as of 1 p.m. eastern time, on April 2, 2003, as provided in 40 CFR 23.2.

ADDRESSES: The complete record for the final rule, Docket ID No. OW-2002-0037, is available for public viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room B-102, 1301 Constitution Ave., NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: For information about today's final rule, contact: Francoise M. Brasier, U.S. EPA Office of Wetlands, Oceans and Watersheds (4503T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, phone (202) 566-2385.

SUPPLEMENTARY INFORMATION:

A. Authority

Clean Water Act sections 106, 205(g), 205(j), 208, 301, 302, 303, 305, 308, 319, 402, 501, 502, and 603; 33 U.S.C. 1256 , 1285(g), 1285(j), 1288, 1311, 1312, 1313, 1315, 1318, 1329, 1342, 1361, 1362, and 1373.

B. Entities Potentially Regulated by the Final Rule

Table of Potentially Regulated Entities

Category	Examples of potentially regulated entities
Governments	States, Territories and Tribes with CWA responsibilites

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in this table could also be regulated. To determine whether you may be regulated by this action, you should carefully examine the applicability criteria in § 130.20 of title 40 of the Code of Federal Regulations. If you have any questions regarding the applicability of this action to you, consult the person listed in the FOR FURTHER INFORMATION CONTACT section.

C. How Can I Get Copies of This Document and Other Related Information

EPA has established an official public docket for this action under Docket ID No. OW-2002-0037. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, EPA West, Room B-102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426. For access to docket materials, please call ahead to schedule an appointment. An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at http://www.epa.gov/edocket to view public comments, access the index listing of the contents of the official public docket and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility previously mentioned. Once in the electronic system, select "search" and then key in the appropriate docket identification number.

D. Explanation of Today's Action

I. Background

On December 27, 2002, EPA proposed to withdraw final regulations affecting the TMDL program (67 FR 79020) that were published in the Federal Register on July 13, 2000 (65 FR 43586). Among other things, the July 2000 rule was intended to resolve issues concerning the identification of impaired waterbodies by promoting more comprehensive inventories of impaired waters. The rule was also intended to improve implementation of TMDLs by requiring EPA to approve, as part of the TMDL, implementation plans containing lists of actions and expeditious schedules to reduce pollutant load-

ings. Finally, the rule included changes to the NPDES program to assist in implementing TMDLs and to better address point source discharges to waters not meeting water quality standards prior to establishment of a TMDL.***13609**

The July 2000 rule was controversial from the outset. Both the proposed and final rules generated considerable controversy, as expressed in Congressional action, letters, testimony and public meetings. Even before it was published in the Federal Register on July 13, 2000, Congress prohibited EPA from implementing the final rule through a spending prohibition attached to an FY2000 appropriations bill that prohibited EPA from using funds "to make a final determination on or implement" the July 2000 rule. This spending prohibition was scheduled to expire on September 30, 2001, and, barring further action by Congress or EPA, the rule would have gone into effect 30 days later on October 30, 2001. Because of the continuing controversy regarding the July 2000 rule, EPA proposed on August 9, 2001 (66 FR 41817), and promulgated on October 18, 2001 (66 FR 53044), a new effective date of April 30, 2003, for the July 2000 rule, to allow time for reconsideration of the rule.

Stakeholder concerns were also reflected in legal challenges to the July 2000 rule by a broad array of litigants. Ten petitions for review were filed by States, industrial and agricultural groups, and environmental organizations asserting that many of EPA's revisions to the TMDL regulations were either unlawful under the Administrative Procedure Act or exceeded the Agency's authority under the CWA. These petitions, which identified more than 50 alleged legal defects in the July 2000 rule, were ultimately consolidated in American Farm Bureau Federation et al. v. Whitman (No. 00-1320) in the United States Court of Appeals for the District of Columbia Circuit. In addition, several other stakeholders have intervened in these lawsuits. The litigation over the July 2000 rule is currently stayed pending EPA's determination regarding whether, and to what extent, that rule should be revised.

In the December 27, 2002, preamble to the proposed withdrawal rule, EPA explained why it had decided to withdraw the July 2000 rule. EPA said that by continuing to examine the regulatory needs of the TMDL and NPDES programs against the impending April 30, 2003, effective date for the July 2000 rule, the Agency was sending confusing signals to the States and other interested parties about which set of rules they should be prepared to implement. Further, because of the significant controversy, pending litigation and lack of stakeholder consensus on key aspects of the July 2000 rule, the Agency said that the July 2000 rule could not function as the blueprint for an efficient and effective TMDL program without significant revisions. Moreover, the Agency said it needed more time to consider whether and how to revise the currently-effective TMDL rules without concern that those efforts would be adversely affected and distracted by the July 2000 rule's impending effective date. In the preamble to the proposed rule, the Agency also explained why it believes that, given the significant progress States have made during the past four years in developing TMDLs, withdrawal of the July 2000 rule will not compromise continuing efforts to implement section 303(d) of the Clean Water Act. EPA's rationale for proposing the withdrawal of the July 2000 rule is more fully explained in the preamble accompanying the proposal (67 FR 79020).

II. Response to Comments and Final Decisions

EPA received approximately 90 separate written comments regarding its proposal to withdraw the July 2000 rule. These comments came from a broad cross-section of stakeholders, including agricultural and forestry groups, business and industry entities and trade associations, State agencies, environmental organizations, professional associations, academic groups and private citizens. An overwhelming majority of the commenters (more than 90 percent) supported EPA's proposed action to withdraw the July 2000 rule. These commenters generally agreed with the Agency's rationale for withdrawing the rule as discussed in the December 27, 2002, preamble. Commenters reiterated EPA's concerns about the potential distraction and confusion caused by the July 2000 rule's impending deadline, as well as the controversy surrounding various provisions of the rule and uncertainty caused by the pending DC Circuit Court litigation. Others stated that

the July 2000 rule was no longer needed because of the increased technical guidance that EPA has provided to States to improve the quality of their lists of impaired waters, and the increased funding provided by EPA for developing TMDLs. Many commenters said that States have made significant strides in developing TMDLs since the rule was originally proposed and promulgated and, therefore, the July 2000 rule was not needed. Several commenters stated that allowing the July 2000 rule to go into effect would be disruptive to ongoing TMDL development efforts, and that withdrawing the July 2000 rule would give the Agency additional time to evaluate the need for new TMDL regulations. Some commenters offered additional reasons for supporting withdrawal of the July 2000 rule. Although most of these reasons are consistent with EPA's rationale for withdrawing the July 2000 rule, some are not. For example, some commenters, though supporting EPA's decision to withdraw the July 2000 rule, also questioned the legal soundness of certain provisions of that rule. EPA does not necessarily agree with those comments, and its decision today to withdraw the July 2000 rule should not be understood as an implicit endorsement of those views and comments.

A small minority of commenters (four) disagreed with EPA's proposal to withdraw the July 2000 rule. One commenter asserted that withdrawing the July 2000 rule would "postpone the TMDL program for several more years" and, by removing incentives to reduce pollution, would hinder progress "to implement the TMDL program" and "only make the problem worse." Another commenter said that not going forward with the July 2000 rule would "undermine the momentum of State programs" that have been "waiting to see Federal guidelines to develop programs of their own."EPA does not agree with these comments. Indeed, one State in its comments supporting withdrawal said that the July 2000 rule "would undo much of the momentum and success" of the State's ongoing and successful TMDL program. As described in more detail in the December 27, 2002, preamble, in recent years, EPA and the States have made great strides in implementing the existing 303(d) program to list impaired waters and develop and implement TMDLs to restore impaired waters. States have substantially improved their TMDL programs while the Agency has provided the States with significant increases in technical and financial support to expand and strengthen all elements of their programs. From FY 1999 to 2002, EPA has provided the States almost $30 million for TMDL-specific activities and allowed States to use a portion of State grants for water program administration (CWA section 106 grants) and nonpoint source programs (CWA sections 319 grants) for developing and implementing TMDLs. In addition, since 1998, EPA has spent more than $11 million to support development of technical guidance for developing TMDLs and identifying the most appropriate and efficient best management practices for nonpoint ***13610** sources. A complete list of these guidance documents can be found at: http:// www.epa.gov/edocket.

Helped by these programmatic initiatives, States have made considerable progress in developing TMDLs despite the fact that the July 2000 rule never became effective. As stated in the December 27, 2002, proposal, between 1996 and 1999, EPA and the States established approximately 800 TMDLs. Since then, and despite the fact that the July 2000 rule never became effective, EPA and the States have established more than an additional 7,000 TMDLs; and States continue to improve the pace at which TMDLs are established. Given this progress and the States' adoption since 1998 of schedules for TMDL development, EPA anticipates no reduction in the pace of TMDLs being developed and the associated improvement in water quality, even if the July 2000 rule does not take effect.

One commenter objected to withdrawing the July 2000 rule because of provisions contained in the rule for expanded public involvement in the listing and TMDL development process. By not implementing the July 2000 rule, the commenter asserted that the public remains "shut out" of the listing and TMDL development process, which allows the States to develop impaired waters lists and establish TMDLs "without adequate public scrutiny." EPA disagrees with this comment. While it is true that the July 2000 rule would have clarified, and, in some measure strengthened, the public participation components of EPA's currently-effective TMDL regulations, the current statutory and regulatory provisions (as supplemented by EPA guidance to the States and its Regional Offices) already allow for public scrutiny and participation in the listing and TMDL development process. EPA's existing regulations require that the process for involving the pub-

lic in a State's listing and TMDL program "shall be clearly described in the State Continuing Planning Process (CPP)" (40 CFR 130.7(a)), and § 130.7(c)(1)(ii) requires that a State's calculations to establish TMDLs be subject to public review, as defined in the State CPP. Additionally, EPA regulations require that when EPA disapproves and establishes a list or a TMDL, EPA must seek public comment (40 CFR 130.7(d)).

EPA's policy has always been that there should be full and meaningful public participation in both the listing and TMDL development process, and EPA has issued guidance in addition to the regulations to support this effort. In EPA's "Guidelines for Reviewing TMDLs Under Existing Regulations Issued in 1992" (May 20, 2002), EPA states that, in addition to the TMDL regulatory requirements, "final TMDLs submitted to EPA for review and approval should describe the State's/tribe's public participation process, including a summary of significant comments and the State's/tribe's responses to those comments."The guidance also states that "provision of inadequate public participation may be a basis for disapproving a TMDL. If EPA determines that a State/tribe has not provided adequate public participation, EPA may defer its approval action until adequate public participation has been provided for, either by the State/tribe or by EPA."

EPA's "Integrated Report" guidance to States, tribes and EPA Regions (Integrated Water Quality Monitoring and Assessment Report (November 19, 2001)) states that "States and territories should provide for full public participation in the development of their Integrated Report prior to its submission to EPA. EPA believes that public understanding of how standard attainment determinations are made for all A[sessement] U[nits]s is crucial to the success of water quality programs and encourages active stakeholder participation in the assessment and listing process.... EPA will consider how the State or territory addressed the comments...when approving or disapproving the 303(d) list of AUs (Category 5)."

Most recently, in May 2002, EPA issued guidance to its Regional Offices stating that when reviewing State 303(d) lists, EPA Regions should review how States provided for public participation to ensure that each State carried out its public participation process consistent with the State's public participation requirements ("Recommended Framework for EPA Approval Decisions on 2002 State Section 303(d) List Submission.") If the Region believes a State has not provided adequate public participation, the guidance provides steps the Region should take in working with a State to provide for additional public participation, and how the State or, if necessary, the Region, should consider and address public comments prior to EPA's approval or disapproval of the list. Finally, it is important to note that nearly all of the States already have public participation requirements under their own State laws for the listing and TMDL development processes, and also provide for public notice.

For all of these reasons, EPA believes that adequate public participation opportunities exist under the currently-effective regulations and that withdrawing the July 2000 rule will not limit meaningful public participation in the listing and TMDL development process.

One commenter stated that, by not implementing the July 2000 rule, States would continue to have inadequate monitoring programs and continue to develop lists of impaired waters based on inadequate data. EPA disagrees. EPA recognizes that no State has a perfect monitoring and listing program. Monitoring and assessment programs are expensive to assemble and implement. While the July 2000 rule would have clarified certain aspects of the existing TMDL regulations regarding listing methodologies, that rule, by itself, would not have provided the additional funding needed by many States to expand their monitoring and assessment programs. Moreover, many of the important listing clarifications and improvements contained in the July 2000 rule have already been provided to, and are currently being implemented by, States, even without the July 2000 rule having gone into effect.

To assist in implementation of the currently-effective TMDL rules, EPA issued the "2002 Integrated Water Quality Monitoring and Assessment Report Guidance" (November 19, 2001) to promote a more integrated and comprehensive system

of accounting for the nation's impaired waters. The guidance recommends that States submit an "Integrated Report" that will satisfy CWA requirements for both section 305(b) water quality reports and section 303(d) lists. The objectives of this guidance are to strengthen State monitoring programs, encourage timely monitoring to support decision making, increase numbers of waters monitored, and provide a full accounting of all waters and uses. The guidance encourages a rotating basin approach and strengthened State assessment methodologies, and is intended to improve public confidence in water quality assessments and 303(d) lists. EPA extended the date for submission of 2002 lists by six months (66 FR 53044) to allow States and Territories time to incorporate some or all of the recommendations suggested by EPA in this guidance. Approximately half of the States and Territories have submitted a 2002 report which incorporates some or all of the elements of this guidance. In addition, EPA also held five stakeholder meetings in 2001 and 2002 to review and comment on a best practices guide that EPA was developing for States on consolidated assessment and listing methodologies. This guidance ("Consolidated Listing and Assessment ***13611** Methodology—Toward a Compendium of Best Practices") was released in July 2002. EPA is continuing to work with States to clarify and strengthen their monitoring programs and to help improve the quality and credibility of their lists of waters that require a TMDL.

One commenter stated that withdrawing the July 2000 rule would continue "to make EPA and the States the target of numerous lawsuits—resulting in the courts driving environmental policy, rather than EPA and the States."EPA does not agree with this comment. EPA does not agree that there are, in the commenter's words, "weaknesses" with the currently-effective TMDL regulations that make the Agency any more vulnerable to litigation than if it did not withdraw the July 2000 rule. Indeed, we believe withdrawing the July 2000 rule will render moot the pending D.C. Circuit Court challenge to that rule. Before July 2000, EPA was named as defendant in over 30 lawsuits challenging State lists and the pace of State TMDL development. Since July 2000, only a few such lawsuits have been filed, even though the July 2000 rule never became effective. Clearly, the number of such suits has declined as the States and EPA have done a better job under the 1985/1992 TMDL rules to establish lists and TMDLs. In addition, to date only a handful of lawsuits have been filed challenging any of the more than 7,000 TMDLs that the States or EPA have established. Given these numbers, the Agency does not believe there is anything inherently litigation-provoking in the currently-effective TMDL rules and, based on this record, EPA does not believe that withdrawing the July 2000 rule will result in increased TMDL litigation.

One commenter objected to withdrawing the July 2000 rule because of concerns regarding the inconsistent implementation of the program under the currently-effective regulations and EPA guidance. EPA does not agree that inconsistent implementation of the TMDL program is a significant problem. Nor, for that matter, would implementation of the July 2000 rule remove all potential for divergent implementation approaches by the different States and EPA Regions. As discussed previously, since publication of the July 2000 rule, EPA has issued numerous detailed policy memoranda, national guidance documents, technical protocol documents, and information on best management practices so that States can improve their methods to monitor and list impaired waters, and develop and implement TMDLs in a consistent, yet flexible way. A complete list of these guidance documents can be found at http://www.epa.gov/edocket. As noted previously, EPA has issued detailed national guidance to EPA Regions on reviewing and approving lists and TMDLs, ("EPA Review of 2002 Section 303(d) Lists and Guidelines for Reviewing TMDLs Under Existing Regulations Issued in 1992" (May 20, 2002)) and is working closely with all the EPA Regional Offices to ensure that their regional review and approval of lists and TMDLs correspond with this national policy. In addition, EPA has recently released a guidance on "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs" (November 22, 2002). This memorandum clarifies EPA's policy on wasteload allocations, specifically that NPDES-regulated storm water discharges must be included in the wasteload allocation component of the TMDL (see 40 CFR 130.2(h)) and affirms EPA's view that an iterative, adaptive management BMP approach is appropriate for permitting such discharges.

EPA has also sponsored numerous TMDL and TMDL-related training sessions and meetings to clarify and provide de-

tailed technical support to the States and Regions to help ensure consistency in listing and TMDL development (see EPA's website for a complete list of recent activities: http:// www.epa.gov/owow/tmdl/training.) EPA also has made available to the public the "National TMDL Tracking System" (NTTS), which includes all State-specific data on approved 303(d) lists and approved TMDLs as well as a national summary of impaired waters and TMDLs that have been approved for these waters (http:// www.epa.gov/owow/tmdl/.) In addition, since the Spring of 2001, EPA has held regular conference calls with EPA Regions and the States to discuss and answer any questions regarding the TMDL program, including technical and policy questions. EPA believes that these guidance documents, the National TMDL Tracking System, training, workshops, and close communication with States and EPA Regional Offices have improved the national consistency in how the TMDL program is implemented at both the Federal and State level, while accommodating the inherent variability in States' water quality standards, land and water characteristics, and available resources.

As to the commenter's point that "there are significant differences between the July 2000 rule and the 1985, 1992 rule * * * [that] cannot adequately be addressed through EPA guidance," EPA notes that its review of the currently-effective TMDL regulations in light of the July 2000 rule is ongoing. EPA has not yet decided what, if any, changes to propose to those regulations. As it continues to consider the need for regulatory changes, EPA will consider the commenter's suggestions regarding which elements belong in regulation and which may be appropriately left to guidance. EPA will also consider the commenter's suggestion that the Agency should allow the public to participate in the development of future program guidance.

One commenter said EPA had not provided enough information to allow it to make a "well-reasoned decision or provide meaningful comment on EPA's proposal to withdraw the July 2000 rule."Nevertheless, that commenter did oppose EPA's proposed action. EPA disagrees with the claim that it did not provide enough information for the public to provide meaningful comment, and given the number of other comments to the proposal addressing EPA's rationale, EPA believes that it adequately discussed its justification for withdrawing the July 2000 rule in the December 27, 2002, preamble.

One commenter opposed withdrawal of the July 2000 rule because it believed that the rule was "necessary" to "aid in the control of nonpoint source pollution."EPA disagrees with this comment. EPA notes that there are numerous existing Clean Water Act authorities and programs, supplemented by other Federal and State programs and initiatives, that address nonpoint source pollution.

One commenter opposed withdrawal of the "TMDL program" because it believed "much time went into the planning of this program to protect waterways * * * [and] it needs to be tied into the NPDES permit program and should be customized to fit individual permits."EPA is not sure it fully understands this comment. To the extent the commenter is opposed to withdrawal of the "TMDL program," EPA notes that it is only withdrawing the July 2000 rule, which has never become effective, and not the TMDL program itself. EPA agrees that it took much planning to develop the July 2000 rule, but, for the reasons already discussed in this preamble and in the December 27, 2002, preamble, EPA has decided to withdraw that rule, regardless of the effort that went into its development. EPA also notes that the currently-effective TMDL program is "tied into the NPDES permit program" in that, among other things, permit ***13612** effluent limits must be consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7. See 40 CFR 122.44(d)(1)(vii)(B). Similarly, 40 CFR 122.4(i) addresses what requirements must be met for a permit to be issued to a new source or new discharger who proposes to discharge a pollutant for which a TMDL has been prepared.

One State commenter, while supporting withdrawal of the July 2000 rule, recommended that as part of this final rulemaking EPA immediately modify 40 CFR 130.7 to require State 303(d) lists every four (instead of every two) years. As EPA continues to consider whether and how to revise the TMDL program, EPA will consider the commenter's suggestion.

One commenter asked for "an evaluation of potential changes from rule making, implementation and funding of Clean Water Act programs and enforcement relative to the Russian River [California] * * * [and an] assurance that this regulatory shift will not result in degradation of either the quality or quantity of our local resources."The commenter did not appear to take a position on the proposed withdrawal of the July 2000 rule, and EPA believes this comment is beyond the scope of the proposal and does not require a response.

One electronic comment merely stated as follows: "We strongly oppose any reduction of restrictions on wetland maintenance."Again, the commenter did not appear to take a position on the proposed withdrawal of the July 2000 rule, and EPA believes this comment is beyond the scope of the proposal and does not require a response.

More than half the commenters requested or encouraged EPA to pursue further rulemaking once the July 2000 rule was withdrawn. Many of these commenters submitted specific recommendations regarding how EPA should structure a new TMDL rule. Some commenters requested that this new rulemaking occur as quickly as possible. One commenter said it "supports EPA's proposed withdrawal of the 2000 rule, assuming that EPA intends to replace that rule in a timely manner with an improved rule now known as the Watershed Rule."Another commenter said it "will only support withdrawal of the July 2000 rule if EPA moves quickly to propose and promulgate a Watershed Rule that provides a comprehensive framework for the evolving TMDL program."Three commenters who supported withdrawal of the July 2000 rule advised against a new rulemaking saying that it "would be disruptive and would only derail State momentum to clean up our waterways."Two other commenters cautioned that a new regulatory proposal "could slow needed progress" and strongly urged the Agency "not to propose any regulatory or other changes that would cripple this vitally important water clean up program."

In response to these comments regarding the future direction of the TMDL program, EPA restates that it has not yet completed its evaluation regarding whether and how to revise the currently-effective TMDL rules. Nor can EPA commit to how long it will take to complete that process. EPA is committed to structuring a flexible, effective TMDL program that States, territories and authorized tribes can support and implement. EPA will carefully consider all of the past and recently-provided commenters' recommendations as it continues to evaluate whether and how to revise the currently-effective TMDL regulations using new regulatory or non-regulatory approaches. EPA, to the best of its ability, will continue to meet and share information with stakeholders regarding this effort, and will provide an opportunity for public comment in a separate Federal Register notice if the Agency decides to move forward with a new rulemaking.

After carefully considering all the comments received in response to its December 27, 2002, proposal, EPA is today promulgating a final rule that withdraws the July 2000 rule. EPA is withdrawing the July 2000 rule, rather than allowing it to go into effect, because EPA believes that significant changes would need to be made to the July 2000 rule before it could represent a workable framework for an effective TMDL program. EPA needs additional time beyond April 2003 to decide whether and how to revise the currently-effective regulations implementing the TMDL program in a way that will best achieve the goals of the CWA, and EPA is not sure how long that effort will take. In light of the significant progress States have made in the past three years establishing TMDLs under the currently-effective rules, EPA does not believe that withdrawing the July 2000 rule will impede States' efforts to implement section 303(d) to work towards cleaning up the nation's waters and meeting water quality standards.

Today's final rule does not change any part of the currently effective TMDL regulations promulgated in 1985, as amended in 1992, at 40 CFR part 130 or the NPDES regulations at parts 122—124.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, (October 4, 1993)), EPA must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action." As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.***13613**

An Agency may not conduct or sponsor and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business based on SBA size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. After considering the economic impacts of today's final rule on small entities, I

certify that this action, which withdraws the July 2000 rule that has not taken effect, will not have a significant economic impact on a substantial number of small entities. Like the July 2000 rule, this final rule will not impose any requirements on small entities. This action withdraws the July 2000 rule, which has never taken effect.

D. Unfunded Mandates Reform Act (UMRA) of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, tribal and local governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Like the July 2000 rule, today's final rule, which withdraws the July 2000 rule that has not taken effect, contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, or tribal governments or the private sector. The final rule imposes no enforceable duty on any State, local or Tribal government or the private sector. Thus, today's rule is not subject to the requirements of sections 202 and 205 of UMRA. For the same reason, EPA has also determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. This action does not impose any requirement on any entity. There are no costs associated with this action. Therefore, today's rule is not subject to the requirements of section 203 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.""Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government as specified in executive Order 13132. It finalizes the withdrawal of the July 2000 rule, which has never taken effect. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249,

November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.""Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

This final rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. It withdraws the July 2000 rule, which has never taken effect. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, EPA must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by EPA. This final rule is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866. ***13614**

H. Executive Order 13211: Energy Effects

This rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use," (66 FR 28355; May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This rule simply finalizes the withdrawal of the July 2000 rule which has never taken effect. We have concluded that this rule is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This final rulemaking does not impose any technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives,

and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective on April 18, 2003.

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 123

Environmental protection, Administrative practice and procedure, Confidential business information, Air pollution control, Hazardous waste, Indians-lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 124

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous waste, Indians-lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 130

Environmental protection, Grant programs—environmental protection, Indians-lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control, Water supply.

The authority citation for part 130 continues to read as follows:

Authority: 33 U.S.C. 1251 et seq.

40 CFR § 9.1

40 CFR § 122.44

40 CFR § 123.44

40 CFR § 124.7

40 CFR § 124.8

40 CFR § 130.0

40 CFR § 130.1

40 CFR § 130.2

40 CFR § 130.3

40 CFR § 130.4

40 CFR § 130.5

40 CFR § 130.6

40 CFR § 130.7

40 CFR § 130.8

40 CFR § 130.9

40 CFR § 130.10

40 CFR § 130.11

40 CFR § 130.12

40 CFR § 130.15

40 CFR § 130.20

40 CFR § 130.21

40 CFR § 130.22

40 CFR § 130.23

40 CFR § 130.24

40 CFR § 130.25

40 CFR § 130.26

40 CFR § 130.27

40 CFR § 130.28

40 CFR § 130.29

40 CFR § 130.30

40 CFR § 130.31

40 CFR § 130.32

40 CFR § 130.33

40 CFR § 130.34

40 CFR § 130.35

40 CFR § 130.36

40 CFR § 130.37

40 CFR § 130.50

40 CFR § 130.51

40 CFR § 130.60

40 CFR § 130.61

40 CFR § 130.62

40 CFR § 130.63

40 CFR § 130.64

For the reasons stated in the preamble, EPA withdraws the final rule amending 40 CFR parts 9, 122, 123, 124 and 130 published July 13, 2000 (65 FR 43586).

Dated: March 13, 2003.

Christine T. Whitman,

Administrator.

[FR Doc. 03-6574 Filed 3-18-03; 8:45 am]

BILLING CODE 6560-50-P

68 FR 13608-01, 2003 WL 1232971 (F.R.)
END OF DOCUMENT

TAB NO. 26

C

Effective: November 3, 2004

West's Annotated California Codes Currentness
Constitution of the State of California 1879 (Refs & Annos)
Article XIIIB. Government Spending Limitation (Refs & Annos)
→ § 6. New programs or services mandated by legislature or state agencies; subvention; appropriation of funds or suspension of operation

SEC. 6. (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates:

(1) Legislative mandates requested by the local agency affected.

(2) Legislation defining a new crime or changing an existing definition of a crime.

(3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

(b)(1) Except as provided in paragraph (2), for the 2005-06 fiscal year and every subsequent fiscal year, for a mandate for which the costs of a local government claimant have been determined in a preceding fiscal year to be payable by the State pursuant to law, the Legislature shall either appropriate, in the annual Budget Act, the full payable amount that has not been previously paid, or suspend the operation of the mandate for the fiscal year for which the annual Budget Act is applicable in a manner prescribed by law.

(2) Payable claims for costs incurred prior to the 2004-05 fiscal year that have not been paid prior to the 2005-06 fiscal year may be paid over a term of years, as prescribed by law.

(3) Ad valorem property tax revenues shall not be used to reimburse a local government for the costs of a new program or higher level of service.

(4) This subdivision applies to a mandate only as it affects a city, county, city and county, or special district.

(5) This subdivision shall not apply to a requirement to provide or recognize any procedural or substantive protection, right, benefit, or employment status of any local government employee or retiree, or of any local govern-

ment employee organization, that arises from, affects, or directly relates to future, current, or past local government employment and that constitutes a mandate subject to this section.

(c) A mandated new program or higher level of service includes a transfer by the Legislature from the State to cities, counties, cities and counties, or special districts of complete or partial financial responsibility for a required program for which the State previously had complete or partial financial responsibility.

CREDIT(S)

(Adopted Nov. 6, 1979. Amended by Stats.2004, Res. c. 133 (S.C.A.4)(Prop.1A, approved Nov. 2, 2004, eff. Nov. 3, 2004).)

Current with urgency legislation through Ch. 192 of 2011 Reg.Sess. and Ch. 8 of 2011-2012 1st Ex.Sess

END OF DOCUMENT

Received
September 15, 2011
Commission on
State Mandates

TAB NO. 27

C

Effective: November 3, 2010

West's Annotated California Codes Currentness
Constitution of the State of California 1879 (Refs & Annos)
Article XIIIC. [Voter Approval for Local Tax Levies] (Refs & Annos)
§ 1. Definitions

SECTION 1. Definitions. As used in this article:

(a) "General tax" means any tax imposed for general governmental purposes.

(b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

(c) "Special district" means an agency of the State, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

(d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

(e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

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

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

CREDIT(S)

(Added by Initiative Measure (Prop. 218, § 3, approved Nov. 5, 1996). Amended by Initiative Measure (Prop. 26, § 3, approved Nov. 2, 2010, eff. Nov. 3, 2010).)

Current with urgency legislation through Ch. 192 of 2011 Reg.Sess. and Ch. 8 of 2011-2012 1st Ex.Sess

END OF DOCUMENT

Received
September 15, 2011
Commission on
State Mandates

TAB NO. 28

C

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Government Code (Refs & Annos)
Title 2. Government of the State of California
Division 4. Fiscal Affairs (Refs & Annos)
Part 7. State-Mandated Local Costs (Refs & Annos)
Chapter 4. Identification and Payment of Costs Mandated by the State (Refs & Annos)
Article 1. Commission Procedure (Refs & Annos)
→ **§ 17552. Exclusive remedy**

This chapter shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIIIB of the California Constitution.

CREDIT(S)

(Added by Stats.1984, c. 1459, § 1. Amended by Stats.1986, c. 879, § 3.)

Current with urgency legislation through Ch. 192 of 2011 Reg.Sess. and Ch. 8 of 2011-2012 1st Ex.Sess

END OF DOCUMENT

Received
September 15, 2011
Commission on
State Mandates

TAB NO. 29

Effective: October 19, 2010

West's Annotated California Codes Currentness
Government Code (Refs & Annos)
Title 2. Government of the State of California
Division 4. Fiscal Affairs (Refs & Annos)
Part 7. State-Mandated Local Costs (Refs & Annos)
Chapter 4. Identification and Payment of Costs Mandated by the State (Refs & Annos)
Article 1. Commission Procedure (Refs & Annos)
§ 17556. Findings; costs not mandated upon certain conditions

The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds any one of the following:

(a) The claim is submitted by a local agency or school district that requests or previously requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district that requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this subdivision. This subdivision applies regardless of whether the resolution from the governing body or a letter from a delegated representative of the governing body was adopted or sent prior to or after the date on which the statute or executive order was enacted or issued.

(b) The statute or executive order affirmed for the state a mandate that has been declared existing law or regulation by action of the courts. This subdivision applies regardless of whether the action of the courts occurred prior to or after the date on which the statute or executive order was enacted or issued.

(c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.

(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. This subdivision applies regardless of whether the authority to levy charges, fees, or assessments was enacted or adopted prior to or after the date on which the statute or executive order was enacted or issued.

(e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate. This subdivision applies regardless of whether a statute, executive order, or appropriation in the Budget Act or other bill that either provides for offsetting savings that result in no net costs or provides for additional revenue specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate was enacted or adopted prior to or after the date on which the statute or executive order was enacted or issued.

(f) The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.

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

CREDIT(S)

(Added by Stats.1984, c. 1459, § 1. Amended by Stats.1986, c. 879, § 4; Stats.1989, c. 589, § 1; Stats.2004, c. 895 (A.B.2855), § 14; Stats.2005, c. 72 (A.B.138), § 7, eff. July 19, 2005; Stats.2006, c. 538 (S.B.1852), § 279; Stats.2010, c. 719 (S.B.856), § 31, eff. Oct. 19, 2010.)

VALIDITY

A prior version of this section was held unconstitutional as impermissibly broad, in the decision of California School Boards Ass'n v. State (App. 3 Dist. 2009) 90 Cal.Rptr.3d 501, 171 Cal.App.4th 1183.

HISTORICAL AND STATUTORY NOTES

2009 Main Volume

For state reimbursement provisions relating to Stats.2004, c. 895 (A.B.2855), see Historical and Statutory Notes under Education Code § 32282.

For Governor's signing message regarding Stats.2004, c. 895 (A.B.2855), see Historical and Statutory Notes under Education Code § 32282.

Urgency effective provisions relating to Stats.2005, c. 72 (A.B.138), see Historical and Statutory Notes under Elections Code § 13304.

Stats.2006, c. 538 (S.B.1852), made nonsubstantive changes to maintain the code.

Subordination of legislation by Stats.2006, c. 538 (S.B.1852), to other 2006 legislation, see Historical and Statutory Notes under Business and Professions Code § 690.

2011 Electronic Update

2010 Legislation

For cost reimbursement and urgency effective provisions relating to Stats.2010, c. 719 (S.B.856), see Historical and Statutory Notes under Business and Professions Code § 154.2.

CROSS REFERENCES

"Commission" defined for purposes of this Part, see Government Code § 17512.
"Costs mandated by the federal government" defined for purposes of this Part, see Government Code § 17513.
"Costs mandated by the state" defined for purposes of this Part, see Government Code § 17514.
"Executive order" defined for purposes of this Part, see Government Code § 17516.
Funding included in school safety consolidated competitive grant, see Education Code § 41511.
"Local agency" defined for purposes of this Part, see Government Code § 17518.
Local education agencies, Los Angeles Unified School District, report on illegal activity and enforcement power, see Education Code § 35401.
"School district" defined for purposes of this Part, see Government Code § 17519.
State-mandated special education programs and services; additional revenue, see Education Code § 56836.156.

CODE OF REGULATIONS REFERENCES

Filing request for reimbursement, see 2 Cal. Code of Regs. § 1184.

LAW REVIEW AND JOURNAL COMMENTARIES

All dried up: Summer holiday prohibition on the lower American River. Isaac T. Bacher, 39 McGeorge L.Rev. 401 (2008).

Emergency vehicles on the side of the highway: Move over and slow down. Vincent L. Jamison, 38 McGeorge L.Rev. 353 (2007).

LIBRARY REFERENCES

2009 Main Volume

Administrative Law and Procedure ⚿ 484.
States ⚿ 111.

Westlaw Topic Nos. 15A, 360.
C.J.S. Public Administrative Law and Procedure §§ 272 to 277.
C.J.S. States §§ 311 to 312.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d State of California § 104, What Constitutes Reimbursable Mandate--Statutory Exclusions.

CA Jur. 3d State of California § 105, What Constitutes Reimbursable Mandate--Federally Mandated Costs.

Other References

ANN.2000 ATLA - Convention Reference Material 1945, ERISA Preemption-A Slow Death Coming.

Treatises and Practice Aids

9 Witkin, California Summary 10th Taxation § 121, Reimbursement Not Required.

9 Witkin, California Summary 10th Taxation § 122, Local Government's Action to Avoid Expenditure.

NOTES OF DECISIONS

Authority of water districts 3
Construction and application 2
Validity 1

1. Validity

Statutory provision declaring that no reimbursement of local government is necessary for costs resulting from "duties that are necessary to implement a ballot measure," does not violate state constitutional provision requiring the state to reimburse local government whenever the Legislature or any state agency mandates a new program or higher level of service. California School Boards Ass'n v. State (App. 3 Dist. 2009) 90 Cal.Rptr.3d 501, 171 Cal.App.4th 1183. States 111

Statutory provision declaring that no reimbursement of local governments is necessary for "duties that are reasonably within the scope of a ballot measure" is impermissibly broad, as it allows for denial of reimbursement when reimbursement is constitutionally required. California School Boards Ass'n v. State (App. 3 Dist. 2009) 90 Cal.Rptr.3d 501, 171 Cal.App.4th 1183. States 111

This section prohibiting commission on state mandates from finding costs mandated by State if it finds that local government has authority to levy service charges, fees, or assessments sufficient to pay for mandated program or

increased level of service is facially constitutional under state constitutional provision requiring State to provide subvention of funds to reimburse local government for costs of state-mandated new program or higher level of service; considered in its context, section effectively and properly construes term "costs" in constitutional provision as excluding expenses that are recoverable from sources other than taxes. County of Fresno v. State of California (1991) 280 Cal.Rptr. 92, 53 Cal.3d 482, 808 P.2d 235. Taxation 3237

2. Construction and application

State Controller's Office had the authority to rely on the Government Code, rather than only on the Parameters and Guidelines (P&Gs) adopted by the Commission on State Mandates, to uphold an audit rule excluding the amount of optional fees from the amount recoverable as state-mandated costs. Clovis Unified School Dist. v. Chiang (App. 3 Dist. 2010) 116 Cal.Rptr.3d 33, 188 Cal.App.4th 794, modified on denial of rehearing. States 111

To the extent a local agency or school district has the authority to charge for a state-mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost. Clovis Unified School Dist. v. Chiang (App. 3 Dist. 2010) 116 Cal.Rptr.3d 33, 188 Cal.App.4th 794, modified on denial of rehearing. States 111

Under the statutes requiring reimbursement to local government for state-mandated costs, the amount of an optional student health fee was deducted from the amount reimbursed to community college districts for the state-mandated cost of the Health Fee Elimination Program, even when districts chose not to charge their students those fees. Clovis Unified School Dist. v. Chiang (App. 3 Dist. 2010) 116 Cal.Rptr.3d 33, 188 Cal.App.4th 794, modified on denial of rehearing. States 111

Statute precluding state reimbursement of local agency for cost of program or level of service mandated by state if local agency has "authority" to level sufficient fees is triggered if local agency has power or right to levy fees sufficient to cover costs of state-mandated program, regardless of practical ability of local agency to collect sufficient fees in light of surrounding economic circumstances. Connell v. Superior Court (App. 3 Dist. 1997) 69 Cal.Rptr.2d 231, 59 Cal.App.4th 382, review denied. States 111

3. Authority of water districts

Water district statute on its face authorized local water districts to levy fees sufficient to pay costs involved with state regulation amendment increasing level of purity required for use of reclaimed wastewater in irrigation, and thus, regulation did not trigger entitlement to reimbursement of local water districts from state for costs of complying with state-mandated increase in purity requirements. Connell v. Superior Court (App. 3 Dist. 1997) 69 Cal.Rptr.2d 231, 59 Cal.App.4th 382, review denied. States 111

West's Ann. Cal. Gov. Code § 17556, CA GOVT § 17556

Current with urgency legislation through Ch. 192 of 2011 Reg.Sess. and Ch. 8 of 2011-2012 1st Ex.Sess

END OF DOCUMENT

TAB NO. 30

C

Effective: January 1, 2008

West's Annotated California Codes Currentness
Government Code (Refs & Annos)
Title 2. Government of the State of California
Division 4. Fiscal Affairs (Refs & Annos)
Part 7. State-Mandated Local Costs (Refs & Annos)
Chapter 4. Identification and Payment of Costs Mandated by the State (Refs & Annos)
Article 1. Commission Procedure (Refs & Annos)
⇒ § 17564. Claims under specified dollar amount; claims for direct and indirect costs

(a) No claim shall be made pursuant to Sections 17551,17561, or 17573, nor shall any payment be made on claims submitted pursuant to Sections 17551or17561, or pursuant to a legislative determination under Section 17573, unless these claims exceed one thousand dollars ($1,000) . However, a county superintendent of schools or county may submit a combined claim on behalf of school districts, direct service districts, or special districts within their county if the combined claim exceeds one thousand dollars ($1,000) even if the individual school district's, direct service district's, or special district's claims do not each exceed one thousand dollars ($1,000). The county superintendent of schools or the county shall determine if the submission of the combined claim is economically feasible and shall be responsible for disbursing the funds to each school, direct service, or special district. These combined claims may be filed only when the county superintendent of schools or the county is the fiscal agent for the districts. All subsequent claims based upon the same mandate shall only be filed in the combined form unless a school district, direct service district, or special district provides to the county superintendent of schools or county and to the Controller, at least 180 days prior to the deadline for filing the claim, a written notice of its intent to file a separate claim.

(b) Claims for direct and indirect costs filed pursuant to Section 17561 shall be filed in the manner prescribed in the parameters and guidelines or reasonable reimbursement methodology and claiming instructions.

(c) Claims for direct and indirect costs filed pursuant to a legislatively determined mandate pursuant to Section 17573 shall be filed and paid in the manner prescribed in the Budget Act or other bill, or claiming instructions, if applicable.

CREDIT(S)

(Added by Stats.1986, c. 879, § 9. Amended by Stats.1992, c. 1041 (A.B.1690), § 4; Stats.1999, c. 643 (A.B.1679), § 6; Stats.2002, c. 1124 (A.B.3000), § 30.9, eff. Sept. 30, 2002; Stats.2004, c. 890 (A.B.2856), § 23; Stats.2007, c. 329 (A.B.1222), § 9.)

Current with urgency legislation through Ch. 192 of 2011 Reg.Sess. and Ch. 8 of 2011-2012 1st Ex.Sess

END OF DOCUMENT

Received
September 15, 2011
Commission on
State Mandates

TAB NO. 31

C

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Water Code (Refs & Annos)
Division 7. Water Quality (Refs & Annos)
Chapter 5.5. Compliance with the Provisions of the Federal Water Pollution Control Act as Amended in 1972 (Refs & Annos)

§ 13370. Legislative findings and declaration

The Legislature finds and declares as follows:

(a) The Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.), as amended, provides for permit systems to regulate the discharge of pollutants and dredged or fill material to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.

(b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.

(c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Control Act for the purpose of carrying out its responsibilities under this program.

CREDIT(S)

(Added by Stats.1972, c. 1256, p. 2485, § 1, eff. Dec. 19, 1972. Amended by Stats.1978, c. 746, p. 2343, § 1; Stats.1980, c. 676, p. 2028, § 319; Stats.1987, c. 1189, § 1.)

CROSS REFERENCES

Board defined for purposes of this Code, see Water Code § 25.
Exemption from penalty for discharging hazardous waste, see Water Code §§ 13261, 13265, 13268.
Person defined for purposes of this Code, see Water Code § 19.
Person defined for purposes of this Division, see Water Code § 13050.
Pollution defined for purposes of this Division, see Water Code § 13050.

State board defined for purposes of this Division, see Water Code § 13050.
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Cal. Civ. Prac. Environmental Litigation § 7:9, Grounds for Assessment of Liability.

Cal. Civ. Prac. Environmental Litigation § 9:2, Environmental Statutes Giving Rise to Potential Criminal Liabil-

ity.

Cal. Civ. Prac. Environmental Litigation § 7:16, Grounds for Review.

Cal. Civ. Prac. Environmental Litigation § 7:26, Grounds for Civil Monetary Remedies.

Treatises and Practice Aids

2 Witkin Cal. Crim. L. 3d Crimes Against Peace Welf § 392, Pollution.

12 Witkin, California Summary 10th Real Property § 893, Porter-Cologne Water Quality Control Act.

12 Witkin, California Summary 10th Real Property § 896, Federal Clean Water Act.

West's Ann. Cal. Water Code § 13370, CA WATER § 13370

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END OF DOCUMENT

Received
September 15, 2011
Commission on
State Mandates

Documentation in Support of Rebuttal to San Francisco Bay Regional Water Quality Control Board's and the California Department of Finance's Response to Test Claim 10-TC-03 Municipal Regional Stormwater Permit—

Santa Clara County

Received
September 15, 2011
Commission on
State Mandates

INDEX TO DOCUMENTATION IN SUPPORT OF REBUTTAL
VOLUME III—FEDERAL AND STATE CASES, STATUTES, CONSTITUTIONAL REFERENCES AND OTHER AUTHORITY

TAB NO. 32

NARRATIVE STATEMENT IN SUPPORT OF TEST CLAIM
TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

Received
September 15, 2011
Commission on
State Mandates

NARRATIVE STATEMENT IN SUPPORT OF TEST CLAIM

I. INTRODUCTION

The County of Santa Clara ("County") seeks the Commission's approval of claims to recover costs associated with obligations mandated by a handful of provisions of the Municipal Regional Stormwater Permit issued on October 14, 2009 ("MRP") by the California Regional Water Quality Control Board ("Regional Water Board"), San Francisco Bay Region.[1] The MRP regulates the discharge of storm water runoff from the municipal separate storm sewer systems ("MS4s") maintained by a total of 76 cities, counties, and flood control districts within the jurisdiction of six Bay Area regional stormwater programs.

The issues presented by this Test Claim are, by now, familiar to the Commission. Twice in the last year, the Commission found that similar permit provisions constituted unfunded mandates. First, in September 2009, the Commission approved a test claim concerning costs associated with new trash collection obligations imposed in a municipal regional stormwater permit issued by the Los Angeles Regional Water Board.[2] Second, in March 2010, the Commission approved an additional test claim concerning several new requirements of a municipal regional stormwater permit issued by the San Diego Regional Water Board, including street sweeping, reporting requirements, education and public outreach obligations, and mandatory collaboration with other dischargers in the same watershed.[3]

The Commission determined that these obligations constituted unfunded mandates because they (1) were state mandates that exceeded the requirements of the federal Clean Water Act and its implementing regulations; (2) created new programs or otherwise required an increase in the level of stormwater pollution controls delivered by the permittees; and (3) imposed more than $1,000 in costs

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[1] A copy of the MRP, NPDES No. CAS612008, issued as Order No. R2-2009-0074 (October 14, 2009), is attached hereto as Exhibit 1.

[2] In re Test Claim on: Los Angeles Regional Quality Control Board Order No. 01-182, Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21 (September 3, 2009) ("Los Angeles Decision").

[3] In re Test Claim on: San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Case No.: 07-TC-09 (March 26, 2010) ("San Diego Decision"). On July 20, 2010, the State Finance Department, the State Water Resources Control Board, and the Regional Water Quality Control Board, San Diego Region filed a petition in the Sacramento Superior Court seeking a writ of mandate ordering the Commission to set aside the San Diego Decision.

Received
September 15, 2011
Commission on
State Mandates

that the permittees had insufficient authority to recover through the imposition of fees.

Now, the County asks the Commission to apply the same rationale to several new obligations imposed by the MRP. While the new provisions are not all identical to those considered in the San Diego and Los Angeles Decisions, the principles animating the Commission's conclusions in those cases are similar and compel the same results here.

Specifically, the MRP creates new programs or higher levels of service with regard to three categories of activities: Monitoring, Trash Load Reduction, and Stormwater Diversion Studies. Each of these requirements represents an obligation the County did not have under its prior permit. Each represents the Regional Water Board's imposition of state law requirements, which are both stricter and more specific than is required under federal law. These new mandates have imposed or will impose significant financial burdens on the County that the County has no authority to recover through the imposition of fees.

To be clear, this Test Claim does not question the wisdom of these requirements or challenge the Regional Water Board's authority to impose them under state law. However, as set forth in more detail below, these new requirements constitute unfunded state mandates for which the permittees participating in the MRP (the "Permittees") are entitled to reimbursement pursuant to Article XIII B section 6 of the State's Constitution. This Test Claim identifies the activities that are unfunded mandates and seeks to establish a basis for reimbursement for such activities.

II. LEGAL AND PROCEDURAL BACKGROUND

A. Regional Stormwater Permits

When a Regional Water Board issues a stormwater permit, it is implementing both federal and state law:

> Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the

> equivalent of the NPDES permits required by federal law. (§ 13374.)

City of Burbank v. State Water Res. Control Bd. (2005) 35 Cal.4th 613 at 619-621. Section 402(p) of the federal Clean Water Act establishes that an MS4 permit:

> (i) may be issued on a system or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-storm water 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.

33 U.S.C. § 1342(p)(3)(B).[4]

California is among the states that are authorized to implement the NPDES permit program. 33 U.S.C. § 1342(b). Permits issued by the Regional Water Board under this authority must impose conditions that at are at least as stringent as those required under the federal act. 33 U.S.C. § 1371; Cal. Water Code § 13377.

However, relying on its state law authority or discretion, the Regional Water Board is free to issue permits that impose limits or conditions in excess of those required under the federal law where necessary to achieve higher water quality standards and objectives established under state law:

> In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. Its goal is "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." The task of accomplishing this belongs to the

[4] The relevant provisions of the Clean Water Act are set forth in Appendix A to this Test Claim.

Received
September 15, 2011
Commission on
State Mandates

> State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality."
>
> Whereas the State Board establishes statewide policy for water quality control, the regional boards "formulate and adopt water quality control plans for all areas within [a] region". The regional boards' water quality plans, called "basin plans," must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. Basin plans must be consistent with "state policy for water quality control."

City of Burbank v. State Water Res. Control Bd. (2005) 35 Cal.4th 613 at 619 (internal citations omitted). The California Water Code expressly anticipates that the uses and objectives set forth in basin plans and the need to prevent nuisance will require permits issued by Regional Water Boards to impose more stringent regulatory controls than would otherwise result from federal law:

> Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.

Cal. Water Code § 13377.

B. The MRP and the Prior Permit

The MRP was issued by the Regional Water Board, an executive agency of the State of California. It replaced individual permits issued to Permittees participating in six different areawide stormwater programs: the Alameda Countywide Clean Water Program; the Contra Costa Clean Water Program; the San Mateo Countywide Water Pollution Prevention Program; the Santa Clara Valley Urban Runoff Pollution Prevention Program; the Fairfield-Suisun Urban Runoff Management Program; and the City of Vallejo and the Vallejo Sanitary District, and governs stormwater discharges in some 76 different municipal

entities (e.g., cities, counties, and flood control and water conservation districts). (Ex. 1 at 3-4.) The County is among the Permittees participating in the Santa Clara Valley Program (the "Santa Clara Valley Program").

The permit that formerly governed the Santa Clara Valley Program was Permit No. CAS029718 issued by Order No. 01-024 on April 21, 2001, amended by Order No. 01-119 on October 17, 2001, and Order No. R2-2005-0035 on July 20, 2005 (the "Prior Permit"). (Ex. 1 at 3-4.) A copy of the Prior Permit is attached hereto as Exhibit 2.[5] For purposes of establishing that the provisions of the MRP constitute new requirements or a higher level of service, those provisions are compared to the Prior Permit.

C. State Mandate Law

Article XIII B section 6 of the California Constitution provides in relevant part:

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

Cal. Const. Art. XIII.B, § 6. The purpose of section 6 "is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." (*County of San Diego v. State of California* (1991) 15 Cal.4th 68, 81; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.) The section "was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues." (*County of Fresno, supra,* at 487; *Redevelopment Agency v. Comm'n on State Mandates* (1997) 55 Cal.App.4th 976, 984-85.) The Legislature implemented section 6 by enacting a comprehensive administrative scheme to establish and pay mandate

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[5] The amendments to the Prior Permit described above, which relate only to permit provisions not at issue here, are not included in the materials submitted with this test claim. These documents are available at the Regional Water Board's website, at http://waterboards.ca.gov/sanfranciscobay/board_decisions/adopted_orders/2001/R2-2001-119.pdf; and http://waterboards.ca.gov/sanfranciscobay/board_decisions/adopted_orders/2005/R2-2005-0035.pdf. Alternatively, the County can provide hard copies to the Commission upon request.

Received
September 15, 2011
Commission on
State Mandates

claims. (Cal. Gov't Code §§ 17500 *et seq.*; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331, 333 [statute establishes "procedure by which to implement and enforce section 6"].)

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

> (a) The claim is submitted by a local agency . . . that requested legislative authority for that local agency . . . to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. . . .
>
> (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.
>
> (c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. . . .
>
> (d) The local agency . . . has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.
>
> (e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies . . . that result in no net costs to the local agencies or . . . , or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.
>
> (f) The statute or executive order imposes duties that are necessary to implement, reasonably within the scope of, or expressly included in, a ballot measure approved by the voters in a statewide or local election
>
> (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

Received
September 15, 2011
Commission on
State Mandates

Cal. Gov't Code § 17556.

1. The Test

Taken together, the Constitution, statutes, and case law described above establish a three-prong test to determine whether a claimant is eligible for reimbursement through the state's mandate law: (1) the obligations imposed must represent a new program or higher level of service; (2) the mandate must arise from a law, regulation, or executive order imposed by the state, rather than the federal government; and (3) the costs cannot be recoverable by the local agency through the imposition of a fee. Only where all three are satisfied does a mandated cost fall within the subventure requirement of article XIII B section 6.

a. New Program or Higher Level of Service

In order to trigger the state mandate law, the obligations imposed by the state must represent a "new program" or "higher level of service." Programs subject to the state mandate law are those that "carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents of the state." *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56. Whether an obligation imposes a higher level of service depends on whether "the requirements are new in comparison with the preexisting scheme" and "the requirements were intended to provide an enhanced service to the public." *San Diego Unified School Dist. v. Comm'n on State Mandates* (2004) 33 Cal.4th 859, 878. Thus, determining whether a municipal stormwater permit imposes a new program or higher level of service is largely a factual question involving the comparison of the terms of the current and former permits. However, the San Diego Decision addresses a very important general principle on this point that is of great interest here:

All stormwater permits must contain controls that "reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii). This means that all permit parameters are implementing the same standard. In the proceedings leading to the San Diego Decision, the Finance Department argued that the new permit did not constitute a "new program" or a "higher level of service" because each incremental increase in best management practices or other permit requirement was necessary to assure continued compliance with the maximum extent practicable (or "MEP" standard). The Commission correctly rejected this argument stating that such a standard would mean "anything the state imposes under the permit would not be a new program or higher level of service" (San

Received
September 15, 2011
Commission on
State Mandates

Diego Decision at 49). Should this argument be raised here, the Commission should again reject this argument, and instead base its analysis on the "plain language" of the new permit requirements (Los Angeles Decision at 49). Activities that "were not required activities of the permittees prior to the permit's adoption" are "new program[s] or higher level of service" (Los Angeles Decision at 49).

b. State Mandates

"Costs mandated by the state" include "any increased costs which a local agency ... is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution." (Gov't Code § 17514.) Orders issued by any Regional Water Board pursuant to pursuant to Division 7 of the California Water Code (commencing at section 13000) come within the definition of "executive order." *County of Los Angeles v. Comm'n on State Mandates* (2007) 150 Cal.App.4th 898, 920.

Section 17556 of the Government Code exempts costs mandated solely by federal law or regulation unless the "statute or executive order mandates costs that exceed the mandate in that federal law or regulation. . . ." Cal. Gov't Code § 17556(c). Courts have interpreted this provision to mean that an obligation imposed by the state in the implementation of a federal mandate should still be considered a "state mandate" as long as the state has a say about the manner in which that mandate is passed on to local agencies:

> 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 implementing 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.
>
> This reasoning would not hold true where the manner of implementation of the federal program was left to the true discretion of the state.

Hayes v. Comm'n on State Mandates (1992) 11 Cal. App. 4th 1564, 1593. Thus, where the Regional Water Board chooses to impose specific measures of

Received
September 15, 2011
Commission on
State Mandates

compliance as a means of implementing the more general requirements of the federal Clean Water Act, those measures are considered state mandates:

> 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 a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.

Id. The Commission relied on *Hayes* in both the San Diego and Los Angeles Decisions in determining that the Regional Water Quality Control Boards issuing the stormwater permits at issue "freely chose" to exercise discretion and impose conditions beyond those required by federal law. Those conditions were therefore state mandates. (San Diego Decision at 37; Los Angeles Decision at 23.) The Commission further highlighted the importance of a state's discretion, or "free choice" in the context of permits issued under the federal Clean Water Act:

> [E]ach state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act...the California Supreme Court has acknowledged that an NPDES permit may contain terms that are federally mandated *and terms that exceed federal law*. (Los Angeles Decision at 23.)(emphasis added)

Thus, specific permit requirements "may constitute a state mandate even though they are imposed in order to comply with the federal Clean Water Act" (Los Angeles Decision at 23).

c. Fee Authority

In the San Diego Decision, the Commission conducted an extensive analysis of the issue of whether the local agencies charged with implementing the municipal regional stormwater permit in that matter had adequate fee authority to recover the costs mandated upon them by the San Diego Regional Water Board. (San Diego Decision at 100-120.) Mandates are exempted from the subventure requirements of article XIII B, section 6 of the California Constitution where the local agency has "the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Cal. Gov't Code § 17556(d).

Received
September 15, 2011
Commission on
State Mandates

However, Article XIII D of the California Constitution, enacted by the voters through Proposition 218, requires that fees incident to property ownership be subjected to a majority vote by affected property owners or by 2/3 registered voter approval. Cal. Const., art. XIII D. As explained by the Commission in the San Diego Decision, the necessity for voter approval (and the attendant possibility of voter rejection) of a fee renders the permittees' fee authority inadequate to satisfy the exemption of section 17556. (San Diego Decision at 106.) Indeed, in the San Diego Decision, the Commission determined that fee authority is inadequate where the imposition of fees is subject to voter protest that could invalidate them. (San Diego Decision at 115.)

> Under Proposition 218, the local agency has not authority to impose the fee if it is protested by a majority of parcel owners. Additionally, it is possible that a majority of land owners in the local agency may never allow the proposed fee, but the local agency would still be required to comply with the state mandate. This would violate the purpose of article XII B, section 6, which is "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." (San Diego Decision at 115.)

Article XIII D section 6, subdivision (c) provides an exception to Proposition 218's vote requirements for property-related fees for sewer, water, or refuse collection services (Cal. Const., art. XIII D, § 6, subd. (c)). As explained by the Commission in the San Diego Decision, fees for these services are subject to different requirements:

> To impose or increase refuse collection fees, the local agency must provide mailed written notice to each parcel owner on which the fee will be imposed, and conduct a public hearing not less than 45 days after mailing the notice. If written protests against the proposed fee are presented by a majority of the parcel owners, the local agency may not impose or increase the fee (article XIII D, § 6, subd. (a)(2)).

(San Diego Decision at 115.) Still, in the San Diego Decision, the Commission concluded that this process also precludes a finding that the permittees in question had sufficient fee authority within the meaning of section 17556(d):

> Under Proposition 218, the local agency has no authority to impose the fee if it is protested by a majority of parcel

> owners. Additionally, it is possible that a majority of land owners in the local agency may never allow the proposed fee, but the local agency would still be required to comply with the state mandate. This would violate the purpose of article XIII B, section 6, which is to "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."

(San Diego Decision at 115.)

Moreover, the exception for refuse collection applies only to fees that can be carefully calibrated to the costs incurred by the local agency and to the level of services provided to ratepayers:

> In addition, revenues are: (1) not to exceed the funds required to provide the service, (2) shall not be used for any other purpose than to provide the property related service, and the amount of the fee on a parcel shall not exceed the proportional cost of the service attributable to the parcel. And the service must be actually used by or immediately available to the property owner.

Article XIII D, § 6, subd. (b).

One source of such authority is through regulatory fees. Regulatory fees can be imposed under the general police powers afforded to local government without the need for a vote (or subject to a majority voter protest mechanism), only where there is sufficient nexus between the "effect of the regulation and the objectives it was supposed to advance to support the regulatory scheme." *Tahoe Keys Property Owner's Assn. v. State Water Res. Control Bd.* (1993) 23 Cal.App.4th 1459. In the *Tahoe Keys* case, the Court of Appeal found sufficient nexus between properties surrounding Lake Tahoe and nutrient loads in the lake and refused to enjoin a fee to fund efforts to minimize nutrients contributing to eutrophication. *Id.* at 1480.

Similarly, in *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866, 874, the California Supreme Court upheld a fee imposed on paint manufacturers to fund a program aimed at treating children exposed to lead. The Court held that the fee—which was targeted at "the producers of contaminating products" and was used to mitigate the harm caused by those products—was an appropriate exercise of the police power. *Id.* at 877. In view of these appellate

court decisions, this Commission determined in the San Diego Decision that stormwater provisions do not fall within the exceptions provided where the costs and benefits of such provisions do not sufficiently align with the activities or interests of an identifiable group of businesses or property owners to create the nexus required under the *Sinclair Paint* and *Tahoe Keys* cases. (San Diego Decision at 107.)

In the San Diego Decision, the Commission also discussed the impact of a newly enacted provision of section 16103 of the Water Code, which went into effect in January 2010. As the Commission explained, this new law may provide a source of fee authority under some circumstances in the future, but is of no help to permittees in the near term. (San Diego Decision at 120.) Section 16103 authorizes fees for implementation of watershed improvement plans, and, in a tacit acknowledgement that such fees would otherwise fall within the scope of Proposition 218 as described above, expressly provides that such fees are "not imposed solely as an incident of property ownership." Cal. Water Code § 16103.

However, the watershed improvement plans envisioned under section 16103 are comprehensive in scope, may be adopted only after extensive public process, and require approval by the Regional Water Board. *Id.* § 16103(b), (d). These plans do "not necessarily [encompass] the same watershed activities required by [regional permits]" (San Diego Decision at 119) and moreover, adoption of an improvement plan is voluntary. *Id.* § 16101(a). Thus, section 16103 provides fee authority only to permittees who are voluntarily participating in the development of a watershed improvement plan. (*See* San Diego Decision at 120.) The County is unaware of the submission or consideration of any such plan that could provide a source of funding for the costs associated with complying with the new requirements in the MRP.

III. THE UNFUNDED MANDATES AT ISSUE IN THIS TEST CLAIM

The MRP contains 23 separate provisions that establish the prohibitions, limitations, and obligations of the County and other Permittees. This Test Claim pertains to three categories of mandates:

- Provision C.8—Monitoring
- Provision C.10—Trash Load Reduction
- Provision C.11 and C.12—Mercury and PCB Diversion Studies

As set forth in more detail below, each of these provisions imposes a new program or expanded level of service over the Prior Permit. Moreover, these new requirements exceed the mandates of the federal Clean Water Act or its implementing regulations. Finally, compliance with these obligations will impose

Received
September 15, 2011
Commission on
State Mandates

costs beyond what the County is authorized to recover through the imposition of fees.

A. *Monitoring*

Provision C.8 of the MRP requires Permittees to implement a number of water quality monitoring programs that were not required by the Prior Permit. The ways in which each of these specific monitoring requirements represents a new program or higher level of service—and the costs associated with each—are set forth in section A.1 directly below. (For convenience, the principles under which all of these monitoring provisions constitute a state mandate and the reasons that the County has inadequate fee authority to recover the associated costs, are discussed together in sections A.2 and A.3.)

1. Provision C.8 Constitutes a New Program or Higher Level of Service.

In the Los Angeles Decision, the Commission found that a new permit requirement to place and maintain trash receptacles at transit stops, absent in previous permits, was a new program or high level of service. (Los Angeles Decision at 49). Likewise here, Provision C.8 mandates new requirements and obligations not present in the Prior Permit. Thus, each of the monitoring provisions discussed below represent a new program or higher level of service compared to the requirements in the Prior Permit.

a. Provision C.8.b—Regional Monitoring Program for Water Quality in the San Francisco Bay Estuary.

Provision C.8.b requires the County and other Permittees to participate in a cooperative effort among "stakeholder" entities that discharge into the San Francisco Bay Estuary to answer several questions about the conditions in the Estuary, including current, past, and projected future levels of contamination; sources, pathways, loadings, and processes causing or contributing to the contamination; and current and future impacts of contamination. (Ex. 1 at 65.) Permittees are required to participate in this monitoring program by paying their "fair share" of monitoring costs.

(i) Provision C.8.b Imposes a Higher Level of Service.

The Fact Sheet to the MRP characterizes the requirements of Provision C.8.b as a mere continuation of activities required under the Prior Permit. (Ex. 1 at 65 n.20; I-59.) However, the Prior Permit required only submission of a multi-year monitoring plan that includes participation in the San Francisco Estuary

Received
September 15, 2011
Commission on
State Mandates

Regional Monitoring Program ("RMP") *or an acceptable alternative* monitoring program. (Ex. 2, Provision C.8.b, at 37.) By contrast, the MRP mandates that the County financially support the RMP and participate in the development of a monitoring program designed to obtain the answers to the specific questions described above. (Ex. 1 at 65 n.20.)

In addition to the financial contribution required by the MRP, these new requirements for the RMP will require the Santa Clara Valley Program in which the County participates to devote additional resources to the RMP. Program staff participation is expected to increase by roughly 2% per year in order to provide greater coordination between RMP and MRP objectives for this provision. (Declaration of Chris Sommers ("Sommers Decl.") at ¶ 9(a)(i)(i).)

b. Provision C.8.c—Status Monitoring

Provision C.8.c of the MRP imposes substantially increased levels of monitoring relative to the Prior Permit. Specifically, and as set forth below, the MRP requires a specific monitoring protocol to analyze dozens of samples for at least eleven different parameters, measuring at least 33 different components. It also establishes "triggers" requiring further monitoring. (Ex. 1 at 65-71.)

(i) Provision C.8.c Imposes a Higher Level of Service.

This provision of the MRP imposes new, specific and detailed obligations on the County and other Permittees in the Santa Clara Valley Program with respect to creek monitoring. Provision C.8.c of the MRP greatly expands the number of monitoring sites and parameters, including:

- Algae bioassessment (20 sites/yr)
- Chlorine (23 sites/yr)
- Temperature (8 sites/yr)
- Stream Surveys (9 miles/yr)

Additionally, Provision C.8.c increases the number of creek sites that must be sampled annually for the following parameters (site increases are in parentheses):

- Total Phosphorus (7 sites/year)
- Dissolved Orthophosphate (7 sites/yr)
- Total Nitrogen (7 sites/yr)
- Nitrate (7 sites/yr)
- Ammonia (7 sites/yr)

- Silica (7 sites/yr)
- Chloride (7 sites/yr)
- Dissolved Organic Carbon (DOC) (7 sites/yr)

(Ex. 1 at 65-71, Tbls 8.1 & 8.2, Attachment H). None of these specific requirements were included in the Prior Permit. (Ex. 2 at 18-19.)

c. Provision C.8.d—New Monitoring Studies and Projects

Provision C.8.d of the MRP requires the County and other Permittees to undertake three types of projects within their watersheds. (Ex. 1 at 71-73.)

Identifying Stressors and Sources. Provision C.8.d.i provides that, when status monitoring reveals a potential source of stress to the water bodies identified in Table 8.1, the Permittees are required to conduct a site-specific study to identify the stressor or source. (Ex. 1 at 71.) The study sets forth very specific protocols for these studies:

> This study should follow guidance for Toxicity Reduction Evaluations (TRE) or Toxicity Identification Evaluations (TIE). A TRE, as adapted for urban stormwater data, allows Permittees to use other sources of information (such as industrial facility stormwater monitoring reports) in attempting to determine the trigger cause, potentially eliminating the need for a TIE. If a TRE does not result in identification of the stressor/source, Permittees shall conduct a TIE.

(*Id.* at 71.) If a source is identified, the MRP requires implementation of "one or more controls" and continued monitoring to assess whether those controls are reducing the cause or causes of the trigger stressor or source. (*Id.*) If the County and other Permittees conduct these studies through the Santa Clara Valley Program, they may be required to conduct up to five such projects within the five-year permit term. (*Id.* at 71-72.)

Evaluation of BMP Effectiveness. Provision C.8.d.ii. requires investigations into the effectiveness of BMPs. (*Id.* at 72.) The County is required to investigate one BMP during the term of the MRP. (*Id.*)

Geomorphic Studies. Finally, Provision C.8.d.iii requires all permittees governed by the MRP to select one water body within each county, and complete one of three types of studies:

(1) Gather geomorphic data to support the efforts of a local watershed partnership to improve creek conditions; or

(2) Inventory locations for potential retrofit projects in which decentralized, landscape-based stormwater retention units can be installed; or

(3) Conduct a geomorphic study which will help in development of regional curves which help estimate equilibrium channel conditions for different- sized drainages.

(Ex. 1 at 72-73.)

(i) Provision C.8.d Imposes a Higher Level of Service.

Under the Prior Permit, source identification projects were required to be conducted at a much lower level of effort compared to what is required by the MRP. BMP effectiveness and geomorphic projects are completely new to the County. There is nothing comparable to these requirements in the Prior Permit. This entire provision constitutes a "new program or higher level of service" within the meaning of the mandate law.

d. Provision C.8.e.i—Pollutants of Concern Monitoring

Provision C.8.e.i requires the County and other Permittees to establish and maintain fixed monitoring stations on specified waterbodies, or approved alternatives for purposes of monitoring pollutants of concern. (Ex. 1 at 73-74.) The monitoring mandated under these provisions is to be directed toward:

(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.

(*Id.* at 73.)

Provisions C.8.e.iii, iv, and v defines the parameters and frequencies, protocols, and methods required for monitoring pollutants of concern. For example:

> **Parameters and Frequencies** – Permittees shall conduct Pollutants of Concern sampling pursuant to Table 8.4, Categories 1 and 2. In Table 8.4, Category 1 pollutants are those for which the Water Board has active water quality attainment strategies (WQAS), such as TMDL or site-specific objective projects. Category 2 pollutants are those for which WQAS are in development. The lower monitoring frequency for Category 2 pollutants is sufficient to develop preliminary loading estimates for these pollutants.

(*Id.* at 74.)

Table 8.4 sets forth explicit requirements for sampling years, minimum sampling occurrences, and sampling intervals for three categories of pollutants.

(i) Provision C.8.e.i Imposes a New Program.

Provision C.8.e.i is a new program. The Prior Permit contained no comparable provision. (Ex. 2 at 18-19.)

e. Provision C.8.e.ii—Long-Term Monitoring

Provision C.8.e.ii requires Long-Term monitoring at specified stations. Alternate locations are permissible only after consulting with the Regional Water Board Surface Water Ambient Monitoring Program ("SWAMP") and approval by the Regional Water Board's executive officer. (*Id.* at 74.) The County and other Permittees in the Santa Clara Valley Program are responsible for monitoring at either the Guadalupe River or Coyote Creek. The MRP suggests locations for where such monitoring should occur for either water body. (*Id.*)

Provision C.8.e.iii requires "Long-Term monitoring pursuant to Table 8.4, Category 3." (Ex. 1 at 74.) Table 8.4 describes Category 3 as requiring testing for toxicity of "Bedded Sediment, fine-grained," to be coordinated with SWAMP's scheduled collection of Category 3 data at the Long-Term monitoring locations." (*Id.*)

(i) Provision C.8.e.ii Imposes a New Program.

The Prior Permit makes no provision for monitoring designed to detect long-term stormwater trends. (Ex. 1 at 18-19.) This is a new requirement.

f. Provision C.8.e.vi—Sediment Delivery Estimate/Budget

Provision C.8.e.vi requires Permittees, by July 1, 2011, to develop "a design for a robust sediment delivery estimate/sediment budget in local tributaries and urban drainages." The study itself must be implemented by July 1, 2012.

(i) Provision C.8.e.vi Imposes a New Program.

The Prior Permit contained no requirement to design or implement sediment delivery studies. This is an entirely new program under the MRP.

g. Provision C.8.f—Citizen Monitoring and Participation

Provision C.8.f requires permittees to encourage "citizen monitoring," although it does not define this term. Instead, it merely directs that

i. Permittees shall encourage Citizen Monitoring.

ii. In developing Monitoring Projects and evaluating Status & Trends data, Permittees shall make reasonable efforts to seek out citizen and stakeholder information and comment regarding waterbody function and quality.

iii. Permittees shall demonstrate annually that they have encouraged citizen and stakeholder observations and reporting of waterbody conditions. Permittees shall report on these outreach efforts in the annual Urban Creeks Monitoring Report.

(Ex. 1 at 76.)

The Fact Sheet provides no additional description or specification of what is required, but says that "Provision C.8.f. is intended to do the following:

> Support current and future creek stewardship efforts by providing a framework for citizens and Permittees to share their collective knowledge of creek conditions; and

> Encourage Permittees to use and report data collected by creek groups and other third-parties when the data are of acceptable quality.

(Ex 1 at App. I 64-65.)

(i) Provision C.8.f Imposes a New Program.

Provision C.8.f is an entirely new requirement. There is no similar provision in the Prior Permit. (Ex. 2. at 18-19.)

h. Provision C.8.g—Reporting

Provision C.8.g.ii requires submission of "an Electronic Status Monitoring Data Report no later than January 15 of each year, reporting on all data collected during the foregoing October 1–September 30 period. Electronic Status Monitoring Data Reports shall be in a format compatible with the SWAMP database. Water Quality Objective exceedences shall be highlighted in the Report. (Ex. 1 at 77.)

Provision C.8.g.iii requires submission of

> a comprehensive Urban Creeks Monitoring Report no later than March 15 of each year, reporting on all data collected during the foregoing October 1–September 30 period, with the initial report due March 15, 2012, unless the Permittees choose to monitor through a regional collaborative, in which case the due date is March 15, 2013.

(Ex. 1 at 77.) Each Urban Creeks Monitoring Report shall contain summaries of Status, Long- Term, Monitoring Projects, and Pollutants of Concern Monitoring. (*Id.*) The materials required for this submission are extensive, and include maps, data tables, descriptions of data quality, analyses of the data, identification of any "long-term trends in stormwater or receiving water quality," and a discussion of the data relative to beneficial uses identified in the basin plan. (*Id.* at 77-78.)

Finally, Provision C.8.g.vi requires that electronic reports be made available through a regional data center, and optionally through their web sites. The County and other Permittees are required to notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list. (Ex. 1 at 79.)

(i) Provision C.8.g Imposes a Higher Level of Service.

The Prior Permit required the County and other Permittees to prepare a single annual report, which included a description of data collected over the previous fiscal year, and general interpretation of the results. (Ex. 2 at 16-17.) The format of the report was unspecified. (*Id.*)

The MRP requires electronic reporting and requires that the data be maintained in a database accessible by the public. (Ex. 1 p. 77.) In addition, the requirement for submission of a separate annual Urban Creeks Monitoring Report is new. This submission prescribes roughly similar report contents, but due to the increased number of data parameters and programs, the total level of reporting effort will increase.

i. Provision C.8.h— Monitoring Protocols and Data Quality

Provision C.8.h requires that

> Where applicable, monitoring data must be SWAMP comparable. Minimum data quality shall be consistent with the latest version of the SWAMP Quality Assurance Project Plan (QAPP) for applicable parameters, including data quality objectives, field and laboratory blanks, field duplicates, laboratory spikes, and clean techniques, using the most recent Standard Operating Procedures. A Regional Monitoring Collaborative may adapt the SWAMP QAPP for use in conducting monitoring in the San Francisco Bay Region, and may use such QAPP if acceptable to the Executive Officer.

(Ex. 1 at 79.)

(i) Provision C.8.h Imposes a Higher Level of Service.

The Prior Permit makes no mention of the SWAMP program. By contrast, Provision C.8.h of the MRP requires the Santa Clara Valley Program to develop significant updates or additions to existing field standard operating procedures and train field staff to allow for monitoring data to be collected by the Permittees using "SWAMP comparable" methods defined by the State Water Resources Control Board's Surface Water Ambient Monitoring Program.

Received
September 15, 2011
Commission on
State Mandates

Additionally, new data management systems must be developed and managed at significant costs, as the MRP requires data to be reported electronically to the Regional Water Board in "SWAMP comparable" formats. Monitoring data quality assurance procedures (also SWAMP comparable) will also have to be developed, documented and adhered to by the Santa Clara Valley Program at all times, which requires an additional level of effort (staff time) compared to previous quality assurance procedures conducted by Santa Clara Valley Program under the Prior Permit.

2. The New Requirements of Provision C.8 Constitute State Mandates.

The Fact Sheet prepared by Regional Water Board staff in conjunction with the MRP cites to both federal and state law as providing "broad legal authority" for all of the monitoring requirements imposed therein:

> **Broad Legal Authority**: [Federal Clean Water Act] sections 402(p)(3)(B)(ii-iii); [California Water Code] section 13377; Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)

(Ex. 1 at App I-57.) However, for authority specific to the monitoring requirements in Provision C.8, the Fact Sheet cites only to federal regulations:

> **Specific Legal Authority**: Permittees must conduct a comprehensive monitoring program as required under Federal NPDES regulations 40 CFR 122.48, 40 CFR 122.44(i), 40 CFR 122.26.(d)(1)(iv)(D), and 40 CFR 122.26(d)(2)(ii)-(iv).

(*Id.*)[6]

Section 122.48 of the federal regulations implementing the Clean Water Act requires all NPDES permits to contain certain monitoring provisions, including those establishing "type, intervals, and frequency sufficient to yield data which are representative of the monitored activity . . . ." 40 C.F.R. § 122.48. Section 122.44(*i*) requires certain types of monitoring "to assure compliance with permit limitations." 40 C.F.R. § 122.44(i). The requirements described under this provision apply largely to parameters governing an individual permittee's discharge. *Id.*[7] Similarly, the monitoring requirements specific to stormwater

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[6] The text of the referenced sections is set forth in Appendix "A" to this Narrative Statement.

[7] Section 122.44(i)(iii)-(iv) applies to specific types of discharges other than stormwater.

Received
September 15, 2011
Commission on
State Mandates

permits under section 122.126 of the federal regulation are largely aimed at identifying sources and characterizing pollution arising from outflows within each MS4's jurisdiction. 40 C.F.R. §§ 122.26(d)(1)(iv)(D); (2)(ii)-(iv).

Stormwater management programs "*may* impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls." *Id.* § 122.26(d)(2)(iv). However, while cooperative agreements may be required, "each copermittee is only responsible for their own systems." 40 C.F.R. § 122.26(d)(2)(i)(D). Similarly, consistent with the scope of the monitoring provisions discussed above, even where a programmatic approach is taken, federal regulations say that "Copermittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they operate." (40 C.F.R. § 122.26(a)(3)(vi).) In the San Diego and Los Angeles Decisions, the Commission correctly read these regulatory provisions to mean that, while the Regional Water Board may impose collaborative approaches to monitor and control pollutants on a watershed basis, such requirements exceed the mandate in federal law or regulations and are state law mandates. (San Diego Decision at 74; Los Angeles Decision at 30-31.)

a. Requirements for Collaborative or Watershed Monitoring.

Virtually all of the provisions discussed above require the County to engage in some degree of collaborative or watershed-wide monitoring programs. As described above, federal regulations require a stormwater permit to contain provisions aimed at characterizing and controlling pollutants in a permittee's own discharges. Nothing in the plain language of federal statute and regulations requires participation or contributions to the sort of specific collaborative monitoring program mandated by Provision C.8 of the MRP.

Rather, the Regional Water Board freely chose to impose these particular and specific requirements on the County. As the Court of Appeal in *Hayes v. Comm'n on State Mandates* explained only those mandates forced on the state by the federal government may truly be considered "federal" for purposes of Article XIII B section 6 of the State's Constitution:

> 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 a federal program then the costs are the result of a reimbursable state mandate

Received
September 15, 2011
Commission on
State Mandates

> regardless whether the costs were imposed upon the state by the federal government.

Hayes v. Comm'n on State Mandates (1992) 11 Cal. App. 4th 1564, 1593-94.

The Commission correctly determined in the San Diego and Los Angeles Decisions that where federal law authorizes, but does "not require the specificity" outlined in the permit requirements, the Regional Water Board has "freely chosen" to impose those requirements, rendering them state mandates. (San Diego Decision at 59, 74; Los Angeles Decision at 30-31.) This is precisely the case with the collaborative watershed-level activities required under the MRP—they may be *authorized*, but are *not required* by federal law. Therefore, the Regional Water Board freely chose to include them the MRP permit, rendering them state mandates.

b. New Requirements for Characterization of MS4 Discharges.

Requirements of the MRP, such as those set forth in provision C.8.c and C.8.h, impose new requirements to measure specific constituents in stormwater. The level of specificity in these provisions goes far beyond the very general monitoring requirements established under the federal Clean Water Act or its implementing regulations. 40 C.F.R. §§ 122.44(i); 122.48; 122.26(d)(1)(iv)(D); (2)(ii)-(iii). The federal regulations simply require permittees to develop monitoring plans that are sufficient to demonstrate compliance with permit limits and assess impacts of a permittee's discharges.

While outfall monitoring requirements are more directed at the type of information anticipated under the federal regulations than the watershed monitoring discussed above, again the requirements of the MRP are far more specific than is required by the Clean Water Act. While the federal regulations require monitoring sufficient to yield data which are representative of the MS4's own discharges, the means and manner in which the these requirements are implemented and specified in the MRP is an exercise of discretion by the Regional Water Board, which freely chose the specific parameters, testing locations, and sampling frequencies as part of the MRP. Under the test articulated in *Hayes*, this choice as indicated in the MRP renders the requirements in Provision C.8.c a state—rather than a federal—mandate. *Hayes v. Comm'n on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593-94 (defining as state mandates requirements "where the manner of implementation of the federal program was left to the true discretion of the state.").

Indeed, with regard to the provisions in Provision C.8.h, which require the County to conform the format and quality assurance methods to those set by

SWAMP, the Regional Water Board provides no specific legal authority—state or federal. And, unquestionably, there is no federal statute or regulation that would require compatibility with SWAMP methods, formats, or quality assurance procedures. The Regional Water Board "freely chose" to impose the SWAMP compatibility requirement of its own accord. *Hayes v. Comm'n on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593.

c. Citizen Monitoring Requirements.

The Fact Sheet for the MRP describes the legal authority for Provision C.8.f as follows: "CWA section 101(e) and 40 CFR Part 25 broadly require public participation in all programs established pursuant to the CWA, to foster public awareness of environmental issues and decision-making processes." (Ex. 1 at App. I-64.)

Section 101(e) of the Clean Water Act says: "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. § 342 1251(e). Part 25 of the Code of Federal Regulations sets the "minimum" standards to encourage public participation. 40 C.F.R. § 25.1. The application of Part 25 appears to be focused on public participation in U.S. EPA or equivalent state-level agency decision-making with regard to water quality regulatory activities such as regulations and the adoption of NPDES permits.

While these provisions could be read to authorize or even encourage the Regional Water Board to impose additional measures to bring the public into other proceedings or other aspects of the permitting process, nothing in the Clean Water Act or its implementing regulations comes close to requiring the measures identified in Provision C.8.f. of the MRP. As with many other requirements in the MRP, the federal regulations may authorize, but do not require, the specific requirements imposed by Provision C.8.f. Thus, as the Commission correctly determined when considering specific public outreach requirements in the San Diego Decision, this provision constitutes a state mandate. (San Diego Decision at 63, citing *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.)

d. Electronic Reporting.

There is no federal requirement that reports be submitted electronically. Indeed, the Fact Sheet cites only state authority as support for these requirements:

> [California Water Code] section 13267 provides authority for the Water Board to require technical water quality reports. Provision C.8.g. requires Permittees to submit electronic and comprehensive reports on their water quality monitoring activities 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 analyses of the data, including for the CWA section 303(d) listing process.

(Ex. 1 at App I-165.) This is a requirement freely chosen by the Regional Water Board and is a state mandate.

3. The County Will Incur Significant Costs as a Result of the Increased Monitoring Requirements Imposed Under Provision C.8 of the MRP.

The County will incur significant costs as a result of the increased monitoring requirements imposed under Provision C.8 of the MRP. The County has calculated the costs it will incur in implementing these requirements for fiscal years 2010 and 2011. These calculations are reflected in Exhibit 3 to the Test Claim, and are described in more detail in the declaration submitted on behalf of the Santa Clara Valley Program in support of this Test Claim. (Sommers Decl. ¶ 10 & Ex. A.)

4. The County Has Inadequate Fee Authority to Recover Monitoring Costs.

The County does not have adequate authority to impose a regulatory fee to recoup the costs of implementing the requirements of Provision C.8 of the MRP. No statutory authority exists for imposing fees to recover the costs of water quality monitoring.

There is not a sufficient nexus between either the cause of stormwater pollution or the benefits derived from the monitoring requirements to impose targeted fees on specific businesses or individuals. Outside of a general finding that municipal stormwater discharges may be contributing to pollution of various receiving waters, there is no finding in the MRP or its Fact Sheet tying stormwater pollutants to specific businesses or individuals. In fact, many of the ongoing monitoring requirements set forth in the MRP are geared toward identifying potential pollutant contributing sources. (Ex. 1 at 71.) This is insufficient to allow the identification of the cause or benefit nexus discussed in the *Sinclair Paint* and

Tahoe Keys cases described above. The only fee that would suffice would have to be a broad-based property fee, which would trigger Proposition 218's voter approval requirement. As the Commission correctly decided in the San Diego Decision, "a local agency does not have sufficient fee authority within the meaning of Government Code section 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners." (San Diego Decision at 106). Thus, Provision C.8.b does not fall within the exception of section 17556(d) of the Government Code.

Moreover, even if an appropriate group of businesses or individuals could be identified, there is no way that such a fee could be precisely calibrated to assure that it would sufficiently reimburse the County for monitoring costs without exceeding those costs, as is required under Article XIII D, § 6, subd. (b). For all of these reasons, the County cannot recover the state mandated costs of section C.8 through the imposition of a fee.

B. ***Trash Load Reduction***

Provision C.10 of the MRP requires the County to develop short- and long-term plans for reducing the amount of trash entering receiving waters from their stormwater systems and to create a baseline against which future reduction achievements may be measured. The County must also take immediate steps to identify "trash hot spots" within its jurisdiction and to perform and document cleanup actions in those areas. Finally, the County must install full trash capture devices to prevent trash from entering storm drains.

1. Provision C.10 Constitutes a New Program or Higher Level of Service.

a. Provision C.10.a.i—Short Term Trash Load Reduction Plan

Provision C.10.a.i requires the County to submit a Short-Term Trash Load Reduction Plan, including an implementation schedule, to the Water Board by February 1, 2012. (Ex. 1 at 84.) The Plan

> shall describe control measures and best management practices, including any trash reduction ordinances, that are currently being implemented and the current level of implementation and additional control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 40% trash load reduction from its MS4 by July 1, 2014.

(*Id.*) In addition, the Plan "shall account for required mandatory minimum Full Trash Capture devices called for in Provision C.10.a.iii and Trash Hot Spot Cleanup called for in Provision C.10.b." (*Id.*)

b. Provision C. 10.a.ii—Baseline Trash Load and Trash Load Reduction Tracking Method

Provision C.10.a.ii requires the County to document the amount of trash currently being discharged from their stormwater systems:

> Each Permittee, working collaboratively or individually, shall determine the baseline trash load from its MS4 to establish the basis for trash load reductions and submit the determined load level to the Water Board by February 1, 2012, along with documentation of methodology used to determine the load level.

(Ex. 1 at 84.). The County is also required to develop a mechanism to track the reductions in trash loads achieved through the measures imposed by the MRP:

> The submittal shall also include a description of the trash load reduction tracking method that will be used to account for trash load reduction actions and to demonstrate progress and attainment of trash load reduction levels. The submittal shall account for the drainage areas of a Permittee's jurisdiction that are associated with the baseline trash load from its MS4, and the baseline trash load level per unit area by land use type and drainage area characteristics used to derive the total baseline trash load level for each Permittee.

(*Id.*)

Finally, Provision C.10.a.ii requires the County to report its progress on these obligations by February 2011, and disclose whether they are working alone or in conjunction with other Permittees:

> Each Permittee shall submit a progress report by February 1, 2011, that indicates whether it is determining its baseline trash load and trash load reduction method individually or collaboratively with other Permittees and a summary of the approach being used. The report shall also include the types and examples of documentation that will be used to propose exclusion areas, and the land use characteristics and estimated area of potentially excluded areas.

(*Id.*)

c. Provision C.10.a.iii—Minimum Full Trash Capture

Provision 10.a.iii requires the installation of a "mandatory minimum number of full trash capture devices by July 1, 2014, to treat runoff from an area equivalent to 30% of Retail/Wholesale Land that drains to MS4s within their jurisdictions (see Table 10.1 in Attachment J)." (Ex. __ at 85.)

This provision defines "a full trash capture device" as "any single device or series of devices that traps all particles retained by a 5 mm mesh screen and has a design treatment capacity of not less than the peak flow rate Q resulting from a one-year, one-hour, storm in the sub-drainage area." (*Id.*)

d. Provision C.10.b.i—Trash Hot Spot Cleanup and Definition

Provision C.10.b introduces a number of cleanup and reporting activities for the County. The County is to identify and clean "Trash Hot Spots" within its jurisdiction: "Trash Hot Spots in receiving waters shall be cleaned annually to achieve the multiple benefits of beginning abatement of these impacts as mitigation and to learn more about the sources and patterns of trash loading." (*Id.* at 85.)

No express definition of Trash Hot Spot is provided. Provision C.10.b.i describes them in terms of minimum size: "Trash Hot Spots shall be at least 100 yards of creek length or 200 yards of shoreline length." (*Id.* at 86.) Provision C.10.b.ii suggests that they are "high trash-impacted locations on State waters." (*Id.*)

e. Provision C.10.b.ii—Trash Hot Spot Selection and Cleanup

Provision C.10.b.ii provides that the County must designate "at least one Trash Hot Spot per 30,000 population, or one per 100 acres of Retail/Wholesale Commercial Land Area, within their jurisdictions based on Association of Bay Area Governments (ABAG) 2005 data, whichever is greater." (*Id.*) Provision C.10.b.ii also requires the County to select at least one Trash Hot Spot, and to submit information, including "photo documentation (one photo per 50 feet)" and initial assessment results for the proposed hot spots to the Regional Water Board by July 1, 2010. (*Id.*) The minimum number of Trash Hot Spots per Permittee is set forth in Attachment J of the MRP

f. Provision C.10.b.iii—Trash Hot Spot Assessment

Provision C.10.b.iii requires the County to "quantify the volume of material removed from each Trash Hot Spot cleanup, and identify the dominant types of trash (e.g., glass, plastics, paper) removed and their sources to the extent possible" and to provide before-and-after photographic documentation of the cleanup. (*Id.*)

g. Provision C.10.c—Long-Term Trash Load Reduction Plan

Provision C.10.c requires each Permittee to create and submit a plan describing trash reduction measures being implemented and for achieving the reduction goals beyond the five-year MRP term:

> Each Permittee shall submit a Long-Term Trash Load Reduction Plan, including an implementation schedule, to the Water Board by February 1, 2014. The Plan shall describe control measures and best management practices, including any trash reduction ordinances, that are being implemented and the level of implementation and additional control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 70% trash load reduction from its MS4 by July 1, 2017, and 100% by July 1, 2022.

(Ex. 1 at 86.)

h. Provision C.10.d—Reporting

Provision C.10.d requires the County to report annually on its trash load reduction efforts and maintain records documenting these actions and their effects. Provision C.10.d.i requires a summary of

> trash load reduction actions (control measures and best management practices) including the types of actions and levels of implementation, the total trash loads and dominant types of trash removed by its actions, and the total trash loads and dominant types of trash for each type of action. The latter shall include each Trash Hot Spot selected pursuant to C.10.b. Beginning with the 2012 Report, each Permittee shall also report its percent annual trash load reduction relative to its Baseline Trash Load.

(Ex. 1 at 86-87.) Provision C.10.d.ii requires the County to retain records and documentation of trash load reduction efforts "for review," and requires that the preserved records "have the specificity required for the trash load reduction tracking method established pursuant to Provision C.10.a.iii. (*Id.* at 87.)

Received
September 15, 2011
Commission on
State Mandates

i. Provision C.10 is a New Program.

The Prior Permit contained no comparable provisions. Provision C.10 clearly is a new program and each of its provisions requires a higher level of service from the County.

2. The Requirements of Provision C.10 Constitute State Mandates.

The Fact Sheet prepared by Regional Water Board staff in connection with the MRP contains the following narrative recitation of federal statutory and regulatory authority specific to the Trash Load Reduction Provisions found in Provision C.10 of the MRP:

> **Specific Legal Authority**: Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(B) requires, "shall be based on a description of a program, including a schedule, to detect and remove (or require the discharger to the municipal storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer."
>
> Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(2) 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."
>
> Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(3) requires, "a description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water."
>
> Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(B)(4) requires, "a description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer."

(Ex. 1 at 71; Appendix.)

The Fact Sheet also describes authority provided under the Regional Water Board's Basin Plan for the San Francisco Bay:

> San Francisco Bay Basin Plan, Chapter 4 – Implementation, Table 4-1 Prohibitions, Prohibition 7, which is consistent with the State Water Board's Enclosed Bays and Estuaries Policy, Resolution 95-84, ***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. This prohibition was adopted by the Water Board in the 1975 Basin Plan, primarily to protect recreational uses such as boating.

(Ex. 1 at 71 (emphasis added); Appendix A.)

The Regional Water Board's adoption of this prohibition and other provisions of the Basin Plan represent the exercise of discretion in choosing the means and manner that the federal Clean Water Act will be applied to receiving waters within its jurisdiction. The Trash Load Reduction measures in C.10 of the MRP represent a second and additional level of discretion by the Regional Water Board, which chose the means and manner by which this prohibition of the Basin Plan is applied to the Co-Permittees under the MRP. The requirements of Provision C.10 are therefore at least two steps removed from and exceed the general provisions of federal law cited in the Fact Sheet. Because the Regional Water Board freely chose to impose the obligations under Provision C.10, this renders section C.10 a state, not a federal, mandate. *Hayes v. Comm'n on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593. In the Los Angeles Decision, the Commission applied a similar rationale, and concluded that street-sweeping requirements designed to reduce trash in stormwater were far more specific than what was required under federal law. (Los Angeles Decision at 55.) The same logic applies and compels the same result with respect to the trash load reduction provisions in the MRP.

3. The County Will Incur Significant Costs as the Result of the New Trash Load Reduction Requirements Imposed Under Provision C.10 of the MRP.

The County will incur significant costs as a result of the new trash load reduction requirements imposed under Provision C.10 of the MRP. The County has calculated costs it will incur in implementing these requirements for fiscal years 2010 and 2011. These calculations are reflected in Exhibit 3 to the Test Claim, and are described in more detail in the declaration submitted on behalf of the Santa Clara Valley Program in support of this Test Claim. (Sommers Decl. ¶ 10 & Ex. B.)

Received
September 15, 2011
Commission on
State Mandates

4. The County Has Inadequate Fee Authority to Recover the Costs of Implementing Provision C.10.

For all of the reasons discussed above with regard to the monitoring provisions of the MRP, the County does not have adequate authority to impose a regulatory fee to recoup the costs of complying with the Trash Load Reduction requirements of Provision C.10. No statutory authority exists for imposing fees to recover for such costs.

Public Resources Code section 40059 provides local governments with authority over the collection and handling of solid waste, and allows for the collection of fees related to these activities:

> Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following: (1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services.

Cal. Pub. Resources Code § 40059(a).

In the Los Angeles Decision, the Commission concluded that the cost of placing trash receptacles at public transit locations could not be recovered through the imposition of a fee under this provision because such a fee would not be reasonably related to providing "services necessary to the activity for which the fee is charged." (Los Angeles Decision at 59.). In that case, the Commission concluded that even if the Los Angeles permittees had proper jurisdiction to impose a fee on transit riders, this group would gain no particular benefit over that provided to the general public. (*Id.*)

Here, the installation of trash capture devices mandated by the MRP is similarly beyond the fee authority of the County. The Commission in the Los Angeles Decision concluded that there were no businesses and private property owners that could be singled out to pay fees for placement of trash receptacles in transit stops. (Los Angeles Decision at 59 ("Because the trash receptacles are required to be placed at transit stops that would typically be on city property (sidewalks) or transit district property (for bus or metro or subway stations), there are no entities on which the claimants would have authority to impose the fees.") Similarly, here, there are no businesses or individuals whose activities are sufficiently connected to either the benefits of Provision C.10 or the pollution it seeks to address to justify the imposition of fees.

The same is true for the "Hot-Spot" cleanup activities required under Provision C.10. In the San Diego Decision, the Commission concluded that the potential for voter opt-out for fees related to refuse collection and street sweeping made the local agency's fee authority too contingent for section 17556(d) to apply. (San Diego Decision at 115.) The costs of developing the short- and long-term trash load reduction plans and the development of a baseline under the MRP are even more attenuated from the causes of those costs or the benefits to be delivered by the activities.

For the same reasons, no authority exists for the imposition of a regulatory fee under the general police powers enjoyed by local authorities. There is no nexus between either the cause of stormwater pollution or the benefits to be derived from the requirements of Provision C.10 and any specific businesses or individuals to allow a targeted fee, as required in the *Sinclair Paint* and *Tahoe Keys* cases. The only fee that would suffice would have to be a broad-based property fee that would trigger Proposition 218's voter approval requirement. For this reason, Provision C.10 does not fall within the exception of section 17556(d) of the Government Code.

C. ***Mercury and PCB Diversion Studies***

Provisions C.11.f and C.12.f of the MRP require the County and other Permittees to implement pilot programs to evaluate the reduction in mercury and PCB levels attainable by diverting dry weather and first-flush stormwater flows to sanitary sewers, where they may be treated for these contaminants by Publicly Owned Treatment Works ("POTWs"). (Ex. 1 at 91, 99.) The Permittees are also required to quantify and report the reductions achieved during the pilot program. (*Id.*)

The County and other Permittees are required to implement these requirements by collectively "evaluating drainage characteristics and the feasibility of diverting flows to the sanitary sewer." (*Id.*) Provision C.11.f.ii says

> Permittees should work with local POTWs, on a watershed, county, or regional level to evaluate feasibility and to establish cost sharing agreements. The feasibility evaluation shall include, but not be limited to, costs, benefits, and impacts on the stormwater and wastewater agencies and the receiving waters relevant to the diversion and treatment of the dry weather and first flush flows.

(*Id.* at 91.) Provision C.12.f contains a virtually identical provision. (*Id.* at 99.) The results of the feasibility studies are to be used by Permittees to collectively select five pump stations and five alternates for pilot diversion studies. At least

one diversion pilot program must be implemented in each county within the jurisdiction of the MRP. (*Id.* at 91, 100.) Sections C.11.f.ii and C.12.f.ii further direct that the pilot studies be conducted "in industrially- dominated catchments where elevated PCB concentrations are documented. (*Id.* at 91, 99). The Permittees are then required to report the outcome of the studies. (*Id.*)

1. Provisions C.11.f and C.12.f Constitute New Programs.

The Prior Permit contained no provisions requiring the diversion studies and pilot programs for mercury and PCBs required under the MRP. The studies and pilot projects required under sections C.11.f and C.12.f are new programs.

2. Provisions C.11.f and C.12.f Are State Mandates.

For purposes of establishing legal authority, the Fact Sheet lumps Provision C.11 and C.12 in a group that covers Provisions C.9 through C.14, and asserts that these requirements are generally authorized by sections 402(p)(3)(B)(ii-iii) of the Clean Water Act, section 13377 of the California Water Code, and sections 122.26(d)(2)(i)(B, C, E, and F) and 122.26(d)(2)(iv) of the federal NPDES regulations. (Ex. 1 at App I-66.) The Fact sheet also identifies the Regional Water Board's basin plan as a source of authority, and uses permit conditions based on the adoption of a Total Maximum Daily Load as an example of provisions that may be imposed under this authority ("TMDL"). (*Id.*)

The Fact Sheet goes on to state that the mercury control measures in the MRP are intended to "implement the urban runoff requirements stemming from" the TMDL for this pollutant. (*Id.*) It also relates PCB control measures to a TMDL: "The control measures required for PCBs are intended to implement those that are consistent with control measures in the PCBs TMDL implementation plan that has been approved by the Water Board and is pending approval by the State Board, the Office of Administrative Law, and U.S. EPA." (*Id.* at App I-66-67.)

None of the federal provisions cited in the Fact Sheet requires the specific measures imposed by the MRP. The federal statute requires that NPDES permits be "consistent with" TMDLs, nothing more. 40 C.F.R. § 122.44(d)(1)(vii). It does not require the Regional Water Board to implement those TMDLs through any specific permit limit, let alone the studies and pilot projects entailed in MRP Provisions C.11.f and C.12.f. Rather, the Regional Water Board has "freely chosen" these measures as the method and manner of implementing this general "consistency" requirement of federal law. The exercise of discretion in the MRP indicates that these Provisions are state, not a federal, mandates. *Hayes v. Comm'n on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593.

3. The County Will Incur Significant Costs as the Result of the Diversion Studies Required Under Provisions C.11.f and C.12.f of the MRP.

The County will incur significant costs as a result of the new requirements for Diversion Studies relating to mercury and PCB discharges imposed under Provisions C.11.f and C.12.f of the MRP. The County has calculated costs it will incur in implementing these requirements for fiscal years 2010 and 2011,. These calculations are reflected in Exhibit 3 to the Test Claim, and are described in more detail in the declaration submitted on behalf of the Santa Clara Valley Program in support of this Test Claim. (Sommers Decl. ¶ 10 & Ex. C.)

4. The County Does Not Have Adequate Authority to Recover the Costs of Complying with C.11.f and C.12.f Through the Imposition of a Fee.

For many of the same reasons discussed above with regard to the MRP's monitoring and trash requirements, the County does not have adequate authority to impose a regulatory fee to recoup the costs of implementing Provisions C.11.f and C.12.f of the MRP. No statutory authority exists for imposing fees to recover the costs of such projects.

There is no nexus between either the cause of stormwater pollution or the benefits to be derived from the diversion study requirements and any specific businesses or individuals to allow a targeted fee. This is insufficient to allow the identification of the cause or benefit nexus discussed in the *Sinclair Paint* and *Tahoe Keys* cases. The only fee that would suffice would be a broad-based property fee that would trigger Proposition 218's voter approval requirement. Given that a voter-contingent fee is insufficient to establish a local agency's fee authority, Provisions C.11.f and C.12.f do not fall within the exception of section 17556(d) of the Government Code. (San Diego Decision at 106.)

IV. COSTS TO IMPLEMENT MANDATED ACTIVITIES

Over the five-year term of the MRP, the County will incur significant new costs to implement and administer the new programs and higher levels of service mandated by Provisions C.8, C.10, C.11.f and C.12.f. The Santa Clara Valley Program has assessed actual and estimated costs to implement these measures on a Program-wide basis. Each Permittee's share of these mandated costs is based on an established funding formula which apportions costs among Program members based on each Permittee's total area and total population with certain minimum cost shares.

Under the Prior Permit, the County incurred an average annual cost of $33,376.00 to implement the monitoring activities modified by the MRP. As explained above, the activities mandated by MRP Provisions C.10, C.11.f and C.12.f are entirely new programs; therefore the County did not incur any costs to implement such programs under the Prior Permit. During FY 2010-2011, the County's costs to implement the mandated activities described above are estimated to be $852,832.00 and during FY 2011-2012, these costs are estimated to be $1,040,000.00. The County's costs to implement each of these mandated activities in FY 2010-2011 and FY 2011-2012 are summarized in Exhibit 3 and are described in more detail in the declaration submitted on behalf of the Santa Clara Valley Program in support of this Test Claim. (Sommers Decl. ¶ 10 & Exs. A-C.)

V. STATEWIDE COST ESTIMATE

The MRP relates only to a portion of the San Francisco Bay region. This Test Claim is even narrower in scope in that, for some programs, it pertains to new programs and higher levels of service imposed by the MRP on the County directly or indirectly in the form of contributions to work that will be performed jointly with other Permittees within the Santa Clara Valley Program or in other collaborative efforts, compared to the Prior Permit. Therefore, the cost estimates provided relate only to the County and other Permittees participating in the Santa Clara Valley Program. These costs are detailed in the declaration submitted on behalf of the Santa Clara Valley Program in support of this Test Claim, (Sommers Decl. ¶ 10 & Ex. A), and are incorporated into Exhibit 3 to this Test Claim.

VI. FUNDING SOURCES

As discussed in more detail above, the County does not have fee authority to offset these costs. With the exception of the partial potential funding source set forth below, the County is not aware of any state, federal or non-local agency funds that are or will be available to fund these new activities.

Pursuant to the American Recovery and Reinvestment Act ("ARRA"), the San Francisco Estuary Partnership ("SFEP") has been awarded $5 million from the State Water Resources Control Board's Clean Water State Revolving Fund to purchase trash capture devices and provide them to cities and counties throughout the Bay Area, according to a formula based on population and permit requirements. Participation by municipalities, which is voluntary, will require contracting with the Association of Bay Area Governments and compliance with ARRA and Revolving Fund requirements. Therefore, the ARRA funds represent a potential funding source to offset certain costs to comply with the C.10 trash-related requirements, although these funds are not guaranteed or dedicated for any particular Permittee. The projected portion of the ARRA funds that may be available to the County is set forth in Exhibit D to the Sommers Declaration.

VII. PRIOR MANDATE DETERMINATIONS

The County is unaware of any prior mandate determinations relating to the MRP. However, Test Claim Nos. 03-TC-04, 03-TC-19, 03-TC-20 and 03-TC-21, which resulted in the Los Angeles Decision, and Test Claim No. 07-TC-09, which resulted in the San Diego Decision, challenged waste discharge requirements for municipal regional storm water and urban runoff discharges that involved many of the same issues described in this Test Claim. The provisions of the MRP discussed above are analogous to several provisions in the Los Angeles and San Diego municipal stormwater permits that the Commission determined were unfunded mandates within the meaning of section 6 of Article XIII D.

VIII. CONCLUSION

Through the MRP, the California Regional Water Quality Control Board, San Francisco Bay Region has exercised its discretion to impose many new state-mandated activities and demand that the County deliver a higher levels of services than what was required under the Prior Permit. As detailed above, their development and implementation imposes substantial costs. The County believes that the costs incurred and to be incurred satisfy all the criteria for reimbursable mandates and respectfully requests that the Commission make such findings as to each of the mandated programs and activities set forth herein.

TAB NO. 33

DECLARATION OF CHRIS SOMMERS
IN SUPPORT OF TEST CLAIM

I, Chris Sommers, declare as follows:

1. I make this declaration based upon my own personal knowledge, except for matters set forth herein on information and belief, and as to those matters I believe them to be true, and if called upon to testify, I could and would testify competently to the matters set forth herein.

2. I received a Bachelor of Science (BS) degree in Environmental Science from Indiana University in 1994 and Master's of Science (MS) in Natural Resources Management from Humboldt State University in 2000, with a focus on aquatic ecology and indicators of environmental condition of freshwater systems.

3. I am employed by EOA, Inc. as a Managing Scientist. Since 2002, I have served as the watershed monitoring and assessment coordinator for the Santa Clara Valley Urban Runoff Pollution Prevention Program ("Santa Clara Valley Program" or "Program").

4. The Santa Clara Valley Program is a consortium made up of the cities of Campbell, Cupertino, Los Altos, Los Altos Hills, Los Gatos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, Sunnyvale, the County of Santa Clara, and the Santa Clara Valley Water District (collectively, the "Permittees"). The Program was created in 1990 through a Memorandum of Agreement ("MOA"). Among other things, the MOA calls for adoption of an annual program-wide budget and establishes proportional cost-sharing allocations for each of the Permittees.

5. As part of my position, I am responsible for designing, managing and implementing all aspects (e.g., sampling design, field work, analytical analyses, quality control, data management, interpretation and reporting) of water quality monitoring required by municipal stormwater NPDES permits issued to the Program Permittees by the Regional Water Quality Control Board (San Francisco Bay Region) ("Regional Water Board"). Additionally, I assist the Permittees and other Bay Area NPDES Permittees in planning and implementing trash assessments and management strategies to comply with NDPES requirements.

Received
September 15, 2011
Commission on
State Mandates

6. The Permittees are subject to the Municipal Regional Stormwater NPDES Permit, issued by the Regional Water Board, Order No. R2-2009-0074 (NPDES Permit No. CAS612008) (the "MRP"). I have reviewed the MRP and I know and understand its requirements.

7. I have also reviewed and I know and understand the requirements of NPDES Permit No. CAS029718 issued by Regional Water Board Order No. 01-024 on April 21, 2001, amended by Order No 01-119 on October 17, 2001 and Order No. R2-2005-0035 on July 20, 2005 (the "Prior Permit"), under which the Santa Clara Valley Program's member agencies were Permittees.

8. Based on my understanding of the Prior Permit and the MRP, I believe the MRP requires the Permittees to perform new activities that are unique to local governmental entities that were not required by the Prior Permit.

9. The MRP's new activities include the following:

(a) Monitoring

(i) Requirements. Section C.8 of the MRP requires the Permittees to implement a number of water quality monitoring programs that were not required by the Prior Permit.

(1) Provision C.8.b requires an increased level of participation in the Regional Monitoring Program for water quality in the San Francisco Bay Estuary ("RMP"). In addition to increased direct contributions to the RMP, costs for staff participation are expected to increase by roughly 2% per year in order to provide greater coordination between RMP and MRP objectives for this provision. (MRP at 65).

(2) Provision C.8.c requires a substantially increased level of monitoring effort relative to the Prior Permit by greatly expanding both the number of sites that must be monitored per year and the number of monitoring parameters. (MRP at 65-71). These parameters and sites include:

- Algae bioassessment (20 sites/yr)
- Chlorine (23 sites/yr)
- Temperature (8 sites/yr)

- Stream Surveys (9 miles/yr)

Additionally, Provision C.8.c increases the number of creek sites that must be sampled annually for the following parameters (site increases are in parentheses):

- Total Phosphorus (7 sites/year)
- Dissolved Orthophosphate (7 sites/yr)
- Total Nitrogen (7 sites/yr)
- Nitrate (7 sites/yr)
- Ammonia (7 sites/yr)
- Silica (7 sites/yr)
- Chloride (7 sites/yr)
- Dissolved Organic Carbon (DOC) (7 sites/yr)

(3) Provision C.8.d requires three new types of projects that were previously not required under the Prior Permit (Source Identification, BMP Effectiveness, and Geomorphic Projects). These projects will require project design, field work, sampling and laboratory analysis, interpretation and reporting. (MRP at 71-73).

(4) Provision C.8.e requires substantially increased levels of effort for (1) pollutants of concern monitoring, and (2) long-term monitoring. It also imposes a new requirement to conduct a sediment delivery estimate/budget study. (MRP at 73-75).

a. *Pollutants of Concern Monitoring*: The MRP, in Provision C.8.e.i, requires the Permittees to undertake the following new monitoring efforts for pollutants of concern, relative to the Prior Permit.

i. Two new stations are required to be monitored by the Santa Clara Valley Program (none were previously required), involving costs for development and maintenance of the stations;

ii. Due to numerous pollutants to be sampled, both stations will require additional setup (e.g., purchasing equipment, installation, calibration of equipment) of monitoring equipment prior to beginning to monitor annually at one station in October 2011 and another beginning in October 2012;

iii. A minimum of four storms have to be sampled per year at each station. This will require watching and predicting which storms to sample, mobilization of field crews, sample preparation and collection, and transport of samples to laboratory.

iv. Numerous pollutants or analytes are required to be monitored (see MRP at 73-75). For completely new analytes, the costs of analysis along with costs associated with specialized protocols or extra field visits for some pollutants significantly increases the annual average cost.

v. *Long-Term Monitoring.* Provision C.8.e.ii requires long-term monitoring at specific stations, pursuant to specific protocols. (MRP at 74). The Program's monitoring program under the Prior Permit did not require monitoring designed to detect long-term trends. Therefore, existing creek monitoring will need to be redesigned to include trends monitoring as described in C.8.e.ii. This will include an increase in the number of samples collected and analyzed for sediment toxicity and sediment chemistry, including new sediment chemistry parameters.

b. *Sediment Delivery Estimate/Budget.* Provision C.8.e.vi requires the Permittees, by July 1, 2011, to develop "a design for a robust sediment delivery estimate/sediment budget in local tributaries and urban drainages." (MRP at 76). The study itself must be implemented by July 1, 2012. As the Prior Permit contained no requirement to design or implement sediment delivery studies, this is an entirely new program under the MRP.

(5) Provision C.8.f requires the Permittees to encourage "citizen monitoring," although it does not define this term. (MRP at 76). This is an entirely new requirement. Increases associated with this provision include "reasonable efforts to seek out citizen and stakeholder information and comment regarding waterbody function and quality," and annually demonstrating "that they have encouraged citizen and a stakeholder observations and reporting of waterbody conditions" by reporting on these outreach efforts. There are no specific increases in number of monitoring sites or parameters associated with

this provision, but level of coordination (i.e., staff time) required is greater than the existing level.

(6) Provision C.8.g requires specific contents and format for reporting monitoring data. (MRP at 76). Under the Prior Permit, the Santa Clara Valley Program prepared an annual report which included a description of the Permittees' data collected over the previous fiscal year, and general interpretation of the results. The Program is currently not required to submit data in a specified electronic format or report to the extent required by provision C.8.g. Therefore, beginning in fiscal year 2011-2012, new costs for electronic reporting and higher costs for developing reports for all new and expanded programs will be incurred.

(7) Provision C.8.h requires the Permittees to develop significant updates or additions to existing field standard operating procedures and train field staff to allow for monitoring data to be collected by the Santa Clara Valley Program using "SWAMP comparable" methods defined by the State Water Resources Control Board's Surface Water Ambient Monitoring Program. (MRP at 77-78). Additionally, new data management systems must be developed and managed at significant costs, as the MRP requires data to be reported electronically to the Regional Water Board in "SWAMP comparable" formats. Monitoring data quality assurance procedures (also SWAMP comparable) also have to be developed, documented and adhered to by the Program at all times, which requires an additional level of effort (staff time) compared to previous quality assurance procedures conducted by the Program under the Prior Permit.

(b) Trash

(i) Requirements. Section C.10 of the MRP requires the Permittees to implement a number of trash-related programs that were not required by the Prior Permit.

(1) Provision C.10.a requires several specified actions to reduce trash loads from municipal separate storm sewer systems (MS4), including developing Short-Term Trash Load Reduction Plans designed to attain 40% trash load reductions from MS4s by July 1, 2014 (C.10.a.i, MRP at 84). These plans must describe, among other

things, new control measures and best management practices that each Permittee will increase and/or implement to achieve the 40% reduction. Additionally, Permittees are required to determine baseline trash loads from each MS4 and tracking methods to account for trash load reductions (C.10.a.ii, MRP at 84), and installing and maintaining specified numbers of full trash capture devices (C.10.a.iii, MRP at 85). Each of these requirements represent new programs that were not required by the Prior Permit.

(2) Provision C.10.b requires the Permittees to identify, assess, and clean up specified numbers of trash "hot spots" annually based on population or acreage of retail/wholesale commercial land within each jurisdiction (for population-based permittees). (MRP at 85-86). This is a new requirement not required by the Prior Permit.

(3) Provision C.10.c requires the Permittees to submit Long-Term Trash Load Reduction Plans and implementation schedules by February 1, 2014. (MRP at 86). This plan will require implementation methods and practices designed to attain a 70% trash load reduction from MS4s by July 1, 2017, and a 100% reduction by July 1, 2022. This is a new program as such plans were not required by the Prior Permit.

(4) Provision C.10.d requires the Permittees to report annually on trash load reduction efforts and maintain records documenting these actions and their effects. (MRP at 86-87). These reporting requirements are new programs not required by the Prior Permit.

(c) Mercury and PCBs

(i) Requirements. Sections C.11 and C.12 of the MRP require the Permittees to implement pilot projects to divert dry weather and first flush stormwater flows to publicly owned treatment works ("POTWs"). Collectively, must select five pump stations and five alternates for feasibility studies and pilot diversion studies, must implement flow diversion at five pump stations, and must analyze results, as appropriate, in annual reports. (MRP at 91, 99). The studies and pilot projects are new programs that were not required by the Prior Permit.

10. Costs. The estimated costs allocated to each of the Santa Clara Valley Program Permittees during each year of the term of the MRP are summarized below and are detailed in Exhibits A-C to this declaration.

(a) General Assumptions. The anticipated costs stated below are reasonable estimates based on available information and best professional judgment of myself and other Santa Clara Valley Program staff, taking into account San Francisco Bay Area market rates for Program and Permittee staff, outside consultants and services, and materials. Where appropriate, additional assumptions are identified in the subsections below, detailing costs for each MRP program area.

(b) Provision C.8 Costs.

(i) Prior Permit Costs. The Permittees' Program-wide costs for monitoring activities under each year of the Prior Permit averaged approximately $561,712.[1]

(ii) FY 2010 Costs. The estimated Program-wide cost for implementing monitoring activities mandated by MRP Provision C.8 for Fiscal Year ("FY") 2010-2011 will be $483,448.

(iii) FY 2011 Costs. The estimated Program-wide cost for implementing monitoring activities mandated by MRP Provision C.8 for FY 2011-2012 will be $1,047,304.

(iv) Assumptions. The above cost estimates reflect San Francisco Bay Area market conditions and are based upon personnel costs for field and office work that typically range from $100 to $175 per hour and unit costs for chemical and biological laboratory analyses that typically vary between approximately $10 and $3,000 per analysis (see discussion of Provisions C.8.c and C.8.e above for specific required analyses).

(v) Cost Allocations. Each Permittee's share of the Provision C.8 costs listed above is detailed in Exhibit A to this Declaration. Pursuant to Exhibit A of the Santa

[1] This assessment reflects a best professional judgment comparison of previous monitoring activities to MRP requirements. However, some previous tasks have no analogous MRP permit provisions, and these tasks have not been included in the analysis of costs under the Prior Permit.

Clara Valley Program's MOA, each Permittee is allocated an established percentage of costs for shared responsibilities ("Funding Formula"). The cost allocations for each Permittee based on the Funding Formula are identified in each Exhibit to this Declaration. All monitoring costs are allocated according to the Funding Formula.

(c) Provision C.10 Costs.

(i) Prior Permit Costs. Under the Prior Permit, the Permittees did not incur any costs specifically attributable to the MRP's trash-related requirements.

(ii) FY 2010 Costs. The estimated total cost for implementing trash-related activities mandated by MRP Provision C.10 for FY 2010-2011 will be $14,582,277.

(iii) FY 2011 Costs. The estimated total cost for implementing trash-related activities mandated by MRP Provision C.10 for FY 2011-2012 will be $15,652,964.

(iv) Assumptions. I and other Santa Clara Valley Program staff, as well as staff for other Programs made up of MRP permittees in other Bay Area counties, have collaborated to identify a set of best management practices and control measures that we believe will be necessary in order to achieve the 40% trash load reduction from MS4s by July 1, 2014, as required by Provision C.10.a. These practices and measures include:

- Targeted enforcement
- Public education and outreach
- Targeted trash bin/container management
- Single use plastic/paper bag ordinances
- Polystyrene ordinances
- Increased street sweeping (10% increase)
- Increased storm drainage system maintenance (20% increase)

We have projected Program-wide costs to implement these measures (required by C.10.a.i), as well as the costs associated with specific tasks necessary to implement the remaining C.10 provisions (including determination of baseline trash loads and tracking methods; planning, design, installation, operation, and maintenance of full trash capture devices; identification, cleanup, and assessment of specified numbers of "hot spots"; long-term trash load reduction planning; and reporting).

(v) Cost Allocations. Each Permittee's share of the Provision C.10 costs listed above is detailed in Exhibit B to this Declaration. Certain measures identified to implement Provision C.10.a (public education and outreach, baseline trash loading estimates, and trash load reduction tracking methods) will be funded by the Permittees according to the Funding Formula. However, cost allocations for other measures to implement Provision C.10 have been determined based on individual permittees' urban geographical areas, miles required to be covered by increased street sweeping, required full trash capture areas, and/or required number of trash hot spots for cleanup, as appropriate.

(d) Provision C.11.f/C.12.f Costs.

(i) Prior Permit Costs. Under the Prior Permit, the Permittees did not incur any costs associated with the mandated diversion studies.

(ii) FY 2010 Costs. The estimated total cost for implementing diversion study activities mandated by MRP Provisions C.11.f and C.12.f for FY 2010-2011 will be $54,092.

(iii) FY 2011 Costs. The estimated total cost for implementing diversion study activities mandated by MRP Provisions C.11.f and C.12.f for FY 2011-2012 will be $169,674.

(iv) Assumptions. I and other Santa Clara Valley Program staff, as well as staff for other Programs made up of MRP permittees in other Bay Area counties, have collaborated to identify the individual tasks and associated projected costs necessary to implement the five pump station diversion studies required by the MRP. These cost estimates are preliminary, largely based on best professional judgment, and subject to revision as the activities are implemented. For the Program Permittees, these tasks over the next two fiscal years are expected to include coordination with other MRP permittees via the Bay Area Stormwater Management Agencies Association and significant costs for project planning, permits, administration, legal counsel, and reporting. The Program's share of the regional cost to implement these requirements is estimated to be 34%.

(v) Cost Allocations. Each Permittee's share of the Provision C.11.f/C.12.f costs listed above is detailed in Exhibit C to this Declaration. Permittee allocations for the C.11.f/C.12.f costs are based on the Funding Formula.

(e) Total Costs.

(i) Based on the foregoing, the Permittees' aggregate cost to implement all of the C.8, C.10, and C.11f/C.12.f provisions listed above in FY 2010-2011 is estimated to be approximately $15,119,817.

(ii) The Permittees' aggregate cost to implement all of the C.8, C.10, and C.11f/C.12.f provisions listed above in FY 2011-2012 is estimated to be approximately $16,869,942.

11. With the exception of the partial potential funding source set forth below, I am not aware of any dedicated state or federal funds that are or will be available to pay for these increased costs.

(a) Pursuant to the American Recovery and Reinvestment Act ("ARRA"), the San Francisco Estuary Partnership ("SFEP") has been awarded $5 million from the State Water Resources Control Board's Clean Water State Revolving Fund to purchase trash capture devices and provide them to cities and counties throughout the Bay Area, according to a formula based on population and permit requirements. Participation by municipalities, which is voluntary, will require contracting with the Association of Bay Area Governments and compliance with ARRA and Revolving Fund requirements. Therefore, the ARRA funds represent a potential funding source to offset certain costs to comply with the Provision C.10 trash-related requirements, although these funds are not guaranteed or dedicated for any particular Permittee and it is not yet know which Permittees will receive funding from this source. The portion of the ARRA funds projected to be available to each Permittee is set forth in Exhibit D to this Declaration.

12. I am not aware of any other non-local agency funds that are or will be available to pay for these increased costs.

Executed this 19th day of August 2010 at 1410 Jackson St., Oakland, CA

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

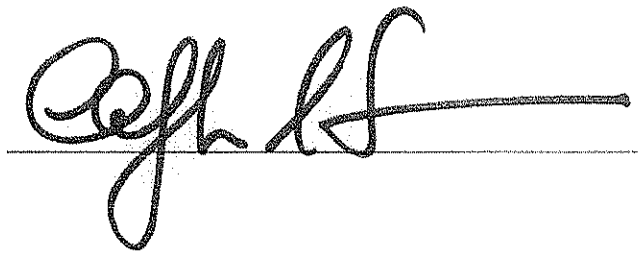

EXHIBIT A TO SOMMERS DECLARATION

Santa Clara Valley Program - Co-Permittees' Costs to Implement Provision C.8 of Municipal Regional Permit

MRP Provision	Name	Permitee Costs								
		Campbell	Cupertino	Los Altos	Los Altos Hills	Los Gatos	Milpitas	Monte Sereno	Mountain View	Palo Alto
	% Program Contribution	*1.88%*	*2.46%*	*1.56%*	*0.43%*	*1.74%*	*2.75%*	*0.14%*	*3.91%*	*4.06%*
C.8.b	SF Bay Monitoring (RMP)									
	C.8.b - PRIOR PERMIT	$3,572	$4,674	$2,964	$817	$3,306	$5,225	$266	$7,429	$7,714
	C.8.b - 2010	$3,922	$5,132	$3,254	$897	$3,630	$5,737	$292	$8,156	$8,469
	C.8.b - 2011	$3,991	$5,222	$3,311	$913	$3,694	$5,837	$297	$8,300	$8,618
C.8.c	Creeks Status Monitoring									
	C.8.c - PRIOR PERMIT	$4,632	$6,062	$3,844	$1,060	$4,288	$6,776	$345	$9,635	$10,004
	C.8.c - 2010	$1,046	$1,369	$868	$239	$968	$1,530	$78	$2,176	$2,259
	C.8.c - 2011	$8,139	$10,649	$6,753	$1,861	$7,533	$11,905	$606	$16,926	$17,576
C.8.d	Monitoring Projects									
	C.8.d - PRIOR PERMIT	$448	$586	$371	$102	$414	$655	$33	$931	$967
	C.8.d - 2010	$0	$0	$0	$0	$0	$0	$0	$0	$0
	C.8.d - 2011	$2,746	$3,593	$2,278	$628	$2,541	$4,017	$204	$5,711	$5,930
C.8.e.i	Pollutants of Concern									
	C.8.e.i - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	$0	$0	$0
	C.8.e.i - 2010	$799	$1,046	$663	$183	$740	$1,169	$60	$1,662	$1,726
	C.8.e.i - 2011	$3,782	$4,949	$3,138	$865	$3,500	$5,532	$282	$7,865	$8,167
C.8.e.ii	Long Term Monitoring									
	C.8.e.ii - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	$0	$0	$0
	C.8.e.ii -2010	$141	$185	$117	$32	$131	$206	$11	$293	$305
	C.8.e.ii - 2011	$391	$512	$325	$89	$362	$572	$29	$814	$845
C.8.e.vi	Sediment Delivery Estimate/Budget									
	C.8.e.vi - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	$0	$0	$0
	C.8.e.vi - 2010	$176	$230	$146	$40	$163	$257	$13	$366	$380
	C.8.e.vi - 2011	$90	$118	$75	$21	$83	$131	$7	$187	$194
C.8.f	Citizen Monitoring									
	C.8.f - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	$0	$0	$0
	C.8.f - 2010	$188	$246	$156	$43	$174	$275	$14	$391	$406
	C.8.f - 2011	$250	$327	$207	$57	$231	$365	$19	$519	$539
C.8.g	Reporting									
	C.8.g - PRIOR PERMIT	$978	$1,279	$811	$224	$905	$1,430	$73	$2,033	$2,111
	C.8.g - 2010	$0	$0	$0	$0	$0	$0	$0	$0	$0
	C.8.g - 2011	$128	$167	$106	$29	$118	$187	$10	$266	$276
C.8.h	Monitoring Protocols/Data Quality									
	C.8.h - PRIOR PERMIT	$934	$1,222	$775	$214	$864	$1,366	$70	$1,942	$2,016
	C.8.h - 2010	$2,820	$3,690	$2,340	$645	$2,610	$4,125	$210	$5,865	$6,090
	C.8.h - 2011	$180	$235	$149	$41	$166	$263	$13	$374	$388
	TOTALS									
	PRIOR PERMIT TOTAL	**$10,563**	**$13,822**	**$8,765**	**$2,416**	**$9,777**	**$15,452**	**$787**	**$21,970**	**$22,812**
	2010 TOTAL	**$9,092**	**$11,896**	**$7,544**	**$2,079**	**$8,415**	**$13,299**	**$677**	**$18,908**	**$19,634**
	2011 TOTAL	**$19,695**	**$25,771**	**$16,343**	**$4,505**	**$18,229**	**$28,809**	**$1,467**	**$40,962**	**$42,533**

EXHIBIT A TO SOMMERS DECLARATION

Santa Clara Valley Program - Co-Permittees' Costs to Implement Provision C.8 of Municipal Regional Permit

MRP Provision	Name	Co-permitee Costs						
		San Jose	Santa Clara	Santa Clara County	Saratoga	SCVWD	Sunnyvale	Total
	% Program Contribution	*30.01%*	*6.23%*	*5.94%*	*1.59%*	*30.02%*	*7.25%*	*99.97%*
C.8.b	**SF Bay Monitoring (RMP)**							
	C.8.b - PRIOR PERMIT	$57,019	$11,837	$11,286	$3,021	$57,038	$13,775	$189,943
	C.8.b - 2010	$62,601	$12,996	$12,391	$3,317	$62,622	$15,124	$208,537
	C.8.b - 2011	$63,703	$13,225	$12,609	$3,375	$63,724	$15,390	$212,208
C.8.c	**Creeks Status Monitoring**							
	C.8.c - PRIOR PERMIT	$73,947	$15,351	$14,637	$3,918	$73,972	$17,865	$246,335
	C.8.c - 2010	$16,698	$3,467	$3,305	$885	$16,704	$4,034	$55,626
	C.8.c - 2011	$129,914	$26,970	$25,714	$6,883	$129,957	$31,385	$432,773
C.8.d	**Monitoring Projects**							
	C.8.d - PRIOR PERMIT	$7,146	$1,484	$1,415	$379	$7,149	$1,726	$23,806
	C.8.d - 2010	$0	$0	$0	$0	$0	$0	$0
	C.8.d - 2011	$43,832	$9,099	$8,676	$2,322	$43,846	$10,589	$146,013
C.8.e.i	**Pollutants of Concern**							
	C.8.e.i - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	$0
	C.8.e.i - 2010	$12,754	$2,648	$2,525	$676	$12,759	$3,081	$42,487
	C.8.e.i - 2011	$60,368	$12,532	$11,949	$3,198	$60,388	$14,584	$201,099
C.8.e.ii	**Long Term Monitoring**							
	C.8.e.ii - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	$0
	C.8.e.ii -2010	$2,251	$467	$446	$119	$2,252	$544	$7,498
	C.8.e.ii - 2011	$6,245	$1,296	$1,236	$331	$6,247	$1,509	$20,803
C.8.e.vi	**Sediment Delivery Estimate/Budget**							
	C.8.e.vi - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	$0
	C.8.e.vi - 2010	$2,806	$583	$555	$149	$2,807	$678	$9,347
	C.8.e.vi - 2011	$1,434	$298	$284	$76	$1,435	$347	$4,779
C.8.f	**Citizen Monitoring**							
	C.8.f - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	$0
	C.8.f - 2010	$3,001	$623	$594	$159	$3,002	$725	$9,997
	C.8.f - 2011	$3,985	$827	$789	$211	$3,986	$963	$13,274
C.8.g	**Reporting**							
	C.8.g - PRIOR PERMIT	$15,605	$3,240	$3,089	$827	$15,610	$3,770	$51,984
	C.8.g - 2010	$0	$0	$0	$0	$0	$0	$0
	C.8.g - 2011	$2,041	$424	$404	$108	$2,041	$493	$6,798
C.8.h	**Monitoring Protocols/Data Quality**							
	C.8.h - PRIOR PERMIT	$14,902	$3,094	$2,950	$790	$14,907	$3,600	$49,644
	C.8.h - 2010	$45,015	$9,345	$8,910	$2,385	$45,030	$10,875	$149,955
	C.8.h - 2011	$2,869	$596	$568	$152	$2,870	$693	$9,557
	TOTALS							
	PRIOR PERMIT TOTAL	**$168,620**	**$35,005**	**$33,376**	**$8,934**	**$168,677**	**$40,736**	**$561,712**
	2010 TOTAL	**$145,126**	**$30,128**	**$28,725**	**$7,689**	**$145,175**	**$35,060**	**$483,448**
	2011 TOTAL	**$314,390**	**$65,267**	**$62,229**	**$16,657**	**$314,495**	**$75,952**	**$1,047,304**

EXHIBIT B TO SOMMERS DECLARATION

Santa Clara Valley Program - Co-Permittees' Costs to Implement Provision C.10 of Municipal Regional Permit

MRP Provision	Assumptions	Permitee Costs								
		Campbell	Cupertino	Los Altos	Los Altos Hills	Los Gatos	Milpitas	Monte Sereno	Mountain View	Palo Alto
	% Program Costs	*1.88%*	*2.46%*	*1.56%*	*0.43%*	*1.74%*	*2.75%*	*0.14%*	*3.91%*	*4.06%*
	Urban Acreage	*3,620*	*6,160*	*4,079*	*5,172*	*5,256*	*7,816*	*1,022*	*7,542*	*9,881*
	Required Full Capture Treatment Area (Acres)	*41*	*64*	*20*	*0*	*49*	*137*	*0*	*113*	*85*
	# Hot Spots	*1*	*2*	*1*	*1*	*1*	*4*	*1*	*3*	*2*
C.10.a.i	**Short Term Trash Reduction Plan**									
	C.10a.i - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	$0	$0	$0
	C.10a.i - 2010	$118,736	$164,098	$119,842	$71,507	$152,561	$195,347	$49,828	$177,139	$321,884
	C.10.a.i - 2011	$180,860	$226,106	$182,030	$133,921	$214,713	$257,297	$112,300	$238,857	$383,572
C.10.a.ii	**Baseline Trash Loading/Load Reduction Tracking**									
	C.10.a.ii - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	$0	$0	$0
	C.10.a.ii - 2010	$1,671	$2,468	$981	$121	$1,849	$4,583	$39	$4,227	$3,494
	C.10.a.ii - 2011	$1,544	$2,161	$1,079	$223	$1,580	$3,328	$72	$3,587	$3,277
C.10.a.iii	**Minimum Full Trash Capture**									
	C.10.a.iii - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	$0	$0	$0
	C.10.a.iii - 2010	$214,656	$333,736	$101,844	$0	$255,394	$716,043	$0	$587,563	$441,847
	C.10.a.iii - 2011	$214,656	$333,736	$101,844	$0	$255,394	$716,043	$0	$587,563	$441,847
C.10.b	**Trash Hot Spot and Cleanup**									
	C.10.b - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	$0	$0	$0
	C.10.b - 2010	$5,126	$9,992	$5,062	$4,836	$5,098	$19,550	$4,778	$15,032	$10,312
	C.10.b - 2011	$2,500	$5,000	$2,500	$2,500	$2,500	$10,000	$2,500	$7,500	$5,000
C.10.c	**Long-Term Trash Load Reduction Plan**									
	C.10.C - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	$0	$0	$0
	C.10.c - 2010	$0	$0	$0	$0	$0	$0	$0	$0	$0
	C.10.c - 2011	$6,376	$6,492	$6,312	$6,086	$6,348	$6,550	$6,028	$6,782	$6,892
C.10.d	**Reporting**									
	C.10.D - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	$0	$0	$0
	C.10.d - 2010	$1,274	$2,168	$1,436	$1,820	$1,850	$2,751	$360	$2,654	$3,478
	C.10.d - 2011	$1,274	$2,168	$1,436	$1,820	$1,850	$2,751	$360	$2,654	$3,478
TOTALS										
	PRIOR PERMIT TOTAL	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**
	2010 TOTAL	**$341,464**	**$512,462**	**$229,165**	**$78,284**	**$416,752**	**$938,274**	**$55,005**	**$786,615**	**$781,015**
	2011 TOTAL	**$407,211**	**$575,663**	**$295,200**	**$144,550**	**$482,385**	**$995,968**	**$121,260**	**$846,943**	**$844,066**

EXHIBIT B TO SOMMERS DECLARATION

Santa Clara Valley Program - Co-Permittees' Costs to Implement Provision C.10 of Municipal Regional Permit

MRP Provision	Assumptions	Co-permitee Costs						
		San Jose	Santa Clara	Santa Clara County	Saratoga	SCVWD	Sunnyvale	Total
	% Program Costs	*30.01%*	*6.23%*	*5.94%*	*1.59%*	*30.02%*	*7.25%*	*99.97%*
	Urban Acreage	*81,260*	*11,568*	*47,876*	*7,242*	*NA*	*12,302*	*210,796*
	Required Full Capture Treatment Area (Acres)	*895*	*168*	*81*	*12*	*8*	*164*	*1,836*
	# Hot Spots	*32*	*5*	*3*	*1*	*12*	*5*	*74*
C.10.a.i	**Short Term Trash Reduction Plan**							
	C.10a.i - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	**$0**
	C.10a.i - 2010	$1,568,002	$435,540	$361,636	$98,407	$36,024	$296,130	**$4,166,681**
	C.10.a.i - 2011	$1,687,000	$496,794	$485,448	$160,589	$155,020	$357,180	**$5,271,687**
C.10.a.ii	**Baseline Trash Loading/Load Reduction**							
	C.10.a.ii - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	**$0**
	C.10.a.ii - 2010	$33,316	$6,422	$3,924	$790	$8,460	$6,610	**$78,957**
	C.10.a.ii - 2011	$27,968	$5,559	$4,201	$994	$15,544	$6,037	**$77,156**
C.10.a.iii	**Minimum Full Trash Capture**							
	C.10.a.iii - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	**$0**
	C.10.a.iii - 2010	$4,673,864	$877,427	$423,045	$64,240	$342,672	$858,625	**$9,890,954**
	C.10.a.iii - 2011	$4,673,864	$877,427	$423,045	$64,240	$342,672	$858,625	**$9,870,710**
C.10.b	**Trash Hot Spot and Cleanup**							
	C.10.b - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	**$0**
	C.10.b - 2010	$158,002	$24,996	$15,438	$5,068	$63,004	$25,200	**$371,494**
	C.10.b - 2011	$80,000	$12,500	$7,500	$2,500	$30,000	$12,500	**$185,000**
C.10.c	**Long-Term Trash Load Reduction Plan**							
	C.10.C - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	**$0**
	C.10.c - 2010	$0	$0	$0	$0	$0	$0	$0
	C.10.c - 2011	$56,002	$8,364	$30,647	$6,318	$6,004	$9,020	**$174,220**
C.10.d	**Reporting**							
	C.10.D - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	**$0**
	C.10.d - 2010	$28,600	$4,071	$16,850	$2,549	$0	$4,330	**$74,191**
	C.10.d - 2011	$28,600	$4,071	$16,850	$2,549	$0	$4,330	**$74,191**
TOTALS								
	PRIOR PERMIT TOTAL	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**
	2010 TOTAL	**$6,461,784**	**$1,348,456**	**$820,893**	**$171,054**	**$450,160**	**$1,190,895**	**$14,582,277**
	2011 TOTAL	**$6,553,434**	**$1,404,715**	**$967,690**	**$237,191**	**$549,240**	**$1,247,692**	**$15,652,964**

EXHIBIT C TO SOMMERS DECLARATION

Santa Clara Valley Progra - Co-Permittees' Costs to Implement Provisions C.11.f and C.12.f of Municipal Regional Permit

MRP Provision	Name	Permitee Costs							
		Campbell	Cupertino	Los Altos	Los Altos Hills	Los Gatos	Milpitas	Monte Sereno	Mountain View
	% Program Contribution	*1.88%*	*2.46%*	*1.56%*	*0.43%*	*1.74%*	*2.75%*	*0.14%*	*3.91%*
C.11.f/C.12.f	Pump Station Diversion Projects								
	C.11/C.12 - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	$0	$0
	C.11/C.12 - 2010	$1,017	$1,331	$844	$233	$941	$1,488	$76	$2,116
	C.11/C.12 - 2011	$3,191	$4,175	$2,648	$730	$2,953	$4,667	$238	$6,636

MRP Provision	Name	Permitee Costs							
		Palo Alto	San Jose	Santa Clara	Santa Clara County	Saratoga	SCVWD	Sunnyvale	Total
	% Program Contribution	*4.06%*	*30.01%*	*6.23%*	*5.94%*	*1.59%*	*30.02%*	*7.25%*	***99.97%***
C.11.f/C.12.f	Pump Station Diversion Projects								
	C.11/C.12 - PRIOR PERMIT	$0	$0	$0	$0	$0	$0	$0	**$0**
	C.11/C.12 - 2010	$2,197	$16,238	$3,371	$3,214	$860	$16,243	$3,923	**$54,092**
	C.11/C.12 - 2011	$6,891	$50,934	$10,574	$10,082	$2,699	$50,951	$12,305	**$169,674**

EXHIBIT D TO SOMMERS DECLARATION

Santa Clara Valley Program - Minimum ARRA Allocations from San Francisco Estuary Partnership

Santa Clara County Permittee Projected Allocation														
Campbell	Cupertino	Los Altos	Los Altos Hills	Los Gatos	Milpitas	Monte Sereno	Mountain View	Palo Alto	San Jose	Santa Clara	Santa Clara County	Saratoga	SCVWD	Sunnyvale
$30,964	$43,123	$20,293	$7,849	$30,252	$71,091	$6,160	$64,569	$52,445	$610,973	$95,751	$60,631	$19,047	$0	$101,530

Commission on State Mandates

Original List Date: 11/15/2010
Last Updated: 9/19/2011
List Print Date: 09/19/2011
Claim Number: 10-TC-03
Issue: Municipal Regional Stormwater Permit - Santa Clara County

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Solano and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On September 19, 2011, I served the:

Claimant Rebuttal Comments
***Municipal Regional Stormwater Permit – Santa Clara County*, 10-TC-03**
County of Santa Clara, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 19, 2011 at Sacramento, California.

Heidi J. Palchik