THE COUNTY COUNSEL
COUNTY OF ORANGE
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Received
June 30, 2011
Commission on
State Mandates

Geoffrey K. Hunt
Supervising Deputy
(714) 834-3306

June 30, 2011

NICHOLAS S. CHRISOS
COUNTY COUNSEL

JACK W. GOLDEN
CHIEF ASSISTANT

JEFFREY M. RICHARD
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JOYCE RILEY
PAULA A. WHALEY
THOMAS A. MILLER
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CAROLYN S. FROST
ROBERT N. ERVAIS
BETH L. LEWIS
LAURA D. KNAPP
ROGER P. FREEMAN
NICOLE A. SIMS
NIKHIL G. DAFTARY
JEANNIE SU
JAMES C. HARVEY
WENDY J. PHILLIPS
TERI L. MAKSOUDIAN
LEON J. PAGE
ANGELICA CASTILLO DAFTARY
KAREN L. CHRISTENSEN
MICHAEL A. HAUBERT
RYAN M. F. BARON
BRAD R. POSIN
SAUL REYES
AURELIO TORRE
MARK D. SERVINO
DEBBIE TORREZ
JACQUELINE GUZMAN
ANDREA COLLER
PAUL M. ALBARIAN
D. KEVIN DUNN
LORI A. TORRISI
MASSOUD SHAMEL
SHARON DURBIN CHERNEY
REBECCA S. LEEDS
NICOLE M. WALSH
MARISA MATSUMURA
ELIZABETH A. PEJEAU
LAUREN C. BAUER
GABRIEL J. BOWNE
JULIA C. WOO
LAUREL M. HAFER
MARK A. BATARSE
ADAM C. CLANTON
KRISTEN K. LECONG
DEPUTIES

Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

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Re: Joint Unfunded Mandate Test Claim by the County of Orange and Various Cities in Orange County Concerning California Water Quality Control Board San Diego Region Order No. R9-2009-0002

Enclosed you will find test claims asserting that certain provisions of the Order R9-2009-0002 issued by the California Water Quality Control Board San Diego Region (San Diego RWQCB) on December 16, 2009 (2009 Permit) are unfunded mandates (Test Claims). The 2009 Permit regulates discharges from the municipal separate storm sewer system (MS4) in south Orange County. The County of Orange, Orange County Flood Control District (OCFCD) and the incorporated cities of Orange County within San Diego RWQCB's jurisdiction are permittees under the 2009 Permit (Copermittees). These Test Claims are being filed jointly by a number of the Copermittees, namely the County of Orange, OCFCD and the following cities: City of Dana Point, City of Laguna Hills, City of Laguna Niguel, City of Lake Forest, City of Mission Viejo and City of San Juan Capistrano (Test Claimants).

Enclosed you will find the separate Test Claims of each of the Test Claimants. Because provisions of the 2009 Permit apply to all of the Copermittees and the issues raised in these Test Claims are common to all of the Test Claimants, the Copermittees are filing their Test Claims jointly as authorized by 2 CCR § 1183 (h). A single Narrative Statement in support of the Test Claims has been prepared and enclosed. Enclosed also are the required declarations of each of the Test Claimants which are intended to be in support of the joint Test Claims. The County is the contact for this joint Test Claim.

You will also find enclosed copies of the documentation required to be submitted along with Test Claims, including copies of the 2009 Permit, along with its supporting fact sheet, the previous 2002 Permit, which was renewed and superseded by the 2009 Permit and the statutes, regulations and other authorities cited in the Narrative Statement.

Received
June 30, 2011
Commission on
State Mandates

Thank you for your consideration of this matter.

Very truly yours,

NICHOLAS S. CHRISOS
COUNTY COUNSEL

By _____
Geoffrey K. Hunt, Supervising Deputy

GKH:azs

Enclosures and cc list on following pages.

Received
June 30, 2011
Commission on
State Mandates

Enclosures:

TEST CLAIMS:
County of Orange and Orange County Flood Control District
City of Dana Point
City of Laguna Hills
City of Laguna Niguel
City of Lake Forest
City of Mission Viejo
City of San Juan Capistrano

WRITTEN NARRATIVE

DECLARATIONS:
County of Orange and Orange County Flood Control District
City of Dana Point
City of Laguna Hills
City of Laguna Niguel
City of Lake Forest
City of Mission Viejo
City of San Juan Capistrano

DOCUMENTATION
Executive Order and Related Documentation
Federal and State Cases, Statutes and Constitutional References
Miscellaneous Authorities

cc: David Gibson, Executive Officer, Regional Water Quality Control Board, San Diego Region

Received
June 30, 2011
Commission on
State Mandates

JOINT TEST CLAIMS

IN SUPPORT OF JOINT TEST CLAIMS IN RE SAN DIEGO RWQCB

ORDER NO. R9-2009-0002

(NPDES NO. CAS0108740)

Of
County of Orange County Flood Control District
City of Dana Point
City of Laguna Hills
City of Laguna Niguel
City of Lake Forest
City of Mission Viejo
City of San Juan Capistrano

BURHENN & GEST LLP
624 SOUTH GRAND AVENUE
SUITE 2200
LOS ANGELES, CALIFORNIA 90017-3321
(213) 688-7715
FACSIMILE (213) 624-1376

RECEIVED
January 6, 2017
Commission on
State Mandates

WRITER'S DIRECT NUMBER
(213) 629-8788

WRITER'S E-MAIL ADDRESS
dburhenn@burhenngest.com

January 6, 2017

VIA DROPBOX

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, CA 95814

Re: California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, 10-TC-11
Response of Joint Test Claimants to Notice of Incomplete Joint Test Claim Filing

Dear Ms. Halsey:

I have been designated as Claimant Representative by all test claimants in the above-referenced Joint Test Claim and am therefore responding on behalf of Joint Test Claimants County of Orange ("County") and the Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo and San Juan Capistrano (the "Joint Test Claimants") to the Notice of Incomplete Joint Test Claim Filing of November 18, 2016 ("Notice Letter"), which stated that the original joint test claim filing was incomplete on several grounds.[1]

The Joint Test Claimants were originally informed that their test claim was deemed complete as of July 13, 2011. The Notice Letter, issued more than five years later, required the Joint Test Claimants to expend significant efforts, including locating old financial records and preparing new declarations, test claim forms and revisions to the Narrative Statement. The Joint Test Claimants were thus forced to incur significant, unforeseeable costs to address the issues raised in the Notice Letter or risk having the joint test claim either denied as untimely or rejected for other reasons stated in the Notice

[1] Please note that my designation as Claimant Representative supersedes the designation of Julia C. Woo, Esq., Deputy County Counsel, County of Orange, recently made by four Joint Test Claimants.

Letter. As previously set forth in our letter of December 2, and for the reasons stated therein, which are incorporated herein by reference, the Joint Test Claimants respectfully dispute the basis for the Notice Letter, on grounds of law and equity, and therefore reserve their right to contest the alleged deficiencies identified in the Notice Letter before the Commission.[2]

Notwithstanding such reservation, and subject to it, the Joint Test Claimants submit with this letter the following new or revised documents:

(a) New Test Claim Forms;
(b) A revised Section 5 Narrative Statement; and
(c) New Section 6 Declarations.

As requested in the Notice Letter, the Joint Test Claimants are not re-attaching any of the supporting documentation, including exhibits.

The Notice Letter indicated that to cure the alleged deficiencies in the original test claim, the Joint Test Claimants were to provide:

1. "Evidence of the date and amount of costs *first* incurred as a result of the alleged new activities required under the Order."

2. "A revised test claim form from each co-claimant."

---

[2]More specifically, Joint Test Claimants assert for the record that the Commission cannot make a determination that the test claim is now incomplete when Commission staff notified Joint Test Claimants on July 13, 2011 that the filing was complete pursuant to 2 CCR § 1183(g). Pursuant to that regulation, within 10 days after the filing of the test claim on June 30, 2011, the Commission was required to notify "the claimant if the test claim was complete or incomplete and send a copy of these regulations unless a correct copy was previously provided." The specific items for which a test claim may be deemed incomplete are the same items the Commission noted in its November 18 letter. The Joint Test Claimants submit that by failing to notify the claimants of the specific bases formulating the Commission's November 18 incompleteness determination within the regulatory 10 day period, coupled with the Commission's prior determination that the filing was complete, the Commission has waived its authority to challenge the completeness of the filing. The Joint Test Claimants further submit that the doctrine of estoppel would also bar the Commission from requiring Joint Test Claimants to substantively supplement the Joint Test Claim with new evidence and documentation concerning events occurring some 6 to 7 years ago when the claimants were in a superior position to correct any alleged deficiencies in the filing. Moreover, to the extent that the Commission is relying on regulations adopted after the date the Test Claim was filed (June 30, 2011) and the date the Commission issued its Notice of Complete Test Claim Filing (July 13, 2011), the Joint Test Claimants respectfully object.

3. "Revised written narratives and declarations that provide a detailed description of the costs that are modified by the alleged mandate including the *actual* increased costs incurred by each co-claimant during the fiscal year for which the joint test claim was filed as well as the actual or estimated annual costs that will be incurred by each co-claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the joint test claim was filed. In addition, please provide the statewide cost estimate (in this case the "statewide cost" is the cost for all of the local agency co-permittees, whether named or not, for the alleged new program or higher level of service imposed by the permit at issue) for increased costs to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the join test claim was filed."

Notice Letter, page 6 (emphasis in original).

In response to item 1, the Joint Test Claimants have included evidence of the date of costs first incurred in the Declarations (see paragraphs 6 and 7) and also in relevant sections of the Section 5 Narrative Statement. This information establishes that costs were first incurred for the Joint Test Claimants in FY 2009-10 or FY 2010-11, and thus, the timeliness of the Joint Test Claim filing is well established. *See* Cal. Code Regs., tit. 2, 1183.1(c) ("For purposes of claiming based on the date of first incurring costs, 'within 12 months' means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred."). Additionally, information is provided in each Declaration as to the amount of the costs incurred in response to the mandates in the Permit.

In response to item 2, and notwithstanding the addition of 2 CCR 1183.1 (b) in 2014, which necessitated designation of one claimant representative for "joint" test claimants, the Joint Test Claimants are herewith filing new test claim forms signed in the case of the County, by the Auditor-Controller and in the case of the cities by their respective City Managers. The names, addresses and contact information for these individuals are also set forth in Section 2 of the forms. Additionally, as noted above, I am designated as the Claimant Representative for all Joint Test Claimants in Section 3 of each of the forms.

In response to item 3, as already noted, both the Declarations and the Section 5 Narrative Statement (in revised sections following the description of each mandated activity) state the actual costs incurred in the relevant fiscal years covered by the Joint Test Claim. Also, costs representing the Joint Test Claimants' best estimate of total statewide costs associated with the Joint Test Claim are set forth in the Section 5 Narrative Statement and are further supported by the Declarations. We also note that while the decision of the Supreme Court in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749 is relevant to the discussion of the Los Angeles County test claim in the Narrative Statement, the decision is not discussed therein.

Instead, the Joint Test Claimants refer the Commission to their supplemental brief filed on October 21, 2016 and to the supplemental brief filed October 28, 2016 by the City of Dana Point.

The Joint Test Claimants wish to thank you for your courtesy in extending the deadline for the submission of this response and also for the further explanations provided in your letter of December 8. While the Joint Test Claimants are responding by the January 6 deadline, the Joint Test Claimants respectfully submit that this deadline is not jurisdictional, both because the regulatory authority cited in the Notice Letter applies only to the initial determination of test claim completeness and because the Executive Director has discretion to extend the 30-day time period within which to cure a returned test claim and still allow the test claimant to preserve the original claim filing date.

Nevertheless, we believe that the information and evidence submitted herewith fully addresses the issues identified in the Notice Letter. If there are any further concerns or issues regarding these matters, we request a prompt response from your staff concerning them.

Thank you for your consideration of these matters.

Very truly yours,

David W. Burhenn

DB:dwb

1. TEST CLAIM TITLE

California RWQCB, San Diego Region, Order No. R9-2009-0002, 10-TC-11

2. CLAIMANT INFORMATION

County of Orange
Name of Local Agency or School District

Eric H. Woolery, C.P.A.
Claimant Contact

Auditor-Controller
Title

12 Civic Center Plaza, Room #200
Street Address

Santa Ana, CA 92702
City, State, Zip

714-834-2450
Telephone Number

714-834-2569
Fax Number

howard.thomas@ocpw.ocgov.com
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

Claimant designates the following person to act as its sole representative in this test claim. All correspondence and communications regarding this claim shall be forwarded to this representative. Any change in representation must be authorized by the claimant in writing, and sent to the Commission on State Mandates.

David W. Burhenn
Claimant Representative Name

Partner
Title

Burhenn & Gest LLP
Organization

624 S. Grande Avenue, Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only

Filing Date: **RECEIVED** June 30, 2011 **Commission on State Mandates**

Revised January 6, 2017

Test Claim #: 10-TC-11

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

Please identify all code sections (include statutes, chapters, and bill numbers) (e.g., Penal Code Section 2045, Statutes 2004, Chapter 54 [AB 290]), regulations (include register number and effective date), and executive orders (include effective date) that impose the alleged mandate .

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002

☑ *Copies of all statutes and executive orders cited are attached.*

Sections 5, 6, and 7 are attached as follows:

5. Written Narrative: pages _____ to _____.
6. Declarations: pages _____ to _____.
7. Documentation: pages _____ to _____.

Sections 5, 6, and 7 should be answered on separate sheets of plain 8-1/2 x 11 paper. Each sheet should include the test claim name, the claimant, the section number, and heading at the top of each page.

5. WRITTEN NARRATIVE

Under the heading "5. Written Narrative," please identify the specific sections of statutes or executive orders alleged to contain a mandate.

Include a statement that actual and/or estimated costs resulting from the alleged mandate exceeds one thousand dollars ($1,000), and include all of the following elements for each statute or executive order alleged:

(A) A detailed description of the new activities and costs that arise from the mandate.

(B) A detailed description of existing activities and costs that are modified by the mandate.

(C) The actual increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate.

(D) The actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.

(E) A statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.

(F) Identification of all of the following funding sources available for this program:
- (i) Dedicated state funds
- (ii) Dedicated federal funds
- (iii) Other nonlocal agency funds
- (iv) The local agency's general purpose funds
- (v) Fee authority to offset costs

(G) Identification of prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate.

(H) Identification of a legislatively determined mandate pursuant to Government Code section 17573 that is on the same statute or executive order.

6. DECLARATIONS

Under the heading "6. Declarations," support the written narrative with declarations that:

(A) declare actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate;

(B) identify all local, state, or federal funds, and fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs;

(C) describe new activities performed to implement specified provisions of the new statute or executive order alleged to impose a reimbursable state-mandated program (specific references shall be made to chapters, articles, sections, or page numbers alleged to impose a reimbursable state-mandated program);

(D) If applicable, describe the period of reimbursement and payments received for full reimbursement of costs for a legislatively determined mandate pursuant to Section 17573, and the authority to file a test claim pursuant to paragraph (1) of Section17574(c).

(E) are signed under penalty of perjury, based on the declarant's personal knowledge, information or belief, by persons who are authorized and competent to do so.

7. DOCUMENTATION

Under the heading "7. Documention, " support the written narrative with copies of all of the following:

(A) the test claim statute that includes the bill number alleged to impose or impact a mandate; and/or

(B) the executive order, identified by its effective date, alleged to impose or impact a mandate; and

(C) relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate; and

(D) administrative decisions and court decisions cited in the narrative. Published court decisions arising from a state mandate determination by the Board of Control or the Commission are exempt from this requirement; and

(E) statutes, chapters of original legislatively determined mandate and any amendments.

8. CLAIM CERTIFICATION

*Read, sign, and date this section and insert at the end of the test claim submission.**

This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim submission is true and complete to the best of my own knowledge or information or belief.

Eric H. Woolery, C.P.A.
Print or Type Name of Authorized Local Agency or School District Official

Auditor-Controller
Print or Type Title

E H. Woolery
Signature of Authorized Local Agency or School District Official

01/03/2017
Date

** If the declarant for this Claim Certification is different from the Claimant contact identified in section 2 of the test claim form, please provide the declarant's address, telephone number, fax number, and e-mail address below.*

1. TEST CLAIM TITLE

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, 10-TC-11

2. CLAIMANT INFORMATION

City of Dana Point
Name of Local Agency or School District

Mike Killebrew
Claimant Contact

Acting City Manager
Title

33282 Golden Lantern
Street Address

Dana Point, CA 92629
City, State, Zip

949-248-3513
Telephone Number

949-248-9052
Fax Number

mkillebrew@danapoint.org
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

Claimant designates the following person to act as its sole representative in this test claim. All correspondence and communications regarding this claim shall be forwarded to this representative. Any change in representation must be authorized by the claimant in writing, and sent to the Commission on State Mandates.

David W. Burhenn, Esq.
Claimant Representative Name

Partner
Title

Burhenn & Gest LLP
Organization

624 S. Grand Ave. Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only

Filing Date:

RECEIVED
June 30, 2011
Commission on State Mandates

Revised January 6, 2017

Test Claim #: 10-TC-11

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

Please identify all code sections (include statutes, chapters, and bill numbers) (e.g., Penal Code Section 2045, Statutes 2004, Chapter 54 [AB 290]), regulations (include register number and effective date), and executive orders (include effective date) that impose the alleged mandate .

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002

☐ *Copies of all statutes and executive orders cited are attached.*

Sections 5, 6, and 7 are attached as follows:

5. Written Narrative: pages 5-1 to _____.
6. Declarations: pages 6-1 to _____.
7. Documentation: pages 7-1 to _____.

Sections 5, 6, and 7 should be answered on separate sheets of plain 8-1/2 x 11 paper. Each sheet should include the test claim name, the claimant, the section number, and heading at the top of each page.

5. WRITTEN NARRATIVE

Under the heading "5. Written Narrative," please identify the specific sections of statutes or executive orders alleged to contain a mandate.

Include a statement that actual and/or estimated costs resulting from the alleged mandate exceeds one thousand dollars ($1,000), and include all of the following elements for each statute or executive order alleged:

(A) A detailed description of the new activities and costs that arise from the mandate.

(B) A detailed description of existing activities and costs that are modified by the mandate.

(C) The actual increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate.

(D) The actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.

(E) A statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.

(F) Identification of all of the following funding sources available for this program:
- (i) Dedicated state funds
- (ii) Dedicated federal funds
- (iii) Other nonlocal agency funds
- (iv) The local agency's general purpose funds
- (v) Fee authority to offset costs

(G) Identification of prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate.

(H) Identification of a legislatively determined mandate pursuant to Government Code section 17573 that is on the same statute or executive order.

6. DECLARATIONS

Under the heading "6. Declarations," support the written narrative with declarations that:

(A) declare actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate;

(B) identify all local, state, or federal funds, and fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs;

(C) describe new activities performed to implement specified provisions of the new statute or executive order alleged to impose a reimbursable state-mandated program (specific references shall be made to chapters, articles, sections, or page numbers alleged to impose a reimbursable state-mandated program);

(D) If applicable, describe the period of reimbursement and payments received for full reimbursement of costs for a legislatively determined mandate pursuant to Section 17573, and the authority to file a test claim pursuant to paragraph (1) of Section17574(c).

(E) are signed under penalty of perjury, based on the declarant's personal knowledge, information or belief, by persons who are authorized and competent to do so.

7. DOCUMENTATION

Under the heading "7. Documention, " support the written narrative with copies of all of the following:

(A) the test claim statute that includes the bill number alleged to impose or impact a mandate; and/or

(B) the executive order, identified by its effective date, alleged to impose or impact a mandate; and

(C) relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate; and

(D) administrative decisions and court decisions cited in the narrative. Published court decisions arising from a state mandate determination by the Board of Control or the Commission are exempt from this requirement; and

(E) statutes, chapters of original legislatively determined mandate and any amendments.

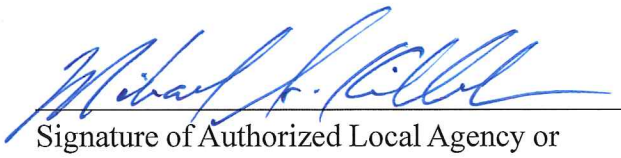
8. CLAIM CERTIFICATION

*Read, sign, and date this section and insert at the end of the test claim submission.**

This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim submission is true and complete to the best of my own knowledge or information or belief.

Mike Killebrew
Print or Type Name of Authorized Local Agency or School District Official

Acting City Manager
Print or Type Title


Signature of Authorized Local Agency or School District Official

January 3, 2017
Date

** If the declarant for this Claim Certification is different from the Claimant contact identified in section 2 of the test claim form, please provide the declarant's address, telephone number, fax number, and e-mail address below.*

1. TEST CLAIM TITLE

California Regional Water Control Board,San Diego Region, No. R9-2009-0002, 10-TC-11

2. CLAIMANT INFORMATION

City of Laguna Hills
Name of Local Agency or School District

Bruce E. Channing
Claimant Contact

City Manager
Title

24035 El Toro Road
Street Address

Laguna Hills, CA 92653
City, State, Zip

949-707-2611
Telephone Number

949-707-2614
Fax Number

bchanning@lagunahillsca.gov
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

Claimant designates the following person to act as its sole representative in this test claim. All correspondence and communications regarding this claim shall be forwarded to this representative. Any change in representation must be authorized by the claimant in writing, and sent to the Commission on State Mandates.

David W. Burhenn, Esq.
Claimant Representative Name

Partner
Title

Burhenn & Gest, LLP
Organization

624 S. Grand Ave., Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only

Filing Date:

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Revised January 6, 2017

Test Claim #: 10-TC-11

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California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002

☑ *Copies of all statutes and executive orders cited are attached.*

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(G) Identification of prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate.

(H) Identification of a legislatively determined mandate pursuant to Government Code section 17573 that is on the same statute or executive order.

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(C) describe new activities performed to implement specified provisions of the new statute or executive order alleged to impose a reimbursable state-mandated program (specific references shall be made to chapters, articles, sections, or page numbers alleged to impose a reimbursable state-mandated program);

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This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim submission is true and complete to the best of my own knowledge or information or belief.

Bruce E. Channing
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title

Signature of Authorized Local Agency or School District Official

12/27/16
Date

** If the declarant for this Claim Certification is different from the Claimant contact identified in section 2 of the test claim form, please provide the declarant's address, telephone number, fax number, and e-mail address below.*

1. TEST CLAIM TITLE

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002 10-TC-11

2. CLAIMANT INFORMATION

City of Laguna Niguel
Name of Local Agency or School District

Rod Foster
Claimant Contact

City Manager
Title

30111 Crown Valley Parkway
Street Address

Laguna Niguel, CA 92677
City, State, Zip

(949) 362-4300
Telephone Number

(949) 362-4340
Fax Number

rfoster@cityoflagunaniguel.org
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

Claimant designates the following person to act as its sole representative in this test claim. All correspondence and communications regarding this claim shall be forwarded to this representative. Any change in representation must be authorized by the claimant in writing, and sent to the Commission on State Mandates.

David W. Burhenn, Esq.
Claimant Representative Name

Partner
Title

Burhenn & Gest LLP
Organization

624 S. Grand Ave., Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

(213) 629-8788
Telephone Number

(213) 624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only
Filing Date:
RECEIVED
June 30, 2011
Commission on State Mandates
Revised January 6, 2017
Test Claim #: 10-TC-11

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California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002

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Print or Type Name of Authorized Local Agency or School District Official

City Manager
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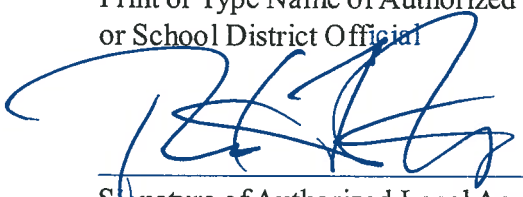

Signature of Authorized Local Agency or School District Official

January 5, 2016
Date

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1. TEST CLAIM TITLE

California Regional Water Quality Control Board, San Diego Region, Order No.

2. CLAIMANT INFORMATION

City of Lake Forest
Name of Local Agency or School District

Robert Dunek
Claimant Contact

City Manager
Title

25550 Commercentre Drive, Suite 100
Street Address

Lake Forest, CA 92630
City, State, Zip

(949) 461-3410
Telephone Number

(949) 461-3511
Fax Number

RDunek@lakeforestca.gov
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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Partner
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dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only

Filing Date

RECEIVED
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Commission on State Mandates

Revised January 6, 2017

Test Claim # 10-TC-11

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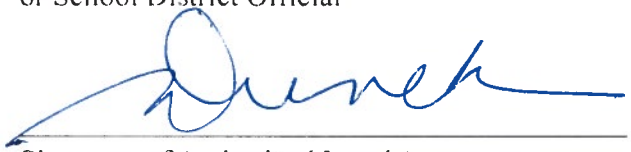
Robert Dunek

Print or Type Name of Authorized Local Agency or School District Official

City Manager

Print or Type Title



Signature of Authorized Local Agency or School District Official

12/15/2016

Date

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1. TEST CLAIM TITLE

California Regional Water Quality Control Board, San Diego Region, Order No. [redacted]

2. CLAIMANT INFORMATION

City of Mission Viejo
Name of Local Agency or School District

Dennis Wilberg
Claimant Contact

City Manager
Title

200 Civic Center
Street Address

Mission Viejo, CA 92691
City, State, Zip

949-470-3051
Telephone Number

949-859-1386
Fax Number

dwilberg@cityofmissionviejo.org
E-Mail Address

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For CSM Use Only

Filing Date: **RECEIVED** June 30, 2011 *Commission on State Mandates*

Revised January 6, 2017

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Dennis Wilberg
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title

Signature of Authorized Local Agency or School District Official

January 4, 2017
Date

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1. TEST CLAIM TITLE

California Regional Water Quality Control Board, San Diego Region, Order No.

2. CLAIMANT INFORMATION

City of San Juan Capistrano
Name of Local Agency or School District

Benjamin Siegel
Claimant Contact

City Manager
Title

32400 Paseo Adelanto
Street Address

San Juan Capistrano, CA 92675
City, State, Zip

949-493-1171
Telephone Number

949-488-3874
Fax Number

BSiegel@sanjuancapistrano.org
E-Mail Address

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Benjamin Siegel
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title

Signature of Authorized Local Agency or School District Official

12-8-16
Date

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SECTION FIVE

NARRATIVE STATEMENT

IN SUPPORT OF JOINT TEST CLAIMS IN RE SAN DIEGO RWQCB ORDER NO. R9-2009-0002 NPDES NO. CAS0108740

TEST CLAIM 10-TC-11

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NARRATIVE STATEMENT IN SUPPORT OF TEST CLAIM

I. INTRODUCTION

On December 16, 2009, the California Water Quality Control Board, San Diego Region ("San Diego RWQCB" or "Regional Board") issued Order No. R9-2009-0002, National Pollutant Discharge Elimination System ("NPDES") NPDES No. CAS0108740 (hereinafter the "2009 Permit" or "Permit") regulating discharges from the municipal separate storm sewer systems ("MS4s") in south Orange County, California.[1] The 2009 Permit reissued NPDES Permit No. CAS0108740, which was first adopted by the Regional Board on July 16, 1990 (Order No. 90-38), and then reissued on August 8, 1996 (Order No. 96-03) and February 13, 2002 (Order No. R9-2002-01). The County of Orange, Orange County Flood Control District and the cities in Orange County within the jurisdiction of the San Diego RWQCB are all permittees under the 2009 Permit ("Copermittees").

The 2009 Permit contains a number of unfunded State mandates for which the Permittees[2] are entitled to reimbursement under Article XIII B section 6 of the California Constitution. This Test Claim identifies the activities that are unfunded mandates and sets forth the basis for reimbursement for such activities. These new unfunded programs and activities are described in detail below, but are generally described as follows:

A. New requirements involving "Non-Storm Water Discharges" as set forth in Section B of the 2009 Permit.

B. New Total Maximum Daily Loads and Water Quality Based Effluent Limitation requirements as set forth in Section I of the 2009 Permit.

C. New requirements involving implementation of non-storm water dry weather numeric action levels ("NAL") as set forth in Section C of the 2009 Permit.

D. New requirements involving implementation of storm water numeric action levels ("SAL") as set forth in Section D of the 2009 Permit.

E. New "Low Impact Development" ("LID") and "Hydromodification" requirements including a Hydromodification Management Plan ("HMP") as set forth in Sections F.1.d and F.1.h of the 2009 Permit.

F. New reporting requirements including an annual assessment of the effectiveness of the Jurisdictional Runoff Management Program and a work plan demonstrating

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[1] A copy of the 2009 Permit is included under Section 7 - Documentation to these Test Claims.

[2] The Permittees are the cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Laguna Woods, Lake Forest, Mission Viejo, Rancho Santa Margarita, San Clemente, San Juan Capistrano, the County of Orange, and the Orange County Flood Control District.

a responsive and adaptive approach for the use of resources as set forth in Section J of the 2009 Permit.

G. New reporting requirements related to the Watershed Workplan report as set forth in Section K.1.b of the 2009 Permit.

H. New reporting requirements, including describing all activities a Copermittee will undertake pursuant to the 2009 Permit and an individual Jurisdictional Runoff Management Report as set forth in Sections K.1.a and K.3 of the 2009 Permit.

I. New requirements mandating the use of geographical information system (GIS) maps.

J. New retrofitting requirements involving developing and implementing a retrofitting program for existing development as set forth in Section F.3.d of the 2009 Permit.

K. New BMP maintenance tracking requirements in Section F.1.f of the 2009 Permit.

A. STATEMENT OF INTEREST OF JOINT TEST CLAIMANTS

This test claim is being filed by the County of Orange ("County") and the Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo and San Juan Capistrano (collectively, "Joint Test Claimants"). The Joint Test Claimants are filing this Test Claim jointly and, pursuant to 2 Cal. Code Reg. § 1183.1(g), attest to the following:

1. The Joint Test Claimants allege state-mandated costs resulting from the same Executive Order, i.e., the 2009 Permit;

2. The Joint Test Claimants agree on all issues of the Test Claim;

3. The Joint Test Claimants have designated one contact person to act as a resource for information regarding the test claim in Section 3 of their Test Claim Forms; and

4. All Test Claim forms have been executed by either the Auditor-Controller (on behalf of the County) or by City Managers (or equivalent personnel) of the city Joint Test Claimants.

B. STATEMENT OF ACTUAL AND/OR ESTIMATED COSTS EXCEEDING $1,000

The Joint Test Claimants further state that, as set forth below and in the attached Section 6 Declarations filed herewith in support, the actual and/or estimated costs from the state mandates set forth in this Test Claim exceed $1,000 for each of the Joint Test Claimants. This Narrative Statement sets forth specific amounts expended by the Joint Test Claimants as determined from the perusal of pertinent records and as disclosed in the Section 6 Declarations filed herewith, including in the Declaration (Second) of Chris Crompton. The Joint Test Claimants respectfully reserve the right to modify such amounts when or if additional information is received.

C. THE TEST CLAIM IS TIMELY FILED

As set forth in the Declarations attached in Section 6, Paragraphs 6(a)-(i) and 7, the Joint Test Claimants first began incurring increased costs under the 2009 Permit in Fiscal Year (FY) 2009-10, which commenced on July 1, 2009.

The 2009 Permit was adopted by the San Diego RWQCB on December 16, 2009, within FY 2009-10. This is a fact which may be administratively noticed by the Commission, pursuant to Evidence Code §452(c) (records of executive bodies, such as the RWQCB). Thus, any costs incurred pursuant to such executive order (the 2009 Permit) could not have been incurred prior to that date. Nevertheless, as set forth above, the Joint Test Claimants are presenting evidence of the date of first incurrence of costs within FY 2009-10. The Commission's regulations provide that a test claim must be filed with the Commission "not later than 12 months following the effective date of a statute or executive order, or within 12 months of first incurring increased costs as a result of a statute or executive order, whichever is later. For purposes of claiming based on the date of first incurring costs, 'within 12 months' means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant." Because the Joint Test Claimants first incurred such costs during FY 2009-10 and this Test Claim was filed on June 30, 2011, prior to the end of FY 2010-11, the Test Claim is, under the Commission's regulations, timely filed.[3]

II. PROGRAM BACKGROUND

California adopted the Porter Cologne Water Quality Control Act ("Porter-Cologne") in 1969, three years prior to the adoption of the federal Clean Water Act (the "CWA") and eighteen years before federal law expressly regulated MS4s. When Congress enacted the CWA, it modeled the Act in part on Porter-Cologne, but scaled back many requirements to meet the needs of a national program. As a result, the comprehensive statewide program enacted through Porter-Cologne exceeds the more limited regulatory scope of the CWA, including the CWA's National Pollutant Discharge Elimination System ("NPDES") program.

One primary difference between Porter-Cologne and the CWA is the role Congress intended the CWA to play in the state regulatory scheme. When adopting the CWA, Congress preserved the states' ability to impose more stringent water quality controls, allowing the Act to be a federal baseline for water quality.[4] California quickly elected to incorporate the CWA's NPDES program into its existing regulatory structure, becoming the first state in the nation authorized to issue NPDES permits. The California Legislature ("Legislature") determined that assuming the responsibility was "in the interest of the people of the state, ***in order to avoid direct regulation by the federal government of persons already subject to state law*** pursuant to this division . . . ."[5]

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[3] 2 Cal. Code Reg. § 1183.1(c).

[4] Section 510 of the CWA, which is codified at Title 33 U.S.C. § 1370, acknowledges the states' authority to adopt or enforce standards or limitations regarding the discharge of pollutants provided such standards are not less stringent than the "effluent limitation, or other limitation, effluent standard, prohibition pretreatment standard or standard of performance" under the CWA.

[5] Cal Water Code § 13370(c) [emphasis added].

A. FEDERAL LAW

The principal federal law regulating water quality is the CWA, found at 33 U.S.C. § 1251 *et seq*. The CWA, was enacted in 1972, and amended in 1987 to implement a permitting system for all discharges of pollutants from point sources to waters of the United States. In 1987, the CWA was amended to make clear that such discharges include discharges from MS4s. Following the 1987 amendments, NPDES permits are required for discharges from MS4s serving a population of more than 100,000 or from systems that the United States Environmental Protection Agency ("US EPA") or the state determine contribute to a violation of a water quality standard or represent a significant contribution of pollutants to waters of the United States.[6] Pursuant to the CWA, the MS4 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.[7]

In 1990, US EPA issued regulations to implement Phase 1 of the NPDES program, 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 including 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. [8]

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6 33 U.S.C. § 1342(p)(2) requires NPDES permits for the following discharges:

(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.

7 33 U.S.C. § 1342(p)(3)(B).

8 40 Code of Federal Regulations section 122.26(d)(2)(iv).

Under the CWA, each state is free to enforce its own water quality laws so long as its effluent limitations[9] are not less stringent than those set out in the CWA.[10] The California Supreme Court described the NPDES program 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).)[11]

B. CALIFORNIA LAW

The CWA requires the EPA to issue NPDES permits to MS4 dischargers, but allows the EPA to delegate that authority to the states.[12] In California, the Legislature assigned that responsibility to the State Water Resources Control Board ("State Board"), and the individual Regional Water Quality Control Boards ("Regional Boards"). The permit requirements are subject to the same federal regulations, however, because the state of California has broader authority to regulate discharges than the EPA would under the CWA, requirements in NPDES permits issued by the State and Regional Boards frequently exceed the requirements of federal law.

In *City of Burbank v. State Water Resources Control Board* (2005) 35 Ca1.4th 613, the California Supreme Court expressly recognized that NPDES permits issued by the State and Regional Boards can exceed the requirements of federal law, describing the statutory scheme 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

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[9] *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.)

[10] 33 U.S.C. § 1370.

[11] *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 621; Cal. Water Code, § 13263.

[12] Section 510 of the CWA, which is codified at Title 33 U.S.C. § 1370, acknowledges the states' authority to adopt or enforce standards or limitations regarding the discharge of pollutants provided such standards are not less stringent than the "effluent limitation, or other limitation, effluent standard, prohibition pretreatment standard or standard of performance" under the CWA.

> 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). 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).)[13]

With regard to the baseline role that the CWA plays in California water quality law, the Court held:

> The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to "enforce any effluent limitation" that is not "*less stringent*" than the federal standard (33 U.S.C. § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority. . .[14]

Porter-Cologne therefore provides California with broader authority to regulate water quality than it would have if it were operating exclusively under the CWA. The State's authority under Porter-Cologne extends to non-point sources of pollution such as urban and agricultural runoff, discharges to ground water and discharges to land overlying ground water. It not only establishes broader regulatory authority than the CWA, but also extends that broader regulatory authority to a larger class of waters. It is under this authority that the State and Regional Boards act when issuing NPDES permits that exceed the minimum requirements set forth in federal law, namely Title 40, section 122.26 of the Code of Federal Regulations.

The courts, the State Board and the Regional Boards have repeatedly acknowledged that many aspects of NPDES permits issued in California exceed the minimum requirements of the CWA. In a decision on the merits of the 2001 NPDES permit for San Diego County, the State Board acknowledged that the since NPDES permits are adopted as waste discharge requirements in California, they can more broadly protect "waters of the state," rather than being limited to "waters of the United States."[15] As the State Board has expressed it, "the inclusion of 'waters of the state' allows the protection of groundwater, which is generally not considered to be 'waters of the United States.'"[16]

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

14 *Id*. at pp. 627-628.

15 In Re Building Industry Association of San Diego County and Western States Petroleum Association, State Board Order WQ 2001-15.

16 *Id.*

The Regional Boards have also acknowledged in official documents that many of the requirements of MS4 permits exceed the requirements of federal law and are based, therefore, on the broader authority of Porter-Cologne. For example, in a December 13, 2000 staff report regarding the San Diego Regional Water Quality Control Board's draft 2001 permit, it was found that 40% of the draft permit requirements "exceed the federal regulations" because they are either more numerous, more specific/detailed, or more stringent than the requirements in the regulations.[17]

In *Burbank v. State Board, supra*, 35 Cal.App.4th 613, the California Supreme Court acknowledged that NPDES permits may contain requirements that exceed federal CWA, and held that to the extent such provisions are not required by federal law, the State and Regional Boards are required to consider state law restrictions on agency action.[18] Implicit in the Court's decision is the requirement that orders issued by the State and Regional Boards are subject to State Constitutional restrictions, including those on funding set forth in Article XIII B section 6 of the California Constitution.

In a decision issued by California Court of Appeal in *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, the Appellate Court specifically considered whether permit terms in an MS4 Permit issued by the San Diego Regional Board (for San Diego County and the Cities therein) involving compliance with numeric effluent limits, were either "authorized" or "required" by the CWA. The Court held that: "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."[19] In short, the Court in *BIA v. State Board* found that the San Diego Regional Board had the "discretion" to impose certain permit terms that were not "required" by the CWA. (*Id.* at 886 ["That provision gives the EPA ***discretion*** to determine what pollutant controls are appropriate," *citing Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1167-67.)]

III. STATE MANDATE LAW

Article XIII B section 6 of the California Constitution requires that the Legislature provide a subvention of funds to local agencies any time the Legislature or a state agency requires the local agency to implement a new program, or provide a higher level of service under an existing program. Article XIII B section 6 states 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 . . . .

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

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17 A copy of the Staff Report is included under Section 7 – Documentation to these Test Claims.

18 *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Ca1.4th 613, 618.

19 *Id.* at 881.

A and XIII B impose."[20] The section "was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues."[21] In order to implement Section 6, the Legislature enacted a comprehensive administrative scheme to define and pay mandate claims.[22] Under this scheme, the Legislature established the parameters regarding what constitutes a state mandated cost, defining "Costs mandated by the state" to 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.[23]

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

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[20] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

[21] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 984-985.

[22] Cal. Gov. Code §§ 17500, *et seq.*; *Kinlaw v. State of California* (1991) 54 Ca1.3d 326, 331, 333 [statute establishes "procedure by which to implement and enforce section 6"].

[23] Cal. Gov. Code § 17514.

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.

When a new program or level of service is in part federally required, courts have held that the authority to impose a requirement does not equate to a direct order or mandate to impose the requirement. This principle was expressly recognized in *Long Beach Unified School Dist. v. State of California*, (1990) 225 Cal.App.3d 155. In that case, the court found that an executive order that required school districts to take specific steps to measure and address racial segregation in local public schools constituted a reimbursable mandate to the extent the order's requirements exceeded federal constitutional and case law requirements by mandating school districts to undertake defined remedial actions and measures that were merely advisory under the prior governing law.[24] There was no question that the State had the authority to impose the challenged requirement, and yet the authority to impose the requirement did not equate to federal mandate.

The Commission's decisions on other municipal NPDES permits have likewise recognized that the authority to impose a requirement does not equate to a federal mandate. In its decision on Test Claim 07-TC-09, regarding the San Diego County municipal NPDES permit the Commission addressed this issue in the context of the United States Supreme Court's decision in *P.U.D. No. 1 v. Washington Department of Ecology* (1994) 511 U.S. 700. The Commission held:

> Staff agrees with claimants about the applicability of the P.U.D. case, which determined whether the state of Washington's environmental agency properly conditioned a permit for a federal hydroelectric project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. The U.S. Supreme Court determined that Washington could do so, but the decision was based on section 401 of the Clean Water Act, which involves certifications and wetlands. ***Even if the decision could be applied to section 402 NPDES permits, it merely recognized state authority to regulate flows. The issue here is not whether the state has authority to regulate flows, but whether a federal mandate requires it.*** This was not addressed in the P.U.D. decision.
>
> Overall, there is nothing in the federal regulations that requires a municipality to adopt or implement a hydromodification plan. Thus,

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

> the HMP requirement in the permit "exceed[s] the mandate in that federal law or regulation." As in *Long Beach Unified School Dist. v. State of California*, the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen to impose these requirements. Thus, staff finds that part D.1.g. of the permit is not a federal mandate.[25]

None of the challenged programs in the 2009 Permit are specifically required by the CWA or its implementing regulations, yet the Permit imposes new requirements on the Permittees that exceed the requirements of federal law, and that are unique to the local government entities such as the Permittees.[26] The 2009 Permit therefore represents a state mandate for which the Permittees are entitled to reimbursement pursuant to Article XIII B section 6 of the California Constitution.

IV. STATE MANDATED ACTIVITIES

A. NEW REQUIREMENTS INVOLVING "NON-STORM WATER DISCHARGES" AS SET FORTH IN SECTION B OF THE 2009 PERMIT ARE UNFUNDED STATE MANDATES

1. Challenged Program Requirement

Section B.2 (Non-Storm Water Discharges) of the 2009 Permit provides the following list of non-storm water discharges that are **not** prohibited from being discharged into the MS4:

a) diverted stream flows;

b) rising ground waters;

c) uncontaminated ground water filtration to MS4s;

d) uncontaminated pumped ground water;

e) foundation drains;

f) springs;

g) water from crawl space pumps;

h) footing drains;

i) air conditioner condensation;

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

[26] 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. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 920.

j) flows from riparian habitats and wetlands;

k) water line flushing;

l) discharges from potable water sources not subject to NPDES Permit No. C AG679001, other than water main breaks;

m) individual residential car washing; and

n) dechlorinated swimming pool discharges. [27]

The 2009 Permit noticeably removes three types of non-storm water discharges from the 2002 Permit's list of exempted discharges: **landscape irrigation, irrigation water and lawn watering**. The removal of these three types of non-storm water discharges from the list of exempted discharges means that the Copermittees are now required to prohibit all discharges entering the MS4 from "landscape irrigation," irrigation water" and "lawn watering."

2. Requirements of Federal Law

Section B.2 of the 2009 Permit removes landscape irrigation, irrigation water and lawn watering from the list of exempted non-stormwater discharges that were in the 2002 Permit. The Regional Board provides no legal justification or authority for requiring the Copermittee to impose such an outright prohibition on all such irrigation waters. Neither the 2009 Permit, nor any of its supporting documents, identify any federal regulations as authority for prohibiting all such discharges as required in Section B.2 of the 2009 Permit As such, the removal of these three irrigation water discharges from the list of exempted discharges is not something required anywhere by federal law.

40 C.F.R. 122.26(d)(2)(iv)(B)(1) provides that "the following categories 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: . . . landscape irrigation . . . irrigation water . . . [and] lawn watering." (Emphasis added). This section of the federal regulations thus provides that a municipality must "***address***" such categories of non-storm water discharges, but not that it must "prohibit" all such discharges regardless of the quality or quantity of the irrigation water. Further evidence of the fact that federal law does not require an outright prohibition of all such waters from entering the MS4 is the 2002 Permit which plainly did not require that such discharges "prohibited," and there has been no subsequent change in the CWA or the federal regulations in this regard since then.

Moreover, 40 C.F.R. 122.26(d)(2)(iv)(B)(1) only requires that the municipality "address" such discharges specifically where the municipality first identifies these discharges as specific sources of pollutants. Nowhere in this C.F.R. section does it state that any such discharges must be prohibited. Even if the Copermittees previously identified a specific category or subcategory of non-storm water discharges as a potential source of pollutants in one discrete geographical area,

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[27] 2009 Permit, section B.2, pp. 19-20.

this does not mean that federal law requires the Regional Board to prohibit that entire category of non-storm water discharges throughout all of the Copermittees' jurisdictions. In this case, outside of possibly revising their respective municipal or county codes to provide legal authority as believed needed by the Copermittees to ensure compliance with this new 2009 Permit requirement, none of the Copermittees have determined that prohibiting "landscape irrigation," "irrigation water" in general or "lawn watering" was or is necessary as a means of addressing the alleged pollutants in such irrigation waters.

It is also important to acknowledge that there is a distinction between identifying a particular discharger as a source of pollutants and identifying the entire category as a source of pollutants. The preamble to the federal regulations makes clear that the Copermittees' illicit discharge program need not prevent discharges of the "exempt" categories into the MS4 "unless such discharges are specifically identified on a case-by-case basis as needing to be addressed." 55 Fed. Reg. at 47995. In other words, individual discharges within exempt categories must be addressed when the particular discharge is a source of pollutants to waters of the U.S. The federal regulations do not allow for removing entire categories of exempt non-storm water discharges. U.S. EPA confirmed this case-by-case approach in its Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems (November 1992) ("Part 2 Guidance Manual") where it states:

> If an applicant knows . . . that landscape ***irrigation water from a particular site*** flows through and picks up pesticides or excess nutrients from fertilizer applications, there may be a reasonable potential for a storm water discharge to result in a water quality impact. In such an event, the applicant should contact the NPDES permitting authority to request that the authority order ***the discharger*** to the MS4 to obtain a separate NPDES permit (or in this case, the discharge could be controlled through the storm water management program of the MS4.)[28]

As evidenced by the Guidance Manual, the removal of these three irrigation water discharges from the list of exempted discharges is not something required anywhere by federal law. Finally, not only does federal law not require that all irrigation waters be "prohibited" (*i.e.*, it only requires them to be "addressed"), it further does not require that "all" types of "sources" of irrigation water be "addressed" in the event that one or more types or subtypes of irrigation water, under certain conditions, are determined by that municipality to be sources of pollutants. Accordingly, removing all landscape irrigation, irrigation water and lawn watering from the list of exempted discharges, *i.e.*, in effect, requiring that no amount of irrigation runoff from any source (including residential irrigation water) enter the storm drain system, is not only unreasonable, but it is also not something required anywhere under federal law. In removing landscape irrigation, irrigation water and lawn watering from the list of exempted discharges, the Regional Board imposed a new requirement not mandated by federal law and thus imposed a new state mandated program.

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[28] Exhibit "1", Part 2 Guidance Manual at p. 6-33 (emphasis added).

3. Requirements of Previous Orders

The 2002 Permit included landscape irrigation, irrigation water and lawn watering in its list of exempted non-stormwater discharges. See Section B.2. of pages 8-9 of 2002 Permit.

4. Mandated Activities

Section B.2 of the 2009 Permit requires Copermittees to perform the following activities that are **not** required under either federal law or the 2002 Permit:

- By removing landscape irrigation, irrigation water and lawn watering from the list of exempted non-storm water discharges, the Regional Board is now requiring that each Copermittee take steps to "prohibit" all discharges resulting from landscape irrigation, irrigation water and lawn watering of any type or quantity, from entering the Copermittees MS4, *e.g.*, from entering the public streets, gutters, or any portion of the storm water conveyance system.

To comply with the prohibition against discharges from landscape irrigation, irrigation water and lawn watering set forth in Section B.2 of the 2009 Permit, the Copermittees must do the following in order to attempt to comply with this new state mandate:

1. Create new public education and outreach materials;

2. Expend significant staff time to amend each Copermittee's Water Quality Ordinance;

3. Expend significant staff time to coordinate with local water districts;

4. Expend significant staff time to track and respond to calls of over-irrigation, enforce, and monitor compliance; and

5. Improve, monitor and aggressively maintain municipal irrigation systems and landscaping throughout each Copermittee's jurisdiction.

5. Actual Increased Costs of Mandate

As set forth in the Declarations of the Joint Test Claimants, paragraph 6(a), Section B.2 of the 2009 Permit removes landscape irrigation, irrigation water and lawn watering from the list of discharge exceptions, exceptions that were included in the 2002 Permit. The Joint Test Claimants incurred costs to address this mandate, including with respect to the development of a new master ordinance to be adopted to address the prohibitions and requisite staff time to implement the new requirements. The Joint Test Claimants incurred increased costs of $401 during FY 2009-10 and costs of $46,947 in FY 2010-11 to address these requirements of the mandate.

B. THE 2009 PERMIT SECTION I ENTITLED "TOTAL MAXIMUM DAILY LOADS" IMPOSES A SERIES OF NEW UNFUNDED STATE MANDATES ON THE PERMITTEES

1. Challenged Program Requirement

Section I of the 2009 Permit, entitled "Total Maximum Daily Loads," imposes several new State-required programs upon the Permittees that are not mandated by federal law, without the Regional Board providing funding for any of these new mandated programs. Specifically, Section I of the Permit requires as follows:

- "The Copermittees in the Baby Beach Watershed "**shall implement BMPs capable of achieving the interim and final bacteria indicator waste load allocations ("WLAs") in discharges to Baby Beach as described in Table 6**. [TABLE 6: TMDL Waste Load Reduction Milestones.]" (2009 Permit, p. 78, § I.1.a.)

- "The Copermittees **shall conduct necessary monitoring, as described in Attachment A to Resolution No. R9-2008-0027**, and submit annual progress reports as part of their yearly reports." (2009 Permit, p. 78, § I.1.b.)

- "**The following WLAs (Table 7) are to be met in Baby Beach receiving water** by the end of year 2019 for wet weather and 2014 for dry weather: [TABLE 7: Final Bacterial Indicator Waste Load Allocations for Baby Beach.]" (2009 Permit, p. 78, § I.1.c.) and

- "**The Copermittees must meet the following Numeric Targets (Table 8) in Baby Beach receiving waters** in order to meet the underlying assumptions of the TMDL. The Numeric Targets are to be met once 100 percent of the WLA reductions have been achieved (See Table 7 above). [TABLE 8: Final Bacterial Indicator Numeric Targets for Baby Beach]." (2009 Permit, p. 78, § I.1.d.)

In short, the 2009 Permit imposes a series of new mandates in connection with a TMDL for Baby Beach, specifically requiring the Copermittees to meet both interim and final numeric limits (referenced as "Waste Load Allocations" or "WLAs" within the Permit) and to comply with monitoring and reporting requirements. None of these requirements (hereafter, the "TMDL-Related Mandates") are required by federal law. Thus, all are State mandates that are required to be funded under the California Constitution.

In addition, various findings within the 2009 Permit confirm that the TMDL-Related Mandates were included in the Permit with the specific intention of compelling compliance with numeric effluent limitations. In Finding E.11, on pages 15 and 16 of the 2009 Permit, the Regional Board explains its intent in imposing the TMDL-Related Mandates, as follows:

> **11. ... Approved TMDL WLAs are to be addressed using water quality-based effluent limitations (WQBELs) calculated as numeric limitations (either in the receiving water and/or at the point of MS4 discharge) and/or as BMPs. In most cases, the**

> **numeric limitation must be achieved to ensure the adequacy of the BMP program.**
>
> * * *
>
> This Order fulfills a component of the TMDL Implementation Plan adopted by this Regional Board on June 11, 2008 **for indicator bacteria in Baby Beach by establishing WQBELs expressed as both BMPs to achieve the WLAs and as numeric limitations for the City of Dana Point and the County of Orange.** The establishment of WQBELs expressed as BMPs should be sufficient to achieve the WLAs specified in the TMDL. **The Waste Load Allocations (WLAs) and Numeric Targets are the necessary metrics to ensure that the BMPs achieve appropriate concentrations of bacteria indicators in the receiving waters.** (2009 Permit, p. 15-16, Finding E.11, emphasis added.)

Accordingly, this finding confirms that the Permit requires compliance with the numeric effluent limits set forth on page 78 of said Permit (and other TMDL numeric limits to be incorporated into the Permit in the future), and that even though the Copermittees may rely upon best management practices ("BMPs") in attempting to comply with these numeric effluent limits, implementation of such BMPs does not constitute compliance with the numeric limits. In sum, the 2009 Permit requires compliance with interim and final numeric limits, irrespective of what BMPs may or may not be implemented and regardless of how effective the BMPs may be. Under all circumstances, whether interim or final, "The Copermittees in the Baby Beach watershed ***shall implement*** BMPs capable of achieving the interim and final [WLAs];" "The following WLAs (Table 7) ***are to be met*** in Baby Beach;" "The Copermittees ***must meet the following Numeric Targets*** (Table 8) in Baby Beach," and "The Copermittees ***shall conduct necessary monitoring*** as described in Attachment A to resolution no. R9-2008-0027, and ***submit annual progress reports*** as part of their yearly reports." (2009 Permit, p. 78, § I.1.a, c, d and b.)

The Permit provisions requiring strict compliance with the Waste Load Allocations from the Baby Beach Bacteria TMDL are not compelled by federal law. Nor does federal law require the related monitoring and reporting requirements contained in the Permit. Accordingly, all such mandates require the subvention of funds before they can properly be required of the local agencies under the 2009 Permit.

2. TMDL Requirements of Federal Law

The CWA was enacted in 1972 by the United States Congress as "a 'comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"[29] "To achieve these ambitious goals, the Clean Water Act establishes distinct roles for the federal and state governments. Under the Act, [EPA] is required . . . to establish and enforce technology-based limitations on individual discharges into the Country's navigable waters," and each state is "to institute comprehensive water quality standards

[29] *City of Burbank v. State Water Resources Control Bd.* (2005) 135 Cal.4th 613, 620.

establishing water quality goals for all intrastate waters." According to the California Supreme Court, "[t]hese state water quality standards provide 'a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'"[30]

Under the CWA, a TMDL is to be established once a water body has been determined not to be meeting a water quality standard, *i.e.*, once the water body has been listed as being "impaired" for the particular pollutant or pollutants in issue.[31] A TMDL is to be established "at a level necessary to implement the applicable water quality standards."[32] Under the federal regulations, a "TMDL" is defined as follows:

> *Total Maximum Daily Load (TMDL).* The sum of the individual WLAs [waste load allocations] for point sources and LAs [load allocations] 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.[33]

The regulations then define a "wasteload allocation" or "WLA" as: "A 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."[34]

Finally, federal regulations require that NPDES permit terms be "***consistent with the assumptions and requirements of any available wasteload allocations*** for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7."[35] The regulations do not require, however, that a WLA be incorporated into a stormwater permit as a strict numeric limit. Instead, how a WLA is to be incorporated into an NPDES Permit depends upon the nature of the permit itself. For industrial waste dischargers, Congress chose to require strict compliance with water quality standards pursuant to 33 U.S.C. § 1311 (b)(1)(C), *i.e.* the wasteload allocations need to be strictly enforced through the use of numeric limits in the industrial waste discharger's NPDES Permit. However, for municipal storm-sewer dischargers, Congress chose to replace ***"the requirements of § 1311 with the requirement that municipal storm-sewer dischargers 'reduce***

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30 *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 704.

31 33 U.S.C. § 1313(d)(1)(C) and (D).

32 33 U.S.C. § 1313(d)(1)(C); also see *Arcadia v. State Board* (2006) 135 Cal.App.4th 1392, 1404 ["A TMDL must be 'established' at a level necessary to implement the applicable water quality standards. . . . Once a TMDL is developed, effluent limitations in NPDES permits must be consistent with the waste load allocations in the TMDL."].

33 40 C.F.R. § 130.2(i).

34 40 C.F.R. § 130.3(h).

35 40 C.F.R. § 122.44(d)(1)(vii)(B).

the discharge of pollutants to the maximum extent practicable," and "expressly" ***"did not require municipal storm-sewer dischargers to comply strictly with 33 U.S.C. § 1311(b)(a)(C)."*** (*Defenders of Wildlife v. Browner* (9th Cir. 1999) ("*Defenders*") 191 F.3d 1159, 1165.)

In sum, while "TMDLs serve as a link in an implementation chain" linking the implementation of water quality standards to the NPDES Permits,[36] strict compliance with WLAs in the TMDL is ***not*** required when incorporating a TMDL into a stormwater NPDES Permit. Rather, a stormwater permit is "consistent with the assumptions and requirements" of the WLAs in a TMDL where it contains provisions to reduce pollutants to "maximum extent practicable," consistent with the MEP" standard.

Nonetheless, as this Commission has previously recognized, "the federal Clean Water Act authorizes states to impose more stringent measures than required by federal law." (Test Claim 07-TC-09, Discharge of Stormwater Runoff – Order No. R9-2007-0001, p. 41.) Thus NPDES "permits may include state-imposed, in addition[] to federally required measures. Those state measures . . . may constitute a state mandate if they 'exceed the mandate in . . . federal law.'" (*Id.* [finding individual permit terms must be analyzed "to determine whether the state requirements exceed the federal requirements imposed on local agencies"].)

Here, the Regional Board has clearly exercised its discretion "to impose more stringent measures than required by federal law." Specifically, the provisions within the 2009 Permit that require all interim and final numeric targets to be "achieved" and "met," as well as the monitoring and reporting obligations associated with such numeric targets, plainly go beyond what is required by federal law, and are thus State mandates. Further, the local agencies responsible for complying with such programs do not have any authority to impose fees to recover the cost of complying with these State mandates.

3. Federal Law Does Not Mandate That Numeric Effluent Limits Be Included In Municipal NPDES Permits, Whether From TMDLs Or Otherwise.

The plain language of the CWA confirms that numeric effluent limits, whether from TMDLs or otherwise, are not required to be imposed upon municipal stormwater NPDES permittees. Instead, federal law provides only that controls should be included in municipal NPDES Permits as needed "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." In this regard, the CWA provides as follows:

> (B) Municipal Discharge.
>
> Permits for discharges from municipal storm sewers –
>
> (i) may be issued on a system- or jurisdiction-wide basis;

[36] *Arcadia v. EPA*, (N.D. Cal. 2003) 265 F.Supp.2d 1142, 1144-45.

> (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 in system, design and engineering methods, and such other provisions as the Administrator **or the State determines appropriate** for the control of such pollutants.[37]

Moreover, the law is clear that unless the CWA or the federal regulations expressly require a particular permit term, the Board has wide discretion in imposing permit requirements. (*See, e.g., Rancho Cucamonga v. Regional Water Quality Control Board, Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389 ("*Rancho Cucamonga*").) In *Rancho Cucamonga*, the Court of Appeal held that for municipal NPDES permits: "The Act authorizes States to issue permits with conditions necessary to carry out its provisions. [Citation] ***The permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants***."[38] Similarly, in *Natural Resources Defense Council v. U.S. EPA* (Ninth Cir. 1992) 966 F.2d 1292, the Ninth Circuit Court of Appeal found that when it comes to municipal stormwater dischargers, "***Congress did not mandate a minimum standards approach***."[39]

In *Defenders, supra*, 191 F.3d 1159, the Ninth Circuit Court of Appeal recognized the different approach taken by Congress for stormwater, finding that "***industrial discharges must comply strictly with state water-quality standards," while "Congress chose not to include a similar provision for municipal storm-sewer discharges.***"[40] The Court found that "33 U.S.C. § 1342(p)(3)(B) is not merely silent regarding whether municipal discharges must comply with 33 U.S.C. § 1311," but instead Section 1342(b)(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.'" The *Defenders* Court thus concluded that "***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)***."[41]

Divers' Environmental Conservation Organization v. State Water Resources Control Board (2006) 145 Cal.App.4th 246 ("*Divers' Environmental"*) is directly relevant to the principal issue in dispute regarding the TMDL-Related Mandates in this Test Claim. In *Divers' Environmental*, the plaintiff brought suit claiming that an NPDES Permit issued to the United States Navy, by the San Diego Regional Board, was contrary to law because it did not incorporate waste load allocations ("WLAs") from a TMDL into the Navy's permit as numeric effluent limits. After discussing the relevant requirements of the CWA, as well as governing case authority, the Court of Appeal found that, in regulating stormwater permits, EPA ***"has repeatedly expressed a***

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37 33 U.S.C. § 1342(p)(3)(B), emphasis added.

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

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

40 *Defenders,* at 1165, emphasis added.

41 *Ibid*. emphasis added.

preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations." (*Id.* at 256.) The Court went on to find that "it is now clear that in implementing numeric water quality standards, such as those set forth in CTR [the California Toxics Rule], permitting agencies ***are not required to do so*** solely by means of a corresponding ***numeric*** WQBEL's" (water quality based effluent limits). (*Id*. at 262, emphasis added.) Thus, *Divers' Environmental* confirms that the TMDL-derived numeric effluent limits included in the Permit here are not mandated by federal law, but were included at the discretion of the Regional Board.

Similarly, in *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 874, a case, as discussed above, involving municipal NPDES Permit issued by the San Diego Regional Board, the California Court of Appeal confirmed the Ninth Circuit's holding in *Defenders* that the CWA does not require compliance with numeric limits for storm water permittees, finding as follows:

> [I]n 1987, Congress amended the Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. [Citations.] 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 municipal storm water discharges, Congress clarified that the EPA has the authority to fashion NPDES permit requirements to meet water quality standards without specific numeric effluent limits and instead to impose "controls to reduce the discharge of pollutants to the maximum extent practicable.**"[42]

A recent decision from the Oregon Court of Appeal further confirms that federal law does not require WLAs from a TMDL to be incorporated into a stormwater NPDES Permit. In *Tualatin River Keepers, et al. v. Oregon Department of Environmental Quality* (2010) 235 Ore. App. 132 ("*Tualatin River*"), the court considered whether WLAs from adopted TMDLs were required to be enforced as strict numeric effluent limits within a municipal NPDES Permit. The petitioners argued that the Oregon Department of Environmental Quality ("DEQ") had erred by issuing a permit that did not "specify wasteload allocations in the form of numeric effluent limits." (*Id*. at 137.) Specifically, the petitioners contended that, ***under State law***, numeric effluent limits were required to incorporate the wasteload allocations into the Permit "in a meaningful way." (*Id.* at 147-148.)

Noticeably, the petitioners in the *Tualatin* case did not even argue that ***federal law*** required WLAs from a TMDL to be incorporated into a municipal NPDES Permit as "numeric effluent limitations." And indeed, the Oregon Court found that under the CWA, best management practices were considered to be a "type of effluent limitation," and that such best management practices were authorized to be used pursuant to the CWA, section 33 U.S.C. § 1342(p) as a means of controlling "storm water discharges." (*Id*. at 141-142, citing 33 U.S.C. § 1342(p) and 40 CFR

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

§ 122.44(k)(2)-(3).) The Court in *Tualatin* then concluded that Oregon law did not require TMDLs to be enforced through the use of numeric effluent limits, holding as follows:

> The applicable TMDLs in this case set forth specific wasteload allocations for municipal storm water. The permits at issue, in turn, indicate the bodies of water for which TMDLs and wasteload allocations have been established and reference the specific TMDL for those bodies of water. **The permits provide in the "adaptive management" section that, "[w]here TMDL wasteload allocations have been established for pollutant parameters associated with the permittee's [municipal separate storm sewer system] discharges, the permittee must use the estimated pollutant load reductions (benchmarks) established in the [storm water management plan] to guide the adaptive management process. . . . Adequate progress toward achieving assigned wasteload allocations will be demonstrated through the implementation of best management practices that are targeted at TMDL-related pollutants."** Pursuant to that section, permittees must evaluate progress toward reducing pollutant loads "through the use of performance measures and pollutant load reduction benchmarks developed and listed in the [stormwater management plan]."
>
> * * *
>
> **Although the permits do not themselves include numeric wasteload allocations like those set forth in the TMDLs, the TMDL wasteload allocations are clearly referenced in the permits, and the permits require implementation of best management practices, set forth in the storm water management plans, to make progress towards meeting those wasteload allocations. Again, best management practices are a type of effluent limitation that is used in municipal storm water permits.** *See* 40 CFR § 122.44(k)(2)-(13). Furthermore, the permits incorporate benchmarks, through incorporation of the storm water management plan, which are specific pollutant load reduction goals for the permittees. Those measures are "permit requirements" that properly incorporate the TMDL wasteload allocations.

(*Id.* at 148-149, emphasis added.) The *Tualatin River* case thus further confirms that the CWA does not require WLAs from TMDLs to be incorporated into stormwater permits as numeric limits.

Moreover, all of the above authority confirming that federal law does not require the use of numeric effluent limits, in any fashion, within a municipal NPDES Permit is consistent with the long-held policies of the California State Water Resources Control Board ("State Board"). For example, in State Board Order No. 91-03 (Exhibit "1" hereto), in the context of considering the need for numeric effluent limitations in a municipal NPDES Permit (in the San Francisco Region),

the State Board concluded that: "***Numeric effluent limitations are not legally required***. Further, we have determined that the program of prohibitions, source control measures and 'best management practices' set forth in the Permit constitutes effluent limitations as required by law." (Exhibit "2", p. 30-31.)

Further, in a companion decision to Order No. 91-03, *i.e.* Order No. 91-04, related to the issuance of another municipal NPDES that did not contain numeric limits (this time for the Los Angeles Region), the State Board similarly found that: "***There are no numeric objectives or numeric effluent limits required at this time, either in the Basin Plan or any Statewide Plan that applied to storm water discharges***." (Exhibit "3", State Board Order No. 91-04, p. 14.)

The reason for the State Board's position was explained, in part, in a February 11, 1993 State of California Memorandum regarding the "*Definition of 'Maximum Extent* Practicable (Exhibit "4" hereto – hereafter "MEP Memo"), the State Board's Chief Counsel's Office concluded as follows:

> **On its face, it is possible to discern some outline of the intent of Congress in establishing the MEP standard. First, the requirement is to reduce the discharge of pollutants, rather than totally prohibit such discharge**. Presumably, the reason for this standard (and the difference from the more stringent standard applied to industrial dischargers in Section 402(p)(3)(A), **is the knowledge that it is not possible for municipal dischargers to prevent the discharge of all pollutants in storm water**. (MEP Memo, p. 2, bolding added, underlining in original.)

The Memo concluded the following factors should be considered in making a determination on whether a BMP is consistent with the "MEP" standard:

> 1. Effectiveness: Will a BMP address a pollutant of concern?
>
> 2. Regulatory Compliance: Is the BMP in compliance with storm water regulations as well as other environmental regulations?
>
> 3. Public acceptance: Does the BMP have public support?
>
> 4. **Cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefit to be achieved?**
>
> 5. **Technical feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc.?**[43]

Given these realities, the State Board has consistently recognized not only that federal law does not require that numeric limitations be included in an NPDES permit, but that such numeric limits are generally inappropriate in such permits.

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[43] Exhibit 10, MEP Memo, pp. 4-5, emphasis added.

Indeed, countless other State Board decisions and related policy and guidance documents have repeatedly reaffirmed the State Board's position that federal law does not require the use of numeric effluent limits within municipal NPDES Permits, like the 2009 Permit in question. (*See, e.g.*, Exhibit "5," State Board Order No. 98-01, p. 12 ["Stormwater permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs ***in lieu of numeric water quality-based effluent limitations***."]; Exhibit "6," State Board Order No. 2000-11, p. 3 **["*In prior Orders this Board has explained the need for the municipal storm water programs and the emphasis on BMPs in lieu of numeric effluent limitations*."]**; Exhibit "7," State Board Order No. 2001-15, p. 8 ["While we continue to address water quality standards in municipal storm water permits, we also continue to believe that ***the iterative approach***, which focuses on timely improvements of BMPs, is appropriate."]; Exhibit "8," State Board Order No. 96-13, p. 6 ["***federal law does not require*** the [San Francisco Reg. Bd] to dictate the specific controls."]; Exhibit "9," State Board Order No. 2006-12, p. 17 ["***Federal regulations do not require numeric effluent limitations for discharges of storm water***"]; Exhibit "10," *Stormwater Quality Panel Recommendations to The California State Water Resources Control Board – The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater Associated with Municipal, Industrial and Construction Activities*, June 19, 2006, p. 8 ["***It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers***."]; and Exhibit "11," an April 18, 2008 letter from the State Board's Chief Counsel to the Commission on State Mandates, p. 6 ["***Most NPDES Permits are largely comprised of numeric limitations for pollutants. . . . Stormwater permits, on the other hand, usually require dischargers to implement BMPs.***"].)

In *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564 ("*Hayes*"), the Court of Appeals established the standard for the Commission to follow when determining whether a State mandate is required under federal law, particularly when a general federal requirement is imposed upon the State. Specifically, the Court found as follows:

> When the federal government imposes costs on local agencies, those costs are not mandated by the State and thus would not require State subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations. **This should be true even though the State has adopted an implementation statute or regulation pursuant to the federal mandate so long as the State had *no* "true choice" in the manner of the implementation of the federal mandate**.…
> **[T]he reasoning would not hold true where the manner of implementation was left to the true discretion of the State.**[44]

Here, the Board's decision to incorporate WLAs from the Baby Beach TMDL into the 2009 Permit and to require strict compliance with such numbers was clearly the result of a "true choice" on the part of the Board, as it is well-established that federal law does not require that WLAs from a TMDL be incorporated into a stormwater permit as strict "numeric effluent limitations." Nor does federal law require the imposition of the various related TMDL monitoring and reporting requirements imposed on the Copermittees by the 2009 Permit. To the contrary, as

[44] *Hayes v. Commission on State Mandates*, *supra*, 11 Cal.App.4th at p. 1593.

confirmed by numerous court decisions as well as by various State Board Orders and policy, the CWA only requires the application of the MEP standard, not the imposition of numeric limits. In addition, and as the State Board's Numeric Effluent Limits Expert Panel concluded in 2006, **"*It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and, in particular, urban dischargers*"** (Exhibit "12", Numeric Effluent Limits Panel, p. 8). Further, "***it is not possible for municipal dischargers to prevent the discharge of all pollutants in stormwater***." (Exhibit 4, MEP Memo, p. 2.) A mandate that stormwater permittees comply with numeric limits, in any form, goes beyond federal law.

4. There Were No TMDL-Related Mandates In The 2002 Permit

The 2002 Permit contained none of the TMDL-Related Mandates in issue in this Test Claim. As such, all of the requirements involving TMDLs within the 2009 Permit are new requirements that go beyond what is required under federal law, and thus all such requirements constitute unfunded State mandates.

5. TMDL – Related Mandates and Actual Increased Costs to the Joint Test Claimants

2009 Permit Sections I.1.(a)-(d) impose mandates upon Copermittees County and City of Dana Point to meet the numeric effluent limits specified in Tables 6, 7 and 8 on page 78 of the 2009 Permit, along with related monitoring and reporting obligations.

Each of the TMDL-Related Mandates are new programs not contained anywhere in the 2002 Permit. Further, each obliges the various Copermittees to strictly meet interim or final numeric effluent limits, and exposes the Copermittees enforcement action or third-party citizen suits if the limits are not met. (*See* 33 U.S.C. § 1365; *also see NRDC v. County of Los Angeles et al.* (9th Circuit 2013) 725 F.3d 1194 [holding county and flood control district liable in a third-party citizen suit based upon monitoring results that showed exceedances of numeric water quality standards].) Yet, as discussed in detail above, and as confirmed in case after case and in numerous State Board Orders and policy documents, not to mention the plain language of the Act itself, the CWA does not require the imposition of numeric effluent limits within municipal NPDES Permits.

The San Diego RWQCB has therefore imposed a state mandate on the County and the City of Dana Point, who have incurred increased costs to address the requirements of the TMDL-related mandate. As set forth in the Section 6 Declarations at paragraph 6(i), the increased costs of the mandate to these Joint Test Claimants were $28,575.91 in FY 2009-10 and $33,646.10 in FY 2010-11.

C. THE 2009 PERMIT PROVISIONS, SECTIONS C AND F, REQUIRING THE DEVELOPMENT OF MONITORING AND INVESTIGATION AND COMPLIANCE PROGRAMS TO MEET NON-STORMWATER DRY WEATHER ACTION LEVELS" OR "NALS," ARE UNFUNDED STATE MANDATES

1. The Challenged Program Requirements Involving NALs

Under Section C of the 2009 Permit, entitled "Non-Stormwater Dry Weather Action Levels," the Copermittees are required to comply with a number of new requirements triggered by specified pollutant concentration levels termed "Non-Stormwater Dry Weather Actions Levels" or "NALs" (hereafter, "NAL-Triggered Mandates"). The NAL-Triggered Mandates are contained in Section C (pages 21-24) and Section F.4(d) and (e) (pages 70-71) of the 2009 Permit. They include an elaborate and very particular set of programmatic investigation, monitoring and reporting requirements, and action items, all based on the existence, type and frequency of a NAL exceedance.

Specifically, the 2009 Permit requires as follows:

> 1. Each Copermittee, beginning no later than May 1, 2011, **shall implement** the non-storm water dry weather action level (NAL) **monitoring** as described in Attachment E of this Order. (2009 Permit, p. 21, Section C.1.)
>
> 2. **In response to an exceedance of an NAL, each Copermittee must investigate and identify the source of the exceedance in a timely manner. . . . Following the source investigation and identification, the Copermittees must submit an action report dependant on the source of the pollutant exceedance as follows:**
>
> a. If the Copermittee identifies the source of the exceedance as natural (non-anthropogenically influenced) in origin and in conveyance into the MS4; then **the Copermittee shall report their findings and documentation** of their source investigation to the Regional Board **within fourteen days** of the source identification.
>
> b. **If the Copermittee identifies the source of the exceedance as an illicit discharge or connection, then the Copermittees must eliminate the discharge to their MS4 and report the findings**, including any enforcement action(s) taken, and documentation of the source investigation to the Regional Board **within fourteen days** of the source identification. If the Copermittee is unable to eliminate the source of discharge within fourteen days, **then the Copermittee must submit, as part of their action report, their plan and timeframe to eliminate the source of the exceedance . . . .**

c. If the Copermittee identifies the source of the exceedance as an exempted category of non-storm water discharge, **then the Copermittees must determine if this is an isolated circumstance or if the category of discharges must be addressed through the prevention or prohibition of that category of discharge as an illicit discharge. The Copermittee must submit their findings in including a description of the steps taken to address the discharge and the category of discharge, to the Regional Board for review with the next subsequent annual report.** Such description shall include relevant updates to or new ordinances, orders, or other legal means of addressing the category of discharge. The **Copermittees must also submit a summary of their findings with the Report of Waste Discharge**.

d. If the Copermittee identifies the source of the exceedance as a non-storm water discharge in violation or potential violation of an existing separate NPDES permit (e.g. the groundwater dewatering permit), **then the Copermittee must report, within three business days, the findings to the Regional Board including all pertinent information regarding the discharger and discharge characteristics.**

e. If the Copermittee is unable to identify the source of the exceedance after taking and documenting reasonable steps to do so, **then the Copermittee must identify the pollutant as a high priority pollutant of concern in the tributary subwatershed, perform additional focused sampling and update their programs within a year to reflect this priority. The Copermittee's annual report shall include these updates to their programs including, where applicable, updates to their watershed workplans (Section G.2), retrofitting consideration (Section F.3.d) and program effectiveness work plans (Section J.4).**

f. The Copermittee or any interested party, may evaluate existing NALs and propose revised NALs for future Board consideration.

3. . . . **Failure to timely implement required actions specified in this Order following an exceedance of an NAL constitutes a violation of this Order**. . . . During any annual reporting period in which one or more exceedances of NALs have been documented the **Copermittee must submit with their next scheduled annual report, a report describing whether and how the observed exceedances did or did not result in a discharge from the MS4 that caused, or threatened to cause or contribute to a condition of pollution, contamination, or nuisance in the receiving waters**.

4. **Monitoring of effluent will occur at the end-of-pipe prior to discharge** into the receiving waters, with the focus on Major Outfalls, as outlined in 40 CFR 122.26(B5-6) and Attachment E of this Order. **The Copermittees must develop their monitoring plans** to sample a representative percentage of major outfalls and identified stations within each hydrologic subarea. **At a minimum, outfalls that exceed any NALs once during any year must be monitored** in the subsequent year. Any station that does not exceed an NAL for three years may be replaced with a different station.

5. **Each Copermittee shall monitor** for the non-storm water dry weather action levels, which are incorporated into this Order as follows:

   a. **Action levels for discharger to inland surface waters:**

      Table 4.a.1: General Constituents . . .

      Table 4.a.2: Priority Pollutants . . .

   b. **Action levels for discharger to bays, harbors and lagoons/estuaries:**

      Table 4.b: General Constituents . . .

   c. **Action levels for discharges to the surf zone:**

      Table 4.c: General Constituents . . .

(2009 Permit, pp. 21-24, Section C, Non-Stormwater Action Levels.) Other NAL-Triggered Mandates are set forth in Section F.4 of the 2009 Permit, as follows:

d. **Each Copermittee must conduct** dry weather field screening and analytical **monitoring** of MS4 outfalls and other portions of its MS4 within its jurisdiction to detect illicit discharges and connections in accordance with Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2009-0002 in Attachment E of this Order. (2009 Permit, p. 70, Section F.4.d.)

Also under Section F.4.e. of the Permit, entitled "**Investigation/Inspection And Follow-Up"**:

> **Each Copermittee must "implement procedures to investigate and inspect** portions of the MS4 that, based on the results of the field screening, analytical monitoring, or other appropriate information, indicate a reasonable potential of containing illicit discharges, illicit connections, or other sources of pollution in non-storm water.
>
> (1) Develop response criteria data: **Each Copermittee must develop, update and use the** numeric criteria action levels (or other actions level criteria where appropriate) to determine when follow-up investigations will be performed in response to water quality monitoring. The criteria **must include the required non-stormwater action levels** (see Section C) and a consideration of 303d-listed waterbodies and environmentally sensitive areas (ESAs) as defined in Attachment C. (2009 Permit, p. 70-71, Section F.4.e.)

Furthermore, Sections F.4.e(2)(b) and (c) provide:

> 2. Respond to data: **Each Copermittee must investigate portions of the MS4** for which water quality data or conditions indicate a potential illegal discharge or connection . . .
>
> > (b) Field screen data: Within two business days of receiving dry weather field screening results that exceed action levels, the Copermittees **must either initiate an investigation to identify the source of the discharge or document the rationale** for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation **shall be included in the Annual Report**. (2009 Permit, p. 71, Section F.4.e(2)(b).)
> >
> > (c) Analytical data: Within five business days of receiving analytical laboratory results that exceed action levels, the Copermittees **must either initiate an investigation to identify the source of the discharge or document the**

> **rationale** for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation **shall be included in the Annual Report**. (2009 Permit, p. 71, Section F.4.e(2)(c).)

In short, Sections C and F of the Permit set forth a series of very detailed programmatic action requirements to monitor for, report on, and respond to NAL exceedances, all of which will be very costly and difficult to adhere to. Yet, NAL-Triggered Mandates are not required or even referenced anywhere in the CWA or in the federal regulations thereunder. Further, no numeric NAL-Triggered Mandates were included in the prior 2002 Permit.

2. There Are No NAL-Triggered Mandates Under Federal Law

No federal statute, regulation, or policy requires that municipal stormwater permits include monitoring, reporting and/or compliance obligations in connection with NALs or any other numeric action levels. In fact, nothing under the CWA, nor the regulations thereunder, requires the inclusion of numeric NALs in any fashion in a municipal stormwater permit.

To the contrary, as discussed in detail above in connection with the TMDL-Related Mandates, the language of the CWA, as well as the relevant authority discussing federal requirements for a municipal NPDES Permit under the CWA, all confirm that no numeric limits, whether or not styled as "action levels," are ***required*** to be included within a municipal storm water permit. (*See, e.g., Defenders of Wildlife, supra*, 191 F.3d 1159, 1163 and 1165 ["Industrial discharges must comply strictly with State water-quality standards," while "Congress chose not to include a similar provision for municipal storm-sewer discharges;" "the ***statute unambiguously demonstrates*** that Congress did not require municipal storm-sewer dischargers to strictly comply with 33 U.S.C. § 1311(b)(1)(C)."]; *BIA v. State Board, supra,* 124 Cal.App.4th 866, 874 ***["With respect to municipal stormwater discharges, Congress clarified that the EPA has the authority to fashion NPDES Permit requirements to meet water quality standards without specific numeric effluent limits and to instead impose 'controls to reduce the discharge of pollutants to the maximum extent practicable.'"]***; *Divers' Environmental, supra*, 145 Cal.App.4th 246, 256 ***["In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations."]***; State Board Order No. 2000-11, p. 3 ["In prior orders this Board has explained the need for the municipal stormwater programs ***and the emphasis on BMPs in lieu of numeric effluent limitations***."]; State Board Order No. 2006-12, p. 17 ***["Federal regulations do not require numeric effluent limitations for discharges of stormwater."]***; and State Board Order No. 91-03, pgs. 30-31 ["***We . . . conclude that numeric effluent limitations are not legally required***. Further we have determined that the program of prohibitions, source control measures and 'best management practices' set forth in the Permit constitutes effluent limitations as required by law.'"].)

While the NALs are not traditional "strict" numeric effluent limits, in that an exceedance of an NAL does not automatically constitute a permit "violation," numeric NALs are similar to strict numeric effluent limits in that they impose new mandated requirements on the Copermittees to meet such numeric limits. If the Copermittees' non-storm water discharges exceed the NALs, the Copermittees must thereafter implement costly measures to comply with the numeric action

levels, regardless of the feasibility of complying. (*See* 2009 Permit, Section C (pages 21-24) and Section F.4(d) and (e) (pages 70-71).) Thus, the "NAL-Triggered Mandates" go far beyond what is required to be imposed in an MS4 permit. Accordingly, the Board had a "true choice" in deciding to impose the "NAL-Triggered Mandates." (*Hayes v. Commission on State Mandates*, *supra*, 11 Cal.App.4th at 1593.)

3. Requirements From The 2002 Permit

Although general dry-weather monitoring and follow-up requirements were included in the 2002 Permit, all of the NAL-Triggered Mandates set forth in the 2009 Permit are specific new requirements that were not included in the 2002 Permit.

4. The NAL-Triggered Requirements Are Unfunded State Mandates

None of the monitoring, reporting and compliance programs of the NALs-Triggered Mandates are compelled anywhere under federal law. In fact, the Courts and the State Board have consistently concluded that no numeric limits are ***required*** by federal law in any form, whether they are termed "action levels" or "numeric effluent limits." In addition, the NAL-Triggered Mandates under the 2009 Permit are all new requirements not contained in the 2002 Permit. Moreover, no changes have been to federal law since the 2002 Permit was adopted that would support any argument that NALs are now required under federal law, when they were clearly not required under that same federal law in 2002 when the 2002 Permit was adopted.

5. Actual Increased Costs of Mandate

As a result of the mandate set forth in Section C of the 2009 Permit, the Joint Test Claimants have incurred increased costs in the form of additional monitoring and the development of guidance to address NAL exceedances. In addition, certain Joint Test Claimants incurred additional costs in investigation and followup activities to address NAL exceedances. As set forth in the Section 6 Declarations, paragraph 6(b), the Joint Test Claimants incurred increased costs to address this mandate of $13,584 in FY 2010-11 and $63,761 in FY 2011-12.

D. THE 2009 PERMIT PROVISIONS UNDER SECTION D REQUIRING COMPLIANCE WITH VARIOUS PROGRAMS ASSOCIATED WITH STORMWATER ACTION LEVELS OR "SALs" ARE UNFUNDED STATE MANDATES

1. The Challenged Program Requirements Involving Stormwater Action Levels – SALs

Section D of the 2009 Permit, entitled "Stormwater Action Levels," imposes a series of new State mandated programs concerning what are referred to in the Permit as "Stormwater Action Levels" or "SALs." (2009 Permit, pgs. 25-26.) The SALs are purportedly applicable to discharges of "stormwater" (presumably meaning water from precipitation events that enters the MS4 and is thereafter discharged into waters of the United States). Similar to the NAL-Triggered Mandates, the "SAL-Related Mandates" include specific investigation and compliance program requirements in response to any exceedance of SAL, as well as monitoring and reporting obligations associated

with the SALs (hereafter, all such SAL related programs are collectively referred to as "SAL-Related Mandates").

Specifically, under Section D of the 2009 Permit:

> 1. Beginning Year 3 after Order adoption date, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the United States **that exceed the Storm Water Action Levels for the pollutants listed in Table 5 (below) will require each Copermittee to affirmatively augment and implement all necessary storm water controls and measures** to reduce the discharge of the associated class of pollutant(s) to the MEP standard. . . . Copermittees shall take the magnitude, frequency, and number of constituents exceeding the SAL(s), in addition to receiving water quality data and other information, into consideration when reacting to SAL exceedances in an iterative manner. **Failure to appropriately consider and react to SAL exceedances in an iterative manner creates a presumption that the Copermittee(s) have not complied with the MEP standard.**
>
> [Table 5. Storm Water Action Levels. . . .]

(2009 Permit, p. 25, § D.1.) Sections D.2 and D.4 then build on those SAL requirements and impose the following mandates:

> 2. . . . **The Copermittees must develop their monitoring plans to sample a representative percent of the major outfalls within each hydrologic subarea**. At a minimum, **outfalls that exceed SALs must be monitored** in the subsequent year. Any station that does not exceed an SAL for 3 years may be replaced with a different station. SAL samples must be 24 hour time waited composites."
>
> 4. . . . To be relieved of the requirements to prioritize pollutant/watershed combinations of BMP updates and to continue monitoring a station, the **Copermittee must demonstrate that the likely and expected cause of the SAL exceedance is not anthropogenic in nature.**

(2009 Permit, p. 25, § D.2 and D.4.) In short, similar to the NAL-Triggered Mandates, the 2009 Permit includes a series of new monitoring, reporting and compliance obligations associated with "SALs" that were not contained in the 2002 Permit, and that are not required by federal law.

2. There Are No SAL-Related Mandates Required Under Federal Law

Nothing anywhere in the CWA, nor the regulations thereunder, requires the inclusion of Storm Water Action Levels or SALs within a municipal NPDES Permit. In addition, there is no federal requirement that municipal NPDES Permits include monitoring, reporting or compliance obligations that are triggered by an exceedance of a SAL.

Contrary to any requirement to include a SAL-Related Mandate within a municipal NPDES Permit, the plain language of the CWA, as well as controlling case authority interpreting the Act, all make clear that no form of SALs or any related mandates are required to be included within a municipal NPDES Permit by federal law. (*See Defenders of Wildlife, supra*, 191 F.3d 1159, 1163 ***["Industrial discharges must strictly comply with State water-quality standards," while "Congress chose not to include a similar provision for municipal storm-sewer discharges."]***; *Divers' Environmental, supra*, 145 Cal.App.4th 246, 256 **[*"In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations."***]; and *BIA v. State Board, supra*, 124 Cal.App.4th 866, 874 ["With respect to municipal stormwater discharges, Congress clarified that the EPA has the authority to fashion NPDES Permit requirements to meet water quality standards ***without specific numeric effluent limits*** and to instead impose 'controls to reduce the discharge of pollutants to the maximum extent practicable.'"]; State Board Order No. 2000-11, p. 3 ["In prior orders this Board has explained the need for the municipal stormwater programs ***and the emphasis on BMPs in lieu of numeric effluent limitations***."]; State Board Order No. 2006-12, p. 17 ***["Federal regulations do not require numeric effluent limitations for discharges of stormwater."]***; and State Board Order No. 91-03, pgs. 30-31 ["***We . . . conclude that numeric effluent limitations are not legally required***. Further we have determined that the program of prohibitions, source control measures and 'best management practices' set forth in the Permit constitutes effluent limitations as required by law.'"].)

Like the NALs, the SALs are not traditional "strict" numeric effluent limits that result in violations if exceeded, but are nonetheless similar to such limits in that they are new programs imposed on the Copermittees that are tied to achieving compliance with specific numeric limits. As with the NALs, if the Copermittees exceed the SALs, they are subject to additional and costly requirements, regardless of the feasibility of complying with the SALs. (*See* 2009 Permit, pgs. 25-26.) In short, all of these new requirements are tied to determining and achieving compliance with a set of numbers, none of which is required under federal law. Thus, like the NAL-Triggered Mandates, the SAL-Related Mandates go far beyond what is required to be imposed in an MS4 permit, and the Board had a "true choice" in deciding to impose the "SAL-Related Mandates." (*See Hayes v. Commission on State Mandates, supra*, 11 Cal.App.4th at 1593.)

3. There Were No SAL-Related Mandates In the 2002 Permit

All of the SAL-Related Mandates, including monitoring, investigation, reporting and compliance activities contained in the 2009 Permit are new programs that were not included in any fashion in the 2002 Permit.

4. The SAL-Related Requirements are Unfunded State Mandates

None of the monitoring, reporting, or compliance related programs imposed in connection with the SAL-Related Mandates under the 2009 Permit are required by federal law. Further, it is clear that the Courts (as well as the State Board) have consistently found, without exception, that numeric limitations of any kind are ***not required*** in a municipal NPDES Permit. The costs of complying with the SAL-Related Mandates will continue throughout this 2009 Permit and indefinitely with future permits, unless this new program is eliminated. As such, this new state mandate must be funded by the State in accordance with the California Constitution.

5. Actual Increased Costs of Mandate

As a result of the mandates set forth in Section D.2 of the 2009 Permit, the Joint Test Claimants have incurred increased costs in monitoring and the development of SAL protocols, as well as followup activities. As set forth in the Section 6 Declarations, paragraph 6(c), the Joint Test Claimants have incurred increased costs from this mandate of $19,690 in FY 2010-11 and $16,504 in FY 2011-12.

E. NEW "LOW IMPACT DEVELOPMENT" ("LID") AND HYDRO-MODIFICATION REQUIREMENTS REQUIRED BY SECTIONS F.1.D AND F.1.H OF THE 2009 PERMIT ARE UNFUNDED STATE MANDATES

The 2009 Permit requires the Permittees to develop and implement a program to ensure that new development and significant redevelopment, as those terms are defined in the 2009 Permit, comply with strict low impact development and hydromodification prevention requirements. Specifically, the 2009 Permit imposes the following new LID requirements on Permittees: review and update the model and local Standard Storm Water Mitigation Plan ("SSMP"), add low impact development ("LID") BMP requirements for each priority development project ("PDP"),[45] create a formalized review process for all PDPs, assess potential on- or off-site collection and reuse of storm water, amend local ordinances to remove barriers to LID implementation, maintain or restore natural storage reservoirs and drainage corridors, drain a portion of impervious areas into pervious areas, and construct low-traffic areas with permeable surfaces.[46] The 2009 Permit also requires the Permittees to collaboratively develop and implement a Hydromodification Management Plan ("HMP").

The issue of whether these requirements exceed the requirements of federal law, and represent reimbursable state mandates was considered by the Commission in Test Claim 07-TC-09, Discharge of Stormwater Runoff – Order No. R9-2007-0001 (regarding the San Diego County Municipal Stormwater Permit). In its decision on Test Claim 07-TC-09, the Commission determined that the San Diego County NPDES permit's LID and hydromodification requirements exceed the requirements of federal law, and as such represent state mandates. The Commission found, however, that the state mandates were not reimbursable, because the County of San Diego and the other permittees retained the ability to assess fees for new development.

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45 2009 Permit, part D.1.d(3)-(10).

46 *Id*. at part D.1d(4).

With the passage of California's Proposition 26 in November, 2010, it is clear that the costs associated with developing and implementing the LID and hydromodification programs is not recoverable through fees. Proposition 26, enacted by the voters this year to amend Article XIII C of the California Constitution, defined virtually any revenue device enacted by a local government as a tax requiring voter approval, unless it fell within certain enumerated exceptions.

Article XIII C § 2(d)[47] now provides that:

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

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

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

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

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

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

> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
>
> (6) A charge imposed as a condition of property development.
>
> (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.
>
> The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

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

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

With regard to municipal projects, the Commission found that the low impact development and hydromodification requirements in the San Diego County permit are not reimbursable state mandates because the permittees in that case are under no obligation to construct projects that would trigger the San Diego County permit requirements.[48]

In support of this determination, the Commission cited the California Supreme Court's decision in *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727. In *Kern High School Dist.*, the Court held that certain hearing requirements imposed upon school districts did not constitute a reimbursable state mandate because they were a requirement of voluntary program the school districts had elected to participate in. The Court held "activities undertaken at the option or discretion of a local government entity (that is, actions

[48] Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 46, 52.

undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement."[49]

In coming to this decision, the Court relied on a lower court decision in *City of Merced v State of California* (1984) 153 Cal.App.3d 777. In that case, the city elected to take property by eminent domain, under which it was required by then recent legislation to compensate the owner for loss of "business goodwill." The city sought reimbursement from the state, arguing that the new statutory requirement was a reimbursable state mandate. The Court of Appeal concluded that the city's increased costs flowed from its optional decision to condemn the property. The court reasoned: "whether 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. . . Thus, payment for loss of goodwill is not a state-mandated cost."[50]

The conditions that dictated the Court's decision in *Kern High School Dist.* are not present in the 2009 Permit. For one, the 2009 Permit is not a voluntary program. The 2009 Permit nonetheless requires the Copermittees to take immediate actions related to low impact development and hydromodification, including requirements that are not triggered by any voluntary action on the part of the Copermittees. The conditions that dictated the Court's decision in *Kern High School Dist.* are also absent with regard to project implementation. Again, the 2009 Permit is not a voluntary program, yet it requires the Copermittees to incur costs related to low impact development and hydromodification on municipal projects.[51] This includes recreational facilities, parking lots, streets, roads, highways, and any other project large enough to exceed the specified thresholds. The development and upkeep of these municipal land uses is not optional. They are integral to the Copermittee's function as municipal entities, and the failure to make necessary repairs, upgrades and extensions can expose to the Copermittees to liability.

The rationale from *City of Merced* is likewise inapplicable. In that case, the city had the ability to avoid the new program by purchasing property, rather than taking it with eminent domain. Under the 2009 Permit, the Permittees have no such option. The 2009 Permit will force the Copermittees to incur new, additional costs on every municipal project. Moreover, the California Supreme Court has rejected the applicability of *City of Merced* in circumstances beyond those present in Kern High School Dist.

In *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, the Court considered similar regulatory requirements to those at issue in *Kern High School Dist.* The Court discussed its decision in *Kern High School Dist.*, at length, and cautioned against future reliance on *City of Merced* holding:

> [W]e 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 under article XIII B, section 6 of the state Constitution and Government Code section 17514 whenever an***

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[49] *Department of Finance v. Commission on State Mandates* (Kern High School Dist.) (2003) 30 Cal.4th 727, 742.

[50] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783.

[51] 2009 Permit section XII.B.7 requires the Permittees to document which low impact development BMPs are included on any project in the WQMP for the project.

> ***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 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, 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.) 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, 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.[52]

Thus strict reliance on the *City of Merced* rationale is only appropriate in the very limited circumstances presented in the *Kern High School Dist.*, case. Those conditions are not present in the 2009 Permit, which imposes requirements on the Copermittees that are either wholly unrelated to voluntary action on the part of the Copermittees, or are triggered by municipal projects that the Copermittees implement with little to no discretion because they are integral to the Copermittees' function as municipal entities, and/or the failure to undertake them would expose the Copermittees to liability. As set forth above, and in greater detail below, these requirements exceed federal law and represent reimbursable state mandates.

1. Challenged Program Requirements

The Permittees challenge parts F.1.d of the 2009 Permit as applied to municipal projects and development of program Permittees also challenge F.1.h in its entirety.

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[52] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888.

a. Challenged LID Requirements

To comply with these parts F.1.d(4) and F.1.d(7), the Permittees must invest significant resources to review and update the model and local SSMPs and add LID BMP requirements for each priority development project ("PDP").[53] Continued compliance with these sections will also require the Permittees to add requirements to municipal projects and will significantly increase the costs of design and construction.

New LID BMP requirements include creating a formalized review process for all PDPs, assessing potential on- or off-site collection and reuse of storm water, amending local ordinances to remove barriers to LID implementation, maintaining or restoring natural storage reservoirs and drainage corridors, draining a portion of impervious areas into pervious areas, and constructing low-traffic areas with permeable surfaces.[54] Mandatory language in the 2009 Permit, part F.1.d, creates a state mandate for Permittees to do all of the following:

> (4) Low Impact Development BMP Requirements
>
> Each Copermittee must require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss.
>
> (a) The following LID BMPs must be implemented:
>
> (i) Each Copermittee must require LID BMPs or make a finding of infeasibility for each Priority Development Project in accordance with the LID waiver program in Section F.1.d.(8);
>
> (ii) Each Copermittee must incorporate formalized consideration, such as thorough checklists, ordinances, and/or other means, of LID BMPs into the plan review process for Priority Development Projects;
>
> (iii) The review of each Priority Development Project must include an assessment of potential collection of storm water for on-site or offsite reuse opportunities;
>
> (iv) The review of each Priority Development Project must include an assessment of techniques to infiltrate, filter, store, evaporate, or retain runoff close to the source of runoff; and

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53 2009 Permit, part D.1.d(3)-(10).

54 *Id*. at part D.1.d(4).

(v) Within 2 years after adoption of this Order, each Copermittee must review its local codes, policies, and ordinances and identify barriers therein to implementation of LID BMPs. Following the identification of these barriers to LID implementation, where feasible, the Copermittee must take, by the end of the permit cycle, appropriate actions to remove such barriers.

(b) The following LID BMPs must be implemented at all Priority Development Projects where technically feasible as required below:

(i) Maintain or restore natural storage reservoirs and drainage corridors (including depressions, areas of permeable soils, swales, and ephemeral and intermittent streams.

(ii) Projects with landscaped or other pervious areas must, where feasible, drain runoff from impervious areas (rooftops, parking lots, sidewalks, walkways, patios, etc) into pervious areas prior to discharge to the MS4. The amount of runoff from impervious areas that is to drain to pervious areas shall not exceed the total capacity of the project's pervious areas to infiltrate or treat runoff, taking into consideration the pervious areas' geologic and soil conditions, slope, and other pertinent factors.

(iii) Projects with landscaped or other pervious areas must, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate or treat runoff from impervious areas, prior to discharge to the MS4. Soil compaction for these areas shall be minimized. The amount of the impervious areas that are to drain to pervious areas must be based upon the total size, soil conditions, slope, and other pertinent factors.

(iv) Projects with low traffic areas and appropriate soil conditions must construct walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such as pervious concrete, porous asphalt, unit pavers, and granular materials.

(c) To protect ground water resources any infiltration LID BMPs must comply with Section F.1.(c)(6).

(d) LID BMPs sizing criteria:

(i) LID BMPs shall be sized and designed to ensure onsite retention without runoff, of the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Map ("design capture volume");

(ii) If onsite retention LID BMPs are technically infeasible per section F.1.d.(7)(b), LID biofiltration BMPs may treat any volume that is not retained onsite by the LID BMPs. The LID biofiltration BMPs must be designed for an appropriate surface loading rate to prevent erosion, scour and channeling within the BMP. Due to the flow through design of biofiltration BMPs, the total volume of the BMP, including pore spaces and prefilter detention volume, must be sized to hold at least 0.75 times the design storm volume that is not retained onsite by LID retention BMPs;

(iii) If it is shown to be technically infeasible to treat the remaining volume up to and including the design capture volume using LID BMPs (retention or biofiltration), the project must implement conventional treatment control BMPs in accordance with Section F.1.d.(6) below and must participate in the LID waiver program in Section F.1.d.(7).

(e) All LID BMPs shall be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies.

* * *

(7) Low Impact Development (LID) BMP Waiver Program.

The Copermittees must develop, collectively or individually, a LID waiver program for incorporation into local SSMPs, which would allow a Priority Development Project to substitute implementation of all or a portion of required LID BMPs in section F.1.d(4) with implementation of treatment control BMPs and a mitigation project, payment into an in-lieu funding program, and/or watershed equivalent BMP(s) consistent with Section F.1.d.(11). The Copermittees shall submit the LID waiver program as part of their updated model SSMP. At a minimum, the program must meet the requirements below:

(a) Prior to implementation, the LID waiver program must clearly exhibit that it will not allow PDPs to result in a net impact (after consideration of any mitigation and in-lieu payments) from pollutant loadings over and above the impact caused by

projects meeting LID requirements; (b) For each PDP participating, a technical feasibility analysis must be included demonstrating that it is technically infeasible to implement LID BMPs that comply with the requirements of Section F.1.(d)(4). The Copermittee(s) must develop criteria for the technical feasibility analysis including a cost benefit analysis, examination of LID BMPs considered and alternatives chosen. Each PDP participating must demonstrate that LID BMPs were implemented as much as feasible given the site's unique conditions. Analysis must be made of the pollutant loading for each project participating in the LID substitution program. The estimated impacts from not implementing the required LID BMPs in section F.1.d.(4) must be fully mitigated. Technical infeasibility may result from conditions including, but not limited to:

(i) Locations that cannot meet the infiltration and groundwater protection requirements in section F.1.c.(6). Where infiltration is technically infeasible, the project must still examine the feasibility of other onsite retention LID BMPs;

(ii) Smart growth and infill or redevelopment locations where the density and/or nature of the project would create significant difficulty for compliance with the onsite volume retention requirements; and

(iii) Other site, geologic, soil or implementation constraints identified in the Copermittees updated local SSMP document.

(c) The LID waiver program must include mechanisms to verify that each Priority Development Project participating in the program is in compliance with all applicable SSMP requirements;

(d) The LID waiver program must develop and implement a review process verifying that the BMPs to be implemented meet the designated design criteria. The review process must also verify that each Priority Development Project participating in the program is in compliance with all applicable SSMP requirements.

(e) The LID waiver program must include performance standards for treatment control BMPs specified in compliance with section F.1.(d)(6).

(f) Each PDP that participates in the LID waiver program must mitigate for the pollutant loads expected to be discharged due to not implementing the LID BMPs in section F.1.d.(4). Mitigation projects must be implemented within the same hydrologic subarea as the PDP. Mitigation projects outside of the hydrologic subarea but within the same hydrologic unit may be approved provided that the project proponent demonstrates that mitigation projects within the same hydrologic subarea are infeasible and that the mitigation project will address similar beneficial use impacts as expected from the PDPs pollutant load types and amount. Offsite mitigation projects may include green streets projects, existing development retrofit projects, retrofit incentive programs, regional BMPs and stream restoration. Project applicants seeking to utilize these alternative compliance provisions may propose other offsite mitigation projects, which the Copermittees may approve if they meet the requirements of this subpart.

(g) A Copermittee may choose to implement a pollutant credit system as part of the LID waiver program provided that such a credit system clearly exhibits that it will not allow PDPs to result in a net impact from pollutant loadings over and above the impact caused by projects meeting LID requirements. Any credit system that a Copermittee chooses to implement must be submitted to the Executive Officer for review and approval as part of the waiver program.

(h) The LID waiver program shall include a storm water mitigation fund developed by the Copermittee(s) to be used for water quality improvement projects which may serve in lieu of the PDP's required mitigation in section F.1.d.(8)(e). The LID waiver program's storm water mitigation fund shall, at a minimum, identify:

(i) The entity or entities that will manage the storm water mitigation fund (i.e., assume full responsibility);

(ii) The range and types of acceptable projects for which storm water mitigation funds may be expended;

(iii) The entity or entities that will assume full responsibility for each water quality improvement project, including its successful completion; and

(iv) How the dollar amount of storm water mitigation fund contributions will be determined. In-lieu payments must be

proportional to the additional pollutant load discharged by not fully implementing LID.

(i) Each Copermittee must notify the Regional Board in their annual report of each PDP choosing to participate in the LID waiver program. The annual report must include the following information:

(i) Name of the developer of the participating PDP;

(ii) Site location;

(iii) Reason for LID waiver including technical feasibility analysis;

(iv) Description of BMPs implemented;

(v) Total amount deposited, if any, into the storm water mitigation fund described in section F.1.d.(8)(f);

(vi) Water quality improvement project(s) proposed to be funded; and

(vii) Timeframe for implementation of water quality improvement projects.

(8) Site Design and Treatment Control BMP Design Standards As part of its local SSMP, each Copermittee must develop and require Priority Development Projects to implement sitting, design, and maintenance criteria for each site design and treatment control BMP listed in its local SSMP to determine feasibility and applicability and so that implemented site design and treatment control BMPs are constructed correctly and are effective at pollutant removal, runoff control, and vector minimization. LID techniques, such as soil amendments, must be incorporated into the criteria for appropriate treatment control BMPs. Development of BMP design worksheets which can be used by project proponents is encouraged.

(9) Implementation Process As part of its local SSMP, each Copermittee must implement a process to verify compliance with SSMP requirements. The process must identify at what point in the planning process Priority Development Projects will be required to meet SSMP requirements and at a minimum, the Priority Development Project must implement the required post-construction BMPs prior to occupancy and/or the intended use of any portion of that project. The process must also include identification of the roles and responsibilities of various municipal departments in implementing the SSMP requirements, as well as any

other measures necessary for the implementation of SSMP requirements.

By adding requirements and increasing the specificity of existing requirements, the 2009 LID requirements are new programs or higher levels of service.

b. Challenged Hydromodification Requirements

Part F.1.h requires Permittees to collaboratively develop and implement a Hydromodification Management Plan ("HMP") to manage increases in runoff discharge rates and durations from all PDPs. Permittees must then incorporate the HMP into the local SSMP. The HMP must be so designed and implemented so as to ensure that past-project runoff discharge rates and durations do not exceed pre-development discharge rates and durations. To comply with part F.1.h, the Copermittees must invest significant resources to hold public hearings, hold collaborative meetings, develop an HMP, train staff, and adopt the local SSMP. Continued compliance with these sections will also require Copermittees to add requirements to municipal projects and will significantly increase the costs of design and construction.

Within one year of the 2009 Permit, Copermittees must take interim steps to ensure all PDPs are implementing specified criteria by comparing the pre-development and post-project flow rates and durations, using a continuous simulation hydrologic model. Within two years of the 2009 Permit, Permittees must submit a draft HMP to the Regional Board. On its submission, the draft HMP must have been reviewed by the public. The HMP itself is subject to 14 separate requirements, as follows:

> h. Hydromodification – Limitation 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. The HMP shall be incorporated into the local SSMP and implemented by each Copermittee so that estimated post-project runoff discharge rates and durations shall not exceed pre-development discharge rates and durations. Where the proposed project is located on an already developed site, the pre-project discharge rate and duration shall be that of the pre-developed, naturally occurring condition. The HMP shall be submitted to the Executive Officer within 2 years of permit adoption. The HMP will be made available for public review and comment and the Executive Officer will determine the need for a public hearing.
>
> (1) The HMP must:
>
> > (a) Identify a method for assessing susceptibility of channel segments which receive runoff discharges from Priority Development Projects. The geomorphic stability within the

channel shall be assessed. A performance standard shall be created that ensures that the geomorphic stability within the channel not be compromised as a result of receiving runoff discharges from Priority Development Projects.

(b) Utilize continuous simulation of the entire rainfall record (or other analytical method proposed by the Copermittees and deemed acceptable by the Regional Board) to identify a range of runoff flows for which priority Development Project post-project runoff flow rates and durations shall not exceed pre-development (naturally occurring) runoff flow rates and durations by more than 10 percent, where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses. In addition, the identified range of runoff flow rates and durations must compensate for the loss of sediment supply due to the development. 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. In the case of an artificially hardened (concrete lined, rip rap, etc.) channel, 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 of a comparable soft-bottomed channel.

(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 (naturally occurring) runoff flow rates and durations by more than 10 percent for the range of runoff flows identified under section F.1.h.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses; (2) do not result in channel conditions which do not meet the channel standard developed under section F.1.h.(1)(a) for channel segments downstream of Priority Development Project discharge points; and (3) compensate for the loss of sediment supply due to development.

(d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent runoff from the projects from increasing and/or continuing unnatural rates of erosion of channel beds and banks, silt pollutants

generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

(e) Include a review of pertinent literature.

(f) Identify areas within the San Juan Hydrologic Unit where historic hydromodification has resulted in a negative impact to benthic macroinvertebrate and benthic periphyton by identifying areas with low or very low Index of Biotic Integrity (IBI) scores.

(g) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects. This protocol must include the use of the IBI score as a metric for assessing impacts and improvements to downstream watercourses.

(h) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.

(i) 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.

(j) Include technical information supporting any standards and criteria proposed.

(k) 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.

(l) Include a description of pre- and post-project monitoring and other program evaluation, including IBI score, to be conducted to assess the effectiveness of implementation of the HMP.

(m) Include mechanisms for assessing and addressing cumulative impacts within a watershed on channel morphology.
(n) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.

(2) In addition to the hydrologic control measures that must be implemented per section F.1.h.(1)(c), the HMP must include a suite of management measures to be used on Priority Development Projects to protect and restore downstream beneficial uses and prevent or further prevent adverse physical changes to downstream

channels. The measures must be based on a prioritized consideration of the following elements in this order:

(a) Hydrologic control measures;

(b) On-site management controls;

(c) Regional controls located upstream of receiving waters; and

(d) In-stream controls. Where stream channels are adjacent to, or are to be modified as part of a Priority Development Project, management measures must include buffer zones and setbacks. Under no circumstances will in-stream controls include the use of non-naturally occurring hardscape materials such as concrete, riprap, gabions, etc. The suite of management measures shall also include stream restoration as a viable option to achieve the channel standard in section F.1.h.(1)(a).

(3) Each individual Copermittee has the discretion to not require Section F.1.h. at Priority Development Projects where the project:

(a) Discharges storm water runoff into underground storm drains discharging directly to bays or the ocean; or

(b) Discharges storm water runoff into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to ocean waters, enclosed bays, estuaries, or water storage reservoirs and lakes.

(4) HMP Reporting and Implementation

(a) Within 2 years of adoption of the Order, the Copermittees shall submit to the Regional Board a draft HMP that has been reviewed by the public, including the analysis that identifies the appropriate limiting range of flow rates per section F.1.h.(1)(b).

(b) Within 180 days of receiving Regional Board comments on the draft HMP, the Copermittees shall submit a final HMP that addressed the Regional Board's comments.

(c) Within 90 days of receiving a finding of adequacy from the Executive Officer, each Copermittee shall incorporate and implement the HMP for all Priority Development Projects.

(d) Prior to approval of the HMP by the Regional Board, the early implementation measures likely to be included in the HMP shall be encouraged by the Copermittees.

(5) Interim Hydromodification Criteria

Within one year of adoption of this Order, each Copermittee must ensure that all Priority Development Projects are implementing the following criteria by comparing the pre-development (naturally occurring) and post-project flow rates and durations using a continuous simulation hydrologic model such as US EPA's Hydrograph Simulation Program-Fortran (HSPF):

(a) For flow rates from 10 percent of the 2-year storm event to the 5 year storm event, the post-project peak flows shall not exceed predevelopment (naturally occurring) peak flows.

(b) For flow rates from the 5 year storm event to the 10 year storm event the post-project peak flows may exceed pre-development (naturally occurring) flows by up to 10 percent for a 1-year frequency interval. The interim hydromodification criteria do not apply to Priority Development Projects where the project discharges (1) storm water runoff into underground storm drains discharging directly to bays or the ocean, or (2) storm water runoff into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to ocean waters, enclosed bays, estuaries, or water storage reservoirs and lakes. Within one year of adoption of this Order, each Copermittee must submit a signed, certification statement to the Regional Board verifying implementation of the interim hydromodification criteria.

(6) No part of section F.1.h shall alleviate the Copermittees responsibilities for implementing Low Impact Development BMPs as required under section F.1.d.(4).

2. Requirements of Federal Law

Nothing in the CWA, its regulations, or case law requires local agencies to review and update the BMP requirements listed in an SSMP, to add LID BMP requirements to PDPs, to add a waiver program to development and implement interim hydromodification protocols, or to create an HMP.[55] Indeed, the Commission has already considered whether the requirement to review and update BMP in local SSMPs or the requirement to submit and implement an updated Model SSMP is required by federal law or regulation.[56] This Commission decided "nothing in the federal regulation requires agencies to update local or model SSMPs."[57] In addition, the Commission

[55] 33 U.S.C. § 1342; 40 C.F.R. § 122.26; see also Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 51.

[56] Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, p. 51.

[57] *Ibid*.

determined that the hydromodification requirement constituted "a state-mandated, new program or higher level of service."[58]

The Commission considered and decided that nothing in federal law or regulation requires an updated Model SSMP to define minimum LID and other BMP requirements for incorporation into local SSMPs.[59] Likewise, nothing in federal law or regulation requires a municipality to adopt or implement an HMP.[60] The CWA only requires MS4 permits to impose controls that reduce the discharge of pollutants to the maximum extent practicable ("MEP").[61] MEP is not defined, but the CWA suggests management practices, control techniques, and system, design, and engineering methods as options for attaining the maximum reduction possible.[62] When suggestions are no longer merely being suggested as options for consideration "but are required acts, [t]hese requirements constitute a higher level of service."[63]

Federal regulations require part of a permit application to include a plan for developing, implementing and enforcing controls to reduce the discharge from MS4s that originate in areas of new development.[64] Requiring post-construction controls to limit pollutant discharges originating in areas of new development may be within the requirements of Section 122.26(d)(2)(iv)(A), but the specific LID requirements contained in the 2009 Permit are not required in this Section. By adopting permit provisions that require Permittees to review and update SSMPs, to implement LID requirements and to develop an HMP, the state has freely chosen[65] to impose requirements and related costs that are not federally mandated and that, when mandated by the state, constitute a new program or higher level of service.[66]

3. Requirements of Previous Orders

The 2002 Permit does not require the Copermittees to develop and implement LID permit requirements or an HMP. The most analogous section in the 2002 Permit, part F.1 "Land-Use Planning for New Development and Redevelopment Component," requires each Copermittee to assess the general plan, modify the development project approval process, revise environmental review processes and conduct education efforts.[67] This part does not require review or revision of model or local SSMPs or impose LID requirements.

4. Mandated Activities

To comply with the low impact development and hydromodification requirements in the 2009 Permit, the Copermittees will need to develop and impose a number of new programs. The

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58 *Id.* at p. 97.
59 *Id.* at p. 51.
60 *Id.* at p. 44.
61 33 U.S.C. § 1342(p)(3)(B)(iii).
62 *Ibid*.
63 Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 51; see also *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173.
64 40 C.F.R. § 122.26(d)(2)(iv)(A)(2).
65 *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-1594.
66 Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 51.
67 California Regional Water Quality Control Board San Diego Region Order No. R9-2002-0001, NPDES No. CAS0108740.

specific mandated activities are described in greater detail in section IV.D.1, above. In sum, within one year of the 2009 Permit, Copermittees were required to take interim steps to ensure all PDPs are implementing specified criteria by comparing the pre-development and post-project flow rates and durations, using a continuous simulation hydrologic model. Within two years of the 2009 Permit, Copermittees must develop and submit a draft HMP to the Regional Board. On its submission, the draft HMP must have been reviewed by the public.

The Copermittees are also required to develop and implement LID and hydromodification prevention design principles on municipal projects that qualify as PDPs. This will require creating a formalized review process for all PDPs, training staff on the new protocol, assessing potential on- or off-site collection and reuse of storm water, amending local ordinances to remove barriers to LID implementation, maintaining or restoring natural storage reservoirs and drainage corridors, draining a portion of impervious areas into pervious areas, and constructing low-traffic areas with permeable surfaces.[68] Projects that are subject to these requirements include municipal yards, recreation centers, civic centers, and road improvements, and any other municipal projects meeting the permit-specified thresholds or geographical criteria.

To date, the Copermittees have been and will continue to be required to invest significant resources to review and update the model and local SSMPs and add LID BMP requirements for each PDP.[69] Continued compliance with these sections will also require Copermittees to add requirements to municipal projects and will significantly increase the costs of design and construction.

5. Actual Increased Costs of Mandate

To comply with the 2009 Permit's LID and HMP requirements, the Joint Test Claimants were required to expend resources to develop and administer programs relating to these requirements. The Copermittees, including the Joint Test Claimants, jointly retained consultants to develop the program on a cost-sharing basis, and have been required to expend resources on an individual jurisdictional basis to comply with the LID and HMP requirements within their jurisdictions. As set forth in the Section 6 Declarations, paragraph 6(d), the Joint Test Claimants incurred increased costs of $125,988 in FY 2009-10 and $54,715 in FY 2010-11.

F. NEW REPORTING REQUIREMENTS INCLUDING AN ANNUAL ASSESSMENT OF THE EFFECTIVENESS OF THE JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM AND A WORK PLAN DEMONSTRATING A RESPONSIVE AND ADAPTIVE APPROACH FOR THE USE OF RESOURCES AS SET FORTH IN SECTION J OF THE 2009 PERMIT ARE UNFUNDED STATE MANDATES

1. Challenged Program Requirement

Sections J.1.b, J.2, J.3 and J.4 of the 2009 Permit require the Copermittees to develop a new system of assessing the effectiveness of its stormwater management program and impose new requirements to annually report that assessment to the Regional Board. These requirements are all

[68] 2009 Permit, part D.1.d(4)

[69] *Id.* at part D.1.d(3)-(10).

new requirements and go beyond the requirements of federal law and are being challenged as unfunded mandates.

2. Requirements of Federal Law

The assessment methodology that the Regional Board is requiring in the 2009 Permit is not required by federal regulation. The relevant federal regulation setting forth requirements concerning the assessment of the effectiveness of the MS4 Permittees' stormwater program can be found in 40 CFR § 122.26(d)(2)(v) and 40 CFR §§ 122.42 (c)(3).

40 CFR § 122.26(d)(2)(v) requires a Copermittee to include the following in its application for a MS4 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.

40 CFR §§ 122.42 (c)(3) requires the Copermittees to submit an Annual Report that includes:

> Revisions, if necessary, to the assessment of controls … reported in the permit application under §122.26(d)(2)(iv) and (d)(2)(v) of this part;

The federal requirements are extremely general and leave a Copermittee great latitude in the method they adopt to evaluate the effectiveness of the pollution controls they propose as part of their stormwater program. The federal regulation allows a Copermittee to develop its methodology for the assessment of the effectiveness of its stormwater program.

The federal regulations also require very limited reporting of a Copermittee's proposed assessment activities. The MS4 Permittee's initial application must include an assessment of estimated reductions in pollutants as a result of a Copermittee's proposed watershed management program. The annual reporting requirements in federal regulations related to that assessment are also very limited. A Permittee is required to include in its Annual Report only revisions to its assessment that prove necessary. The federal regulations do not require a formalized ongoing annual reassessment of the entire stormwater program.

3. Requirements of Previous Orders

The program assessment requirements in the 2002 Permits are in Section F.8 of the 2002 Permit. Those provisions are as follows:

> a. As part of its individual [Jurisdictional Urban Runoff Management Plan (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.

Section H.9.1.a.(9).(a) required the Copermittees to submit a written report to the Regional Board describing their Jurisdictional URMP. One of the elements that needed to be included in that report was a description of the strategy that the Copermittee proposed to use to assess the effectiveness of its Jurisdictional URMP. It provided:

> At a minimum, the individual Jurisdictional URMP document shall contain the following information for the following components: … A description of strategies to be used for assessing the long-term effectiveness of the individual Jurisdictional URMP.

The requirements in the 2002 Permit were much less prescriptive and gave the Copermittees latitude in developing procedures for assessing the effectiveness of their stormwater management program and were much more in line with federal regulatory requirements.

4. Mandated Activities in the 2009 Permit

Section J of the 2009 Permit requires all of the Copermittees to develop a system for assessing the effectiveness of their individual Jurisdictional Runoff Management Plan (JRMP). The Copermittees are required under this permit to develop a method for measuring how effective the Copermittees JRMP is in meeting certain objectives. The objectives that must be tracked and measured are

- The effectiveness of the JRMP in reducing discharges of storm water pollutants from its MS4 into each downstream 303(d)-listed water body for which that waterbody is impaired. Assessment measures must be developed for each of the six outcome levels described by CASQA.[70]

- the effectiveness of its management measures in the JRMP for protecting downstream ESAs from adverse effects caused by discharges from its MS4.

[70] *Id.* at section J.1.a(1), p. 79 of 92.

Assessment measures must be developed for each of the six outcome levels described by CASQA.[71]

- The effectiveness of each individual element of the JRMP that Permittees are required to develop by the 2009 Permit[72].

- The effectiveness of "each measure conducted in response to a determination to implement the "iterative" approach to prevent or reduce any storm water pollutants that are causing or contributing to the exceedance of water quality standards as outlined in this Order."[73]

Annually the Copermittees are required to utilize the methodology developed under Section J of the Permit to review its activities conducted to comply with the requirements of this permit and review any BMPs implemented and evaluate the effectiveness of those activities and BMPs to meet the objectives set forth above[74]. The Copermittees must also annually evaluate the methodology itself.[75] The Copermittees must then propose and implements changes to their activities and modifications of BMPs to better meet the objectives set forth above.[76]

Section J also adds significant new reporting requirements that were not in prior permits. Section J.3.a of the 2009 Permit[77] now requires the following:

> Each Copermittee must include a description and summary of its annual and long-term effectiveness assessments within each Annual Report. Beginning with the Annual Report due in 2011, the Program Effectiveness reporting must include:
>
> > (1) 303(d) waterbodies: A description and results of the annual assessment measures or methods specifically for reducing discharges of storm water pollutants from its MS4 into each 303(d)-listed waterbody;
> >
> > (2) ESAs: A description and results of the annual assessment measures or methods specifically for managing discharges of pollutants from its MS4 into each downstream ESA;
> >
> > (3) Other Program Components: A description of the objectives and corresponding assessment measures and results used to evaluate the effectiveness of each general program component. The results must include findings from both program implementation and water quality assessment where applicable;

[71] *Id.* at section J.1.a(2), p. 79 of 92.
[72] *Id.* at section J.1.a(3), pp. 79-80 of 92.
[73] *Id.* at section J.1.a(4), p. 80 of 92.
[74] *Id.* at section J.1.b(1), p. 80 of 92.
[75] *Id.* at section J.1.b(2), p. 80 of 92.
[76] *Id.* at section J.2, pp. 80-81 of 92.
[77] *Id.* at section J.3, p. 81 of 92.

> (4) Receiving water protection: A description and results of the annual assessment measures or methods employed specifically for actions taken to protect receiving water limitations in accordance with Section A.3 of this Order;
>
> (5) A description of the steps taken to use dry-weather and wet-weather monitoring data to assess the effectiveness of the programs for 303(d) impairments, ESAs, and general program components;
>
> (6) A description of activities conducted in response to investigations of illicit discharge and illicit connection activities, including how each investigation was resolved and the pollutant(s) involved;
>
> (7) Responses to effectiveness assessments: A description of each program modification, made in response to the results of effectiveness assessments conducted pursuant to Section J.1.a, and the basis for determining (pursuant to Section J.2.b.) that each modified activity and/or BMP represents an improvement with respect to reducing the discharge of storm water pollutants from the MS4.
>
> (8) A description of the steps that will be taken to improve the Copermittee's ability to assess program effectiveness using measurable targeted outcomes, assessment measures, assessment methods, and outcome levels 1-6. Include a time schedule for when improvement will occur; and
>
> (9) A description of the steps that will be taken to identify aspects of the Copermittee's Jurisdictional Runoff Management Program that will be changed based on the results of the effectiveness assessment

In addition to the information mentioned above, Section J.4 of the 2009 Permit requires the Copermittees to develop a Work Plan. This Work Plan Requirement is a new requirement and was not in prior permits. Section J.4 of the 2009 Permit[78] provides:

> Each Copermittee must develop a work plan to address their high priority water quality problems in an iterative manner over the life of the permit. The goal of the work plan is to demonstrate a responsive and adaptive approach for the judicious and effective use of available resources to attack the highest priority problems. The work plan shall include, at a minimum, the following:

[78] *Id.* at section J.4, p. 82 of 92.

> **a.** The problems and priorities identified during the assessment;
>
> **b.** A list of priority pollutants and known or suspected sources;
>
> **c.** A brief description of the strategy employed to reduce, eliminate or mitigate the negative impacts;
>
> **d.** A description and schedule for new and/or modified BMPs. The schedule is to include dates for significant milestones;
>
> **e.** A description of how the selected activities will address an identified high priority problem. This will include a description of the expected effectiveness and benefits of the new and/or modified BMPs;
>
> **f.** A description of implementation effectiveness metrics;
>
> **g.** A description of how efficacy results will be used to modify priorities and implementation; and
>
> **h.** A review of past activities implemented, progress in meeting water quality standards, and planned program adjustments. The Copermittee shall submit the work plan to the Regional Board within 365 days of adoption of the Order. Annual updates are also required and shall be included with the annual JRMP report. The Regional Board will assess the work plan for compliance with the specific and overall requirements of the Order. To increase effectiveness and efficiencies, Copermittees may combine their implementation efforts and work plans within a hydrologic area or sub area. Each Copermittee, however, maintains individual responsibility for developing and implementing an acceptable work plan.

The requirements in Section J of the 2009 Permit go beyond federal law in a number of significant ways. The assessment methodology set forth in Section J is a methodology created in whole by the Regional Board. This was not a methodology that was proposed by the Copermittees nor is it a methodology that is found in any federal regulation. The 2009 Permit sets forth the objectives that the Copermittees' assessment methodology should measure as well as every element that must be included in that assessment methodology. The Copermittee must develop an assessment methodology that meets those prescriptive requirements.

The 2009 Permit also requires the development of a Work Plan with very specific elements. The formal Work Plan requirement is not found in any federal regulation. Section J of the 2009 Permit requires an annual assessment of the Claimants' stormwater program, the JRMP, be done

and included in reports provided to the Regional Board. That annual assessment covers every aspect of JRMP. That annual assessment must not only assess the effectiveness of elements of the JRMP but also must assess the assessment methodology itself. The Work Plan required by Section J.4 must also be updated annually. These annual reporting requirements and annual requirements to revise the Copermittees original assessment go well beyond anything found in federal regulations.

5. Actual Increased Costs of Mandate

As set forth in the Section 6 Declarations at paragraph 6(h)(i), the Joint Test Claimants have incurred increased costs to address the assessment methodology and criteria required by the mandates in Sections F and J of the 2009 Permit, including development of reporting templates and conducting assessments. The increased costs to the Joint Test Claimants from these mandates were $1,750 in FY 2009-10, $34,439 in FY 2010-11 and $14,990 in FY 2011-12. These increased costs also included the reporting requirements of Sections F, K and Attachment D, discussed in Section IV.H. below.

6. Conclusion

Section J of the 2009 Permit creates a highly prescriptive and highly bureaucratic system for evaluating the JRMP that each of the Copermittees is required to develop. The assessment requirements in the 2002 Permit were contained in three paragraphs that took up one half of a page of the prior permit. The assessment requirements of the 2009 Permit now take up almost four full pages of the new permit. The assessment method required by the 2009 Permit goes well beyond what is required by federal law and significantly different than what was contained in the prior 2002 Permit issued by the Regional Board. These changes are not an incremental changes to existing programs that simply increase the cost of providing existing activities but rather represent a significant increase in the actual level and type of activities required of them by the Regional Board and therefore constitutes a requirement for a "higher level of service" within the meaning of Article XIIIB § 6 of the California Constitution.[79] None of the costs that will be incurred by Copermittees in complying with these new requirements can be recouped through fees given the legal restrictions on local government's power to charge fees. The additional program elements described above, therefore constitute unfunded mandates. Copermittees are constitutionally entitled to be reimbursed for the cost of implementing these mandates.

G. NEW REPORTING REQUIREMENTS, INCLUDING A WATERSHED WORKPLAN REPORT AS SET FORTH IN SECTION K.1.B OF THE 2009 PERMIT ARE UNFUNDED STATE MANDATES

1. Challenged Program Requirement

The Public Meeting requirements found in sections G.6, and K.1.b.(4).(n) of the 2009 Permit are being challenged as unfunded state mandates.

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

2. Requirements of Federal Law

The federal regulations that dictate the essential elements of a MS4 Permittee's program for the management of stormwater is found in 40 CFR § 122.26(d)(2)(iv). Although this regulation spells out certain elements that must be included in a Permittee's stormwater management program, the federal regulations do not set out any procedural requirements that must be followed by a Permittee in developing its program. Specifically there are no provisions in the relevant federal regulations that require a Permittee to conduct a public meeting before adopting any aspect of that management program.

3. Requirements of Previous Orders

The Watershed Urban Runoff Management Program requirements of the 2002 Permit were found in sections J – M of the previous permit. Sections L and M of the 2002 Permit contained the Permittees' reporting requirements related to the Watershed Urban Runoff Management Program.

Although the requirement to develop a Watershed Workplan is similar to reporting requirements in Sections L and M of the 2002 Permit, there are significant additional requirements in the 2009 Permit related to the development of the Watershed Workplan. The most significant of those new requirements is the requirement that Copermittees conduct an annual Watershed Workplan Review at a noticed public meeting[80]

4. Mandated Activities in the 2009 Permit

The requirement to conduct annual public meetings when developing any aspect of a Copermittee's stormwater management program is a new requirement and is not a requirement found in federal regulations.

Section K.1.b and sections G.2 of the 2010 Permit require the preparation of a Watershed Water Quality Workplan (Watershed Workplan) that describes

> … the Permittees' development and implementation of a collective watershed strategy to assess and prioritize the water quality problems within the watershed's receiving waters, identify and model sources of the highest priority water quality problem(s), develop a watershed-wide BMP implementation strategy to abate highest priority water quality problems, and a monitoring strategy to evaluate BMP effectiveness and changing water quality prioritization in the WMA.[81]

Section G of the 2009 Permit also sets forth the procedure that the Copermittees must follow when performing the required annual update to the Watershed Workplan. Specifically the Copermittees are required to conduct a noticed public hearing in each watershed. The permit requirements are as follows:

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[80] 2009 Permit, sections G.6, p. 74 of 91 and K.1.b.4. n, p. 84 of 91.
[81] *Id.* at section G.2, p. 73 of 91.

> Watershed Copermittees shall review and update the Watershed Workplan annually to identify needed changes to the prioritized water quality problem(s) listed in the workplan. All updates to the Watershed Workplan shall be presented during an Annual Watershed Review Meeting. Annual Watershed Review Meetings shall occur once every calendar year and be conducted by the Watershed Copermittees. Annual Watershed Review Meetings shall be open to the public and adequately noticed. Individual Watershed Copermittees shall also review and modify their jurisdictional programs and JRMP.

Section K.1.b.4. of the permit requires:

> Each Watershed Workplan shall, at a minimum, include: … A scheduled annual Watershed Workplan Review Meeting once every calendar year. This meeting shall be open to the public.

5. Actual Increased Costs of Mandate

The public meeting requirements of sections G.6 and K.1.b.4 caused the Joint Test Claimants to incur costs in implementing this requirement, which was new to the 2009 Permit. As set forth in the Section 6 Declarations, paragraph (h)(ii), the Joint Test Claimants incurred increased costs of $823 in FY 2011-12 and costs of $256 in FY 2012-13 to address this mandate.

6. Conclusion

The new public hearing requirement for the Watershed Workplan Review in the 2009 Permit is a significant new requirement being required of the Copermittees. This change is not just an incremental change to an existing program that simply increases the cost of providing existing activities but rather represents a significant increase in the actual level and type of activities required of the Copermittees by the Regional Board and therefore constitutes a requirement for a "higher level of service" within the meaning of Article XIIIB § 6 of the California Constitution.[82] As explained above this higher level of service is not mandated by federal regulations. None of the costs associated with conducting these public meetings can be recouped through fees given the legal restrictions on local government's power to charge fees. The additional program elements described above, therefore constitute unfunded mandates. Copermittees are constitutionally entitled to be reimbursed for the cost of implementing these mandates.

H. NEW REPORTING REQUIREMENTS, INCLUDING DESCRIBING ALL ACTIVITIES A COPERMITTEE WILL UNDERTAKE PURSUANT TO THE 2009 PERMIT AND AN INDIVIDUAL JURISDICTIONAL RUNOFF MANAGEMENT REPORT AS SET FORTH IN SECTIONS K.1.a AND K.3 OF THE 2009 PERMIT ARE UNFUNDED STATE MANDATES

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

1. Challenged Program Requirement

2009 Permit sections F.1.d.(7).(i), F.3.a.(4).(c),; section K.3.a.(3), 1 and Attachment D of the 2009 Permit are unfunded mandates being challenged.

2. Requirements of Federal Law

The federal requirement relating to the Annual Report can be found in 40 CFR §122.42(c) which requires the following:

The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director under §122.26(a)(1)(v) of this part must submit an annual report by the 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;

The relevant federal regulations governing the reporting of the impact of Permittee's flood control faculties and other structural controls can be found in 40 CFR §§122.26(d)(iv)(A)(1) and 122.26(d)(iv)(A)(4) which requires a Permittee to include in its stormwater management plan the following:

> (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; …
>
> (*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; …

3. Requirements of Previous Orders

The reporting requirements under the 2002 Permit are found in sections H and I of that permit. Although Annual Reports were required in the 2002 Permit, the 2009 Permit adds a number of new reporting requirements.

4. Mandated Activities

Section K.3.a of the 2009 Permit requires that each Copermittee prepare an individual JRMP Annual Report which cover implementation of its jurisdictional activities during the past annual reporting period[83]and specify the contents of the JRMP Annual Reports.[84]

New requirements of the Annual Report include:

- The report of priority development projects choosing to participate in the LID waiver program, including details of the feasibility analysis, BMPs implemented and funding details.[85]

- An evaluation of the Copermittees' existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device as well as submit this inventory and evaluation to the Regional Board.[86]

- A Reporting Checklist.[87]

None of these new requirements can be found in the requirements for the Annual Report set forth in 40 CFR §122.42(c).

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[83] 2009 Permit, section K.3.a.1, p. 85 of 91.
[84] *Id*. at section K.3.a.3, pp 85-89 of 91.
[85] Id. at sections F.1.d.(7).(i), p. 39 of 91.
[86] *Id*. at section F.3.a.(4).(c), p. 55 of 91.
[87] *Id*. at section K.3.a.(3), p. 86 of 91 and Attachment D of the 2009 Permit.

As discussed previously in this Narrative, the LID requirements in the section F.1.d. (4) of the 2009 Permit go beyond the requirements of federal regulations. The reporting requirements related to the waiver program required as part of those LID requirements, also go beyond requirements of federal law.

The requirements in section F.3.a.(4).(c) of the 2009 Permit to inventory all of a Permittees' flood control devices also goes beyond the requirements of federal law. 40 CFR §122.26(d)(iv)(A)(1) and 122.26(d)(iv)(A)(4) require that a Permittees application include a description of a Permittee's maintenance practices for its flood control facilities and require a Permittee to develop a procedure to assess the impacts of flood control projects on water quality of receiving waters as well as a procedure to evaluate the feasibility of retrofitting those identified facilities. The federal regulations do not require a full inventory of these facilities and don't require that a Permittee submit such an inventory to the Regional Board.

Finally the Checklist requirement found in section K.3.a.(3), and Attachment D of the 2009 Permit are not required by 40 CFR §122.42(c) requirements for the Annual Report.

5. Actual Increased Costs of Mandate

Please see Section IV.F.5 above with respect to the amounts and dates of the increased costs required by this mandate, which is discussed in the Section 6 Declarations at paragraph (h)(i).

6. Conclusion

The new reporting requirements in the 2009 Permit are significant new requirements being required of the Copermittees. These changes are not just incremental changes to existing programs that simply increase the cost of providing existing activities but rather represent a significant increase in the actual level and type of activities required of them by the Regional Board and therefore constitute a requirement for a "higher level of service" within the meaning of Article XIII B § 6 of the California Constitution.[88] As explained above, this higher level of service is not mandated by federal regulations. None of the costs associated with conducting these activities can be recouped through fees given the legal restrictions on local government's power to charge fees. The additional program elements describe above, therefore constitute unfunded mandates. Copermittees are constitutionally entitled to be reimbursed for the cost of implementing these mandates.

I. THE 2009 PERMIT, SECTION F.4, IMPOSES NEW REQUIREMENTS MANDATING THE USE OF GEOGRAPHICAL INFORMATION SYSTEM (GIS) MS4 MAPS

1. Challenged Program Requirement

Section F.4.b. of the 2009 Permit provides as follows:

"**b. Maintain MS4 Map**

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

> Each Copermittee must maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction. *The use of GIS is required.* The accuracy of the MS4 map must be confirmed during dry weather field screening and analytical monitoring and must be updated at least annually. The GIS layers of the MS4 map must be submitted with the updated Jurisdictional Runoff Management Plan within 365 days after adoption of this Order."[89]

2. Requirements of Federal Law

Neither the 2009 Permit, nor any of its supporting documents, specifically identify any federal regulations as specific authority for imposition of the GIS requirement set forth in Section F.4.b of the 2009 Permit. Moreover, the CWA and the federal regulations do not specifically require the inclusion of a MS4 map with GIS layers. 40 C.F.R. 122.26(d)(2)(iv) (B)(4) requires a description of procedures to prevent, contain and respond to spills that my discharge into the municipal separate storm sewer. 40 C.F.R. 122.26(d)(2)(iv) (B)(4) does not, however, expressly require or mention the use of a GIS MS4 map or layer as part of this program. Federal law does not require the Regional Board to impose this GIS requirement, and thus, the 2009 Permit's requirement for the inclusion of a GIS MS4 map is an unfunded state mandate.

3. Requirements from 2002 Permit

The 2002 Permit provided that each Copermittee develop or obtain an up-to-date labeled map of its entire MS4 and the corresponding drainage watershed within its jurisdiction. Although the use of GIS was recommended, the 2002 Permit did not require that Copermittees use GIS to develop their MS4 maps. *See* Section E.4.a of page E-1 of the 2002 Permit for complete text.

4. Mandated Activities

Section F.4.b of the 2009 Permit requires Copermittees to use GIS in maintaining an updated map of the entire MS4 and the corresponding drainage areas within its jurisdiction, which is **not** required under either federal law or the 2002 Permit. To comply with the GIS requirement set forth in Section F.4.b the Copermittees have or will perform the following activities to comply with the new GIS requirement:

1) Procure GIS field equipment;

2) Digitize storm drains systems and develop a GIS storm drain layer using field equipment; and

3) Maintain an updated map in the GIS system on Copermittee computer system.

[89] 40 C.F.R. § 122.26(d)(2)(iv)(A)(4).

5. Actual Increased Costs of Mandate

To comply with Section F.4.b of the 2009 Permit, the Joint Test Claimants were required to expend time in FY 2009-10 and thereafter to develop, administer and maintain a GIS storm drain layer. As set forth in the Section 6 Declarations, paragraph 6(g), the Joint Test Claimants participated in a cost-sharing effort to achieve this mapping. The Joint Test Claimants incurred costs of $7,570 in FY 2009-10 and $48,639 in FY 2010-11 to address this mandate.

J. NEW REQUIREMENTS FOR DEVELOPING AND IMPLEMENTING A RETROFITTING PROGRAM FOR EXISTING DEVELOPMENT IN SECTION F.3.D OF THE 2009 PERMIT ARE UNFUNDED STATE MANDATES

1. Challenged Program Requirement

The 2009 Permit requires Copermittees to develop and implement a new program, which is not required under federal law or previous Permits, to retrofit existing development. Specifically, the 2009 Permit requires Copermittees to identify existing developments, including municipal developments, as candidates for retrofitting, evaluate and rank candidates according to preestablished criteria, prioritize work plans for implementation according to the evaluation, cooperate with landowners to retrofit private improvements, and track and inspect retrofitting projects. Copermittees will be required to invest significant staff time and other valuable resources into developing and implementing this new and costly program. The retrofitting provisions of the 2009 Permit at issue in this claim are as follows:

> d. Retrofitting Existing Development
>
> Each Copermittee must develop and implement a retrofitting program which meets the requirements of this section. The goals of the existing development retrofitting program are to reduce impacts from hydromodification, promote LID, support riparian and aquatic habitat restoration, reduce the discharges of storm water pollutants from the MS4 to the MEP, and prevent discharges from the MS4 from causing or contributing to a violation of water quality standards. Where feasible, at the discretion of the Copermittee, the existing development retrofitting program may be coordinated with flood control projects and infrastructure improvement programs.
>
> (1) Source Identification
>
> The Copermittee must identify and inventory existing developments (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting. Potential retrofitting candidates must include but are not limited to:
>
> (a) Development that contributes pollutants of concern to a TMDL or a ESA;

(b) Receiving waters channelized or otherwise hardened;

(c) Development tributary to receiving waters that are channelized or otherwise hardened;

(d) Developments tributary to receiving waters that are significantly eroded;

(e) Developments tributary to an ASBS or SWQPA; and

(f) Development that causes hydraulic constriction.

(2) Each Copermittee shall evaluate and rank the inventoried existing developments to prioritize retrofitting. Criteria for evaluation must include but is not limited to:

(a) Feasibility;

(b) Cost effectiveness;

(c) Pollutant removal effectiveness;

(d) Impervious area potentially treated;

(e) Maintenance requirements;

(f) Landowner cooperation;

(g) Neighborhood acceptance;

(h) Aesthetic qualities; and

(i) Efficacy at addressing concern.

(3) Each Copermittee must consider the results of the evaluation in prioritizing work plans for the following year. Highly feasible projects expected to benefit water quality should be given a high priority to implement source control and treatment control BMPs. Where feasible, the retrofit projects should be designed in accordance with the SSMP requirements within sections F.1.d.(3) through F.1.d.(8). In addition, the Copermittee shall encourage retrofit projects to implement where feasible the Hydromodification requirements in Section F.1.h.

(4) When requiring retrofitting on existing development, the Copermittees will cooperate with private landowners to encourage retrofitting projects. The Copermittee may consider the following practices in cooperating and encouraging private landowners to retrofit their existing development:

(a) Demonstration retrofit projects;

(b) Retrofits on public land and easements;

(c) Education and outreach;

(d) Subsidies for retrofit projects;

(e) Requiring retrofit projects as mitigation or ordinance compliance;

(f) Public and private partnerships; and

(g) Fees for existing discharges to the MS4.

(5) The completed retrofit BMPs shall be tracked and inspected in accordance with section F.1.f.

(6) Where constraints on retrofitting preclude effective BMP deployment on existing developments at locations critical to protect receiving waters, a Copermittee may propose a regional mitigation project to improve water quality. Such regional projects may include but are not limited to:

(a) Regional water quality treatment BMPs;

(b) Urban creek or wetlands restoration and preservation;

(c) Daylighting and restoring underground creeks;

(d) Localized rainfall storage and reuse to the extent such projects are fully protective of downstream water rights;

(e) Hydromodification project; and

(f) Removal of invasive plant species.

(7) A retrofit project or regional mitigation project may qualify as a Watershed Water Quality Activity provided it meets the requirements in section G. Watershed Runoff Management Program.

2. Requirements of Federal Law

Nothing in the CWA, its regulations, or case law requires local agencies to develop, fund, and implement a retrofitting program. US EPA regulations require municipal NPDES permits to include "[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."[90] This requirement however applies only to structural flood control devices and simply would not apply to the type of comprehensive program required in the 2009 Permit.

3. Requirements from Previous Orders

Nothing in the 2002 Order requires a retrofitting program. The most analogous section in the 2002 Permit, part F.3.a.(4)(b)(i) stated, in its entirety, "Each Permittee shall evaluate feasibility of retrofitting existing structural flood control devices and retrofit where needed." Developing, funding, and implementing a retrofitting program on existing development is extensively broader and more detailed than simply retrofitting flood control devices as needed. Indeed, the 2009 Permit contains multiple requirements in comparison with the 2002 Permit's single sentence.

4. Mandated Activities

The 2009 Permit imposes at least six new requirements on Copermittees. These requirements are not required by federal law and represent state mandates for which Copermittees are entitled to reimbursement. The costs of developing and implementing the retrofitting program for existing development for which Copermittees should be reimbursed arise from the extensive list of requirements in the 2009 Permit. These requirements include:

- Identifying potential retrofitting candidates by researching and locating developments that contribute to a TMDL or ESA, that are channelized or hardened, that are tributary to receiving waters which are an ASBS, SWQPA, or are significantly eroded, or that cause hydraulic constriction;
- Evaluating the feasibility, cost effectiveness, pollutant removal effectiveness, impervious area, maintenance requirements, landowner cooperation, neighborhood acceptance, aesthetic qualities, and efficacy for each potential retrofitting candidate and then ranking each candidate accordingly;
- Prioritizing retrofit projects in the following year's municipal work plan and designing retrofit projects according to the SSMP requirements and hydromodification where feasible;
- Cooperating with and encouraging private landowners to retrofit;
- Tracking and inspecting retrofit BMPs;
- Considering regional mitigation projects where retrofitting is precluded.

5. Actual Increased Costs of Mandate

As set forth in the Section 6 Declarations, paragraph 6(f), the requirements to develop, fund and implement a retrofitting program involved work by Joint Test Claimants to review land areas

[90] 40 C.F.R. 122.26(d)(2)(iv)(A)(1).

within their jurisdictions for potential retrofitting possibilities. The increased cost associated with these efforts for the Joint Test Claimants was $9,125 in FY 2010-11 and $158,508 in FY 2011-12, plus additional costs as set forth in the Declarations.

K. NEW BMP MAINTENANCE TRACKING REQUIREMENTS IN SECTION F.1.f OF THE 2009 PERMIT ARE UNFUNDED STATE MANDATES

1. Challenged Program Requirement

The 2009 Permit requires Copermittees to develop and implement a new program, which is not required under federal law or previous Permits, to retrofit existing development. Specifically, the 2009 Permit requires Copermittees to inventory and track maintenance of recently existing and future BMPs. Copermittees will be required to invest significant staff time and other valuable resources into developing and implementing this new program. The challenged requirements from the 2009 Permit are as follows:

> f. BMP MAINTENANCE TRACKING
>
> (1) Each Copermittee must develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance within its jurisdiction since July 2001. LID BMPs implemented on a lot by lot basis at a single family residential home, such as rainbarrels, are not required to be tracked or inventoried. At a minimum, the database must include information on BMP type, location, watershed, date of construction, party responsible for maintenance, maintenance certifications or verifications, inspections, inspection findings, and corrective actions, including whether the site was referred to the Vector Control District.
>
> (2) Each Copermittee must establish a mechanism not only to track post-construction BMPs, but also to ensure that appropriate easements and ownerships are properly recorded in public records and the information is conveyed to all appropriate parties when there is a change in project or site ownership.
>
> (3) Each Copermittee must verify that approved post-construction BMPs are operating effectively and have been adequately maintained by implementing the following measures:
>
> > (a) An annual inventory of all approved BMPs within the Copermittee's jurisdiction. LID BMPs implemented on a lot by lot basis at a single family residential home, such as rainbarrels, are not required to be tracked or inventoried. The inventory must also include all BMPs approved for Priority Development Projects since July 2001;

(b) The designation of high priority BMPs. High-priority designation must include consideration of BMP size, recommended maintenance frequency, likelihood of operational and maintenance issues, location, receiving water quality, and other pertinent factors;

(c) Verify implementation, operation, and maintenance of BMPs by inspection, self-certification, surveys, or other equally effective approaches with the following conditions:

(i) The implementation, operation, and maintenance of at least 90 percent of approved and inventoried final project public and private SSMPs (a.k.a. WQMPs) must be verified annually. All post-construction BMPs shall be verified within every four year period;

(ii) Operation and maintenance verifications must be required prior to each rainy season;

(iii) All (100 percent) projects with BMPs that are high priority must be inspected by the Copermittee annually prior to each rainy season;

(iv) All (100 percent) public agency projects with BMPs must be inspected by the Copermittee annually;

(v) At least 50 percent of projects with drainage insert treatment control BMPs must be inspected by the Copermittee annually;

(vi) Appropriate follow-up measures (including re-inspections, enforcement, maintenance, etc.) must be conducted to ensure the treatment BMPs continue to reduce storm water pollutants as originally designed;

(vii) All inspections must verify effective operation and maintenance of the treatment control BMPs, as well as compliance with all ordinances, permits, and this Order; and

(viii) Inspections must note observations of vector conditions, such as mosquitoes. Where conditions are identified as contributing to mosquito production, the Copermittee must notify the Orange County Vector Control District.

2. Requirements of Federal Law

Nothing in the CWA, its regulations, or case law requires local agencies to develop, fund, and implement a retroactive BMP maintenance tracking database and inspection program. US EPA regulations require municipal NPDES permits 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".[91] This general requirement is no where near the specificity included in the 2009 Permit. Pursuant to the court's decision in *Long Beach Unified School Dist. v. State of California*, (1990) 225 Cal.App.3d 155, when the state exercises its discretion to impose requirements that exceed the express requirements of a federal law or program, it imposes a state mandate.

3. Requirements from Previous Orders

Nothing in the 2002 Permit requires the comprehensive BMP maintenance tracking program included in the 2009 Permit.

4. Mandated Activities

The 2009 Permit imposes several new requirements on Copermittees. These requirements are not required by federal law and represent state mandates for which Copermittees are entitled to reimbursement. The costs of developing the retrofitting program for existing development for which Copermittees should be reimbursed arise from the extensive list of requirements in the 2009 Permit. These requirements include:

- developing and maintaining a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance within its jurisdiction since July 2001, including information on BMP type, location, watershed, date of construction, party responsible for maintenance, maintenance certifications or verifications, inspections, inspection findings, and corrective actions, including whether the site was referred to the Vector Control District;

- verifying that approved post-construction BMPs are operating effectively and have been adequately maintained;

- conducting an annual inventory of all approved BMPs within the Copermittee's jurisdiction installed since 2001;

- designating high priority BMPs for inspection and verification; and

- verifying implementation, operation, and maintenance of BMPs by inspection, self-certification, surveys, or other equally effective means.

[91] 40 C.F.R. 122.26(d)(2)(iv)(A)(1).

5. Actual Increased Costs of Mandate

As set forth in the Section 6 Declarations, paragraph 6(e), to implement the mandates set forth in the above-described requirements, the Joint Test Claimants were required to undertake activities within their jurisdictions to inspect and verify the operation and maintenance of BMPs. The Joint Test Claimants incurred increased costs of $34,175 in FY 2010-11 and $45,717 in FY 2011-12 with respect to this mandate.

V. STATEWIDE COST ESTIMATE

This Joint Test Claim concerns a municipal stormwater permit applicable only to local agencies located in the portion of Orange County within the jurisdiction of the San Diego RWQCB. Therefore, any statewide cost estimate must, by virtue of this limitation, apply only to costs incurred by such local agencies. The Joint Test Claimants estimate that, for all requirements set forth in the 2009 Permit that are the subject of this Joint Test Claim applicable to all Copermittees, the amount of $295,100 was expended in FY 2009-10, $349,062 in FY 2010-11 and $369,344 in FY 2011-12. *See* Section 6 Declarations of the Joint Test Claimants, paragraphs (a-i) and the Declaration (Second) of Chris Crompton, paragraph 9.

VI. FUNDING SOURCES

A. THE COPERMITTEES DO NOT HAVE FEE AUTHORITY TO OFFSET THESE COSTS.

The ability of a local government to impose fees or taxes on individuals residing, owning property or conducting business within its jurisdiction is limited by various provisions within the California Constitution. Any fee or tax imposed by the Copermittees would have to comply with the relevant constitutional requirements. As explained below, those constitutional provisions would effectively prevent Copermittees from recouping the costs of implementing any of the challenged provisions by imposing fees. Any tax or property related fee to fund costs associated with the Copermittees' stormwater management program could only be imposed if approved by a vote of the electorate and would likely require approval by a supermajority or 2/3 vote.

1. Copermittees' Activities Mandated by the 2009 Permit Do Not Convey Unique Benefits on or Deal with Unique Burdens Being Imposed on the MS4 by Individual Persons, Businesses or Property Owners.

The provisions of the 2009 Permit that are the subject of this claim involve requirements to develop programs and perform activities that apply throughout the jurisdiction and are not related to services being performed directly for individual businesses property owners, or residents. The programs are intended to improve the overall water quality of receiving water which benefits all persons within the jurisdiction. It would be impossible to identify benefits that any individual resident, business or property owner within the jurisdiction is receiving that are distinct from benefits that all persons within the jurisdictions are receiving. The Copermittees, therefore, cannot develop a fee structure that allocates the total costs of complying with the mandates in the 2009 Permit to individuals that would be based on the unique benefit that such individuals are receiving from that program or activity.

The 2009 Permit is intended to deal with water quality impacts from stormwater that is being conveyed by the Copermittees' MS4 System and reduce pollutants being discharged from the MS4 to the maximum extent practicable. Most of the requirements in the 2009 Permit involve developing programs to minimize the likelihood of pollutants being carried by runoff into the MS4 and to otherwise reduce those pollutants before being discharged into receiving waters.

The vast majority of the water that enters MS4 enters as runoff after flowing over properties being put to a vast array of uses. Except in rare cases, it would be difficult to identify the volume of water or amount of pollutants attributable to an individual property owner. Unlike a sanitary sewer system, where water is being discharged directly into the sanitary sewer and the operator of a sanitary sewer can measure or reasonably approximate the volume being discharged into its conveyance system and thus approximate the burden being placed on its system by an individual property, the operator of an MS4 cannot approximate the individual burden being placed on the MS4 by an individual property owner. It is therefore difficult, if not impossible, for the Copermittees to develop a fee structure that is based on the burden that an individual property is placing on the MS4.

As explained below, because of the impossibility to develop a fee structure based on the benefits enjoyed or burdens imposed by prospective payors, and because none of the activities being performed in response to the 2009 Permit requirements at issue in this claim are being provided directly to any prospective payor, the Copermittees would not have the authority to charge a fee to recoup the costs of complying with the mandates in the 2009 Permit.

2. Article XIII C of the California Constitution Limits Copermittees' Power To Impose Fees

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

Article XIII C § 2(d)[92] now provides that:

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

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

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

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

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92 All future references are to the California Constitution unless otherwise noted.

> … 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.

Valid fees therefore must recover no more than the amount necessary to recover costs of the governmental program being funded by the fee. The person or business being charged the fee, the payor, may only be charged a fee based on the portion of the total government costs attributable to burdens being placed on the government by that payor or an amount based on the direct benefits the payor receives from the program or facility being funded by the fee. The services and work products produced by the Copermittees in response to the requirements of the 2009 Permit are not being provided directly to any individual or are related to a specific benefit conferred on any individual. Any fee charged by the Copermittees for costs related to the requirements of the 2009

Permit at issue in this claim, therefore would not meet the requirement of Article XIII C, sections 1(e) (1) and 1(e) (2) and would not be a valid fee.

3. Any Fee or Tax Charged By Copermittees Not Based On Benefits Received or Burdens Imposed By Payor Must Be Approved By a Vote of the Electorate

A fee or charge that does not fall within the seven exceptions listed in Article XIII C section 1(e) and does not meet the other requirements of Article XIII C is automatically deemed a tax, which must be approved by the voters.

Any tax that is intended to fund a specific program such as a stormwater management program is a "special tax" subject to the requirements of Article XIII A section 4, and Article XIII C section 2(d). If a fee were imposed on owners or occupants of real property that is triggered by their ownership or use of property within the jurisdiction, it would constitute a property related fee governed by Article XIII D of the California Constitution.

Article XIII A section 4 and Article XIII C section 2(d) require Special Taxes be approved by 2/3 of the voters of the portion of the jurisdiction subject to the fee.

Article XIII D requires voter approval of most property related fees. Relevant portions of Article XIII D section 3(a) provides that:

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

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

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

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

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

The case of *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351 struck down a fee that the City of Salinas attempted to enact to fund the city's stormwater

program. The court held in that case that a stormwater fee was a property related fee governed by Article XIII D and that such a fee could not be imposed unless it was approved by the voters.

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

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

The City asserted that the fee did not require voter approval requirements of Article XIII D section 6(c) on two grounds. The first ground was that the fee was not a "property related" fee but rather a "user fee" which the property owner could avoid simply by maintaining a storm water management facility on the property. The City argued that because it was possible to own property without being subject to the fee that it was not a fee imposed "as an incident of property ownership."[93] The second ground asserted by the City was that, even if the fee could be characterized as a property related fee, it was exempted from the voter approval requirements by provisions of Article XIII D § 6(c) that allow local governments to enact fees for sewer and water services without prior voter approval.[94] The court rejected both arguments.

The *Salinas* Court found that because the fee was not directly based on or measured by use, comparable to the metered use of water or the operation of a business, it could not be characterized as a use fee. Rather the fee was based on ownership or occupancy of a parcel and was based on the size of the parcel and therefore must be viewed as a property related fee.[95]

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

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93 *Howard Jarvis Taxpayers Association v. City of Salinas, supra,* at p. 1354.

94 *Ibid.*

95 *Id.* at p. 1355.

property related fee subject to the requirements of Article XIII D and not a user fee. The fee was therefore subject to the voter-approval requirements of Article XIII D unless one of the exceptions in section 6(c) of that section applied.[96]

The Court then went on to reject that the City's contention that the fee fell within exemption from the voter-approval requirement applicable to fees for sewer or water services. The court concluded that that the term "sewer services" was ambiguous in the context of both section 6(c) and Article XIII D as a whole. The court found that, because Article XIII D was enacted through the initiative process, the rule of judicial construction that an enactment must be strictly construed required the court to take a narrow reading of the sewer exemption. The court went on to hold that the sewer services exception in Article XIIID § 6(c) was applicable only to sanitary sewerage and *not* to services related to stormwater.[97]

The Court observed:

> The City itself treats storm drainage differently from its other sewer systems. The stated purpose of [the City storm drainage fee ordinance] was to comply with federal law by reducing the amount of pollutants discharged into the storm water, and by preventing the discharge of "non-storm water" into the storm drainage system, which channels storm water into state waterways … the City's storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it is discharged into natural bodies of water..[98]

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

> …[W]e cannot subscribe to the City's suggestion that the storm drainage fee is "for . . . water services." *Government Code section 53750*, enacted to explain some of the terms used in articles XIII C and XIII D, defines " '[w]ater' " as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (Gov. Code, § 53750, subd. (m).) The average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.[99]

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96 *Ibid*.

97 *Id*. at pp.1357-1358.

98 *Id.* at p. 1358.

99 *Ibid*.

4. Conclusion

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

B. FUNDING SOURCES

The Permittees are not aware of any state, federal or non-local agency funds that are available to completely fund these new activities. To the extent such funding was received, the Declarations reflect General Fund costs not covered by any such funds. In the case of the County, funding that was additional to the General Fund, including from road, parks and Flood District funding, was available for certain Permit obligations. See Section 6 Declarations, paragraph 8.

VII. PRIOR MANDATE DETERMINATIONS

A. LOS ANGELES COUNTY

In 2003 and 2007, the County of Los Angeles and 14 cities within the county (the Los Angeles claimants) submitted test claims 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21. The test claims asserted that provisions of Los Angeles Water Board Order 01 -1 82 constitute reimbursable state mandates. As is the case with the Regional Board Order that is the subject of this Test Claim, Order 01-182 was the 2001 renewal of the existing MS4 Permit. Order 01-182 is the MS4 Permit for Los Angeles County and most of its incorporated cities, and serves as an NPDES permit. The permit provisions require the Los Angeles claimants to install and maintain trash receptacles at specified transit stops and to inspect certain industrial, construction, and commercial facilities for compliance with local and/or state storm water requirements.

On September 3, 2009, the Commission issued a final decision entitled 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 ("Los Angeles Decision"). The Los Angeles Decision partially approved the test claims. The Commission found the trash receptacle requirement to be a reimbursable state mandate.

B. SAN DIEGO COUNTY

In 2007, the County of San Diego and 21 cities within the county (the San Diego claimants) submitted test claim 07-TC-09. The test claim asserted that many provisions of San Diego Water Board Order R9-2007-0001 constitute reimbursable state mandates. Order R9-2007-0001 is the 2007 renewal of the municipal storm water permit for San Diego County and many of its incorporated cities, and serves as an NPDES permit. The challenged permit provisions require the San Diego claimants to: (1) conduct and report on street sweeping activities; (2) clean and report on storm sewer cleaning; (3) implement a regional urban runoff management program; (4) assess program effectiveness; (5) conduct public education and outreach; (6) collaborate among

Permittees to implement the program; (7) implement hydromodification management plans; and (8) implement plans for low impact development.

On March 30, 2010, the Commission issued a final decision entitled In re Test Claim on: San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Case No. 07-TC-09 (San Diego Decision). The San Diego Decision partially approved the test claim. The Commission's decision took the relatively narrow Los Angeles Decision to its logical conclusion. The Commission found the following permit requirements to be reimbursable state mandates:

1. Street Sweeping
2. Street Sweeping Reporting
3. Conveyance System Cleaning
4. Conveyance System Cleaning Reporting
5. Public Education Requirements with Specific Target Communities and Specified Topics
6. Mandatory Watershed Activities and Collaboration in Watershed Urban Management Program
7. Regional Urban Runoff Management Program
8. Program Effectiveness Assessment
9. Long-term Effectiveness Assessment
10. Permittee Collaboration

The Commission also found the hydromodification and low impact development requirements in the San Diego Permit to be state mandates, but not reimbursable mandates because the local agencies could charge fees to pay for these programs.

VIII. CONCLUSION

The 2009 Permit imposes many new mandated activities and programs on the Copermittees that are not required to be imposed on local governments under federal law. As detailed above the costs to develop and implement these new programs and activities are substantial. Yet, the Copermittees do not have the ability/authority to develop and impose fees to fund any of these new State mandated programs. The costs incurred and to be incurred to comply with these state mandated programs all satisfy the criteria for reimbursable mandates, and the Copermittees respectfully request that the Commission make such findings as to each of the mandated programs and activities set forth herein, and find that they require funding under the State Constitution.

SECTION 6 DECLARATIONS
IN SUPPORT OF

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, ORDER NO. R9-2009-0002, 10-TC-11

DECLARATION OF CHRIS CROMPTON ON BEHALF OF THE COUNTY OF ORANGE IN SUPPORT OF TEST CLAIM

I, Chris Crompton, 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 would and would competently testify to the matters set forth herein under oath.

2. I am employed by the County of Orange (hereafter, "County") as Manager, Water Quality Compliance in OC Public Works. I have knowledge of the County's funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately 25 years and have managed compliance with the municipal stormwater permit program for the County of Orange and its role as Principal Permittee for the entire time.

4. I have reviewed California Regional Water Quality Control Board San Diego Region ("RWQCB"), Order No. R9-2009-0002 issued by the RWQCB on December 16, 2009 (the "Permit") and am familiar with the requirements of the Permit as it applies to the County. The County was a copermittee under that permit.

5. I have also reviewed and I am familiar with the requirements of the Order No. R9-2002-0001 issued by the San Diego RWQCB on February 13, 2002 (the "2002 Permit"). The County was a copermittee under that permit.

6. Based on my understanding of the requirements of the 2002 Permit and the requirements of the Permit, I believe that the Permit required the copermittees to perform the

following new activities, among others, that were not required by the 2002 Permit, and which are unique to local government entities:

a. Non-Stormwater Discharges: Permit Section B removes from the list of exempted discharges all landscape irrigation, irrigation water, and lawn watering discharges originating from any location or source, including residential irrigation discharges from potable water sources, which was previously included in the category of exempted discharges in the 2002 Permit. The removal of this discharge exemption required the copermittees, including the County, to undertake various tasks, which could include adoption of new ordinances to address these flows, expending staff time to create new public education and outreach materials, the tracking, monitoring, and response to and investigate of incidents and complaints of irrigation runoff and improvement of municipal irrigation systems and landscaping. In addition to these direct costs, the copermittees, including the County, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. I am informed and believe and therefore state that the County share of these costs was $163 in Fiscal Year (FY) 2009-10 and $3,099 in FY 2010-11. I am further informed and believe and therefore state that the County first incurred these costs on or about April 2, 2010. In addition, I am informed and believe and therefore state that the County incurred direct costs in response to this mandate in the amount of $16,935.95 in FY 2010-11. I am further informed and believe and therefore state that the County first incurred these costs on or about July 9, 2010.

b. Non-Stormwater Dry Weather Action Levels: Permit Sections C and F.4.(d) and (e) required the copermittees, including the County, to implement new follow-up investigation and source tracking activities triggered by exceedances of dry-weather non-stormwater action levels (NALs) according to newly established, prescriptive concentration levels, and also

required testing of new and expanded numbers of constituents as compared to the 2002 Permit. In the 2002 Permit, the copermittees, including the County, were allowed to set their own criteria for investigative and source tracking actions in the previously implemented dry weather program to meet basin standards. As a consequence of this expanded NAL monitoring and follow-up investigation program, an exceedance of any NAL required each copermittee, including the County, to investigate and identify the source of the exceedance in a timely manner. If this was not possible, the copermittees, including the County, were required to submit a prioritization plan and timeline that identified the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the copermittees were required to submit an action report dependent on the source of the pollutant exceedances following the identification process set forth in Permit Section C.2. The copermittees, including the County, collectively retained consultants on a cost-sharing basis to develop guidance on implementing the required compliance actions and to evaluate the action levels in Permit Tables 4 a-c. I am informed and believe and therefore state that the County's share of the cost for such consultant support was $5,511 in FY 2010-11 and $22,490 in FY 2011-12. I am further informed and believed and therefore state that the County first incurred costs for these mandated activities on or about July 9, 2010. In addition to these shared costs, I am informed and believe and therefore state that the County incurred additional direct increased costs of $40,148.72 in FY 2011-12 as the result of followup activities following monitoring which recorded NAL exceedances.

c. Stormwater Action Levels: Permit Section D required the copermittees, including the County, to conduct end-of-pipe assessments during wet weather monitoring to determine stormwater action level (SAL) compliance metrics at major outfalls. The copermittees were

required to develop their monitoring plans to sample a representative percentage of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceeded SALs would trigger additional monitoring in the subsequent year. Any station that did not exceed a SAL for 3 years were required to be replaced with a different station. SAL samples were required to be 24-hour time weighted composites. Future requirements included, beginning in Year 3 after the Permit adoption date, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the United States that exceeded the SALs for the pollutants listed in Table 5 of the Permit would require the copermittees, including the County, to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutant(s). Additionally, the copermittees, including the County, were required to utilize the exceedance information when adjusting and executing annual work plans. To address these requirements, the County was part of a copermittee program to share the costs for monitoring elements of this mandated program and the initial development of SAL protocols. I am informed and believe and therefore state that the County share of such costs was $6,905 in FY 2010-11 and $5,198 in FY 2011-12. I am further informed and believed and therefore state that the County first incurred costs for these mandated activities on or about July 9, 2010.

d. Low Impact Development (LID) and Hydromodification Requirements: Permit Sections F.1.d and F.1.h required the copermittees, including the County, to ensure that new development and significant redevelopment comply with low impact development ("LID") and hydromodification prevention requirements. These sections required the copermittees, including the County, to develop and implement LID principals set forth in the Permit and structural features into public agency Priority Development Projects (PDPs). In addition, the copermittees,

including the County, were required under Permit Section F.1.d.4 to establish a land development program whereby each PDP was required to implement LID BMPs. This program required County staff to undertake various steps, including to develop this program and to train municipal staff on implementation requirements. Further Permit Section F.1.d.7 required the copermittees, including the County, to develop a LID waiver program for incorporation into local SSMPs which met specific Permit requirements. Further, under Permit Section F.1.h, the copermittees, including the County, were required to collaborate to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all PDPs. Further, Permit Section F.1.h.5 required the copermittees, including the County, to implement interim hydromodification criteria prior to the development of the HMP. The copermittees, including the County, participated in a cost-sharing program with outside consultants and County staff to address these requirements. I am informed and believe and therefore state that the County's share of the cost of this program in FY 2009-10 was $62,319 and in FY 2010-11 was $18,006. I am further informed and believe and therefore state that the County first incurred these costs on or about January 22, 2010. I am further informed and believe and therefore state that most of the costs described above cannot be recouped through fees charged to private entities.

e. BMP Maintenance Tracking: Permit Section F.1.f required the copermittees, including the County, to develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance activities conducted within its jurisdiction since July 2001. This program required staff time to contact property owners for permission to inspect on-site BMPs or process self-certification statements. I am informed and believe and therefore state that the cost to the County for these requirements was $17,765.27 in

FY 2010-11 and $29,979.88 in FY 2011-12. I am further informed and believe and therefore state that the County first incurred these costs on or about July 9, 2010. I am further informed and believe and therefore state that most of the costs described above regarding previously installed BMPs cannot be recouped through fees charged to private entities.

f. Retrofitting Existing Development: Permit Section F.3.d required the copermittees, including the County, to develop and implement a retrofitting program to meet the requirements set forth in that section. This new mandated program required the copermittees, including the County, to identify and inventory areas of existing development (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting; evaluate and rank the inventoried existing developments to prioritize retrofitting; consider the results of the evaluation in prioritizing work plans for the following year; and track and inspect completed retrofit BMPs. I am informed and believe and therefore state that while the County did not incur direct costs for these requirements in FY 2010-11 or FY 2011-12, the County incurred costs in subsequent fiscal years during the term of the Permit.

g. Maintain MS4 Map: Permit Section F.4.b required the copermittees, including the County, to maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction, including the use of Geographical Information System (GIS) technology. The Copermittees, including the County, engaged in a cost-sharing effort to achieve this mapping. I am informed and believe, and therefore state, that the County's share of such costs in FY 2009-10 was $3,071 and that the County's share of such costs in FY 2010-11 was $2,753. I am further informed and believe and therefore state that the County first incurred these costs on or about January 8, 2010.

h. Reporting Requirements

(i) Program Effectiveness Assessment and Reporting and Jurisdictional Runoff Management Program (JRMP) Annual Reports: In addition to what was required in the 2002 Permit, Permit Section J required the copermittees, including the County, to develop a work plan, an effectiveness assessment system based on CASQA outcome levels, and an annual assessment review to address their high priority water quality problems in an iterative manner over the life of the Permit. The minimum requirements of this provision are set forth in pages Permit Section J at 79-82. Further, Permit Section F.1.d(7)(i) required the copermittees, including the County, to generate upgraded individual JRMP Annual Reports which cover implementation of their jurisdictional activities during the past annual reporting period. Additional requirements in the Permit compared to the 2002 Permit included: reporting of PDPs choosing to participate in the LID waiver program, including details of the feasibility analysis, implemented BMPs and funding details with the second year JRMP Annual Report. In addition, pursuant to Permit Section F.3.a.(4)(c), each copermittee, including the County, was required to evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device, and to submit this inventory and evaluation to the RWQCB. Such evaluation was also required to include a Reporting Checklist (Permit Section K.3.a.(3) and Attachment D). The copermittees, including the County, participated in a cost-sharing program to develop updated reporting templates, conduct assessments for the Unified Annual Report and to develop watershed workplans. I am informed and believe and therefore state that the County's share of such costs in FY 2010-11 was $5,801 and that the costs in FY

2011-12 were $3,748. I am further informed and believe and therefore state that the County first incurred costs for these mandates on or about July 9, 2010.

(ii) Watershed Workplan Public Meetings: Permit Sections K.1.b.4 and G.6 required the copermittees, including the County, to hold an annual public Watershed Workplan Review Meetings to present updates to the Watershed Workplan. This public meeting requirement was not contained in the 2002 Permit. The copermittees, including the County, participated in a cost-sharing effort to undertake these activities. I am informed and believe and therefore state that the County's cost share for such requirements was $334 in FY 2011-12 and $104 in FY 2012-13. I am further informed and believe and therefore state that the County first incurred costs with respect to such mandated activities on or about October 29, 2010.

i. Total Maximum Daily Loads (TMDLs): Permit Section I.1 required the County to comply with a series of new numeric effluent limits based on waste load allocations for the Baby Beach Bacterial Indicator TMDL. These new program requirements involved the imposition of numeric effluent limits from wasteload allocations from this TMDL, as set forth in Permit Tables 6, 7 and 8. This TMDL-related program was not required as a part of the 2002 Permit and thus constitutes a new program under the Permit. I am informed and believe and therefore state that the County's share of the costs for this mandated program was $28,575.91 in FY 2009-10 and $31,646.10 in FY 2011-12. I am further informed and believe and therefore state that the County first incurred such costs on or about January 22, 2010.

7. The County first incurred costs under the Permit in FY 2009-10, which began on July 1, 2009.

8. I am informed and believe and therefore state that there are no dedicated state, federal or regional funds that were available to pay for any of these new programs/activities. The County, in addition to its General Fund, had sources of other County funding, including from road, parks and Flood District funding, for certain Permit obligations. To the extent such fees were employed and/or such funds appropriated for such obligations, they would not be available for other County obligations. I am informed and believe and therefore state that I am not aware of any other fee or tax which the County would have the discretion to impose under California law to cover any portion of the cost of these new programs/activities.

Executed January 6 2017 at Orange, California.

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

Chris Crompton
Manager, Water Quality Compliance
OC Public Works

DECLARATION (SECOND) OF CHRIS CROMPTON ON BEHALF OF THE COUNTY OF ORANGE IN SUPPORT OF TEST CLAIM

I, Chris Crompton, 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 competently testify to the matters set forth herein under oath.

2. I am employed by the County of Orange ("County") as Manager, Water Quality Compliance at OC Public Works. I have knowledge of the County's funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately 25 years and have managed compliance with the municipal stormwater permit program for the County of Orange and its role as Principal Permittee for the entire time.

4. I am familiar with the requirements of California Regional Water Quality Control Board, Santa Ana Region ("RWQCB") Order No. R8-2009-0030, issued by the RWQCB on May 22, 2009 (the "Permit"). The County is a permittee under that Permit.

5. I am also familiar with the matters set forth in the Test Claim filed before the Commission on State Mandates regarding the Permit and the municipalities that are Joint Test Claimants in that Test Claim.

6. The County was designated as the Principal Permittee in the Permit. In that role, the County has, among other things, responsibility for budgeting, contracting with consultants and other third parties, and the invoicing of permittees for their share of the costs of programs

subject to cost-sharing among the permittees. In my role as Manager, I am familiar with these processes and how permittees are invoiced.

7. The cost-sharing programs in which permittees under the Permit participated can be divided into two main categories: (a) compliance with Total Maximum Daily Load ("TMDL") provisions applicable to Baby Beach, set forth in Paragraph 6(i) of my Declaration on behalf of the County in this Test Claim; and (b) non-TMDL compliance activities, including those activities identified in Paragraph 6(a)-(h) of my Declaration on behalf of the County in this Test Claim.

8. I have reviewed financial records maintained by the County in its regular business relating to the cost-sharing programs. I have also reviewed the dates on which the Joint Test Claimants submitted payment for such cost-sharing amounts. Based on that review, I understand and believe and therefore state that:

a. With regard to Baby Beach TMDL requirements, the County received payment from the City of Dana Point on or about August 12, 2011.

b. With regard to the non-TMDL requirements of the Permit that were subject to cost sharing, for requirements for which compliance efforts commenced in the second half of FY 2009-10, the County received payment from the Joint Test Claimants during a period commencing on or about December 21, 2009 and ending on or about January 21, 2010. For Permit compliance efforts which commenced in FY 2010-11, the County received payment from the Joint Test Claimants during a period commencing on or about January 18, 2011 and ending on or about March 3, 2011. For Permit compliance efforts which commenced in FY 2011-12, the County received payment from the Joint Test Claimants during a period commencing on or about January 17, 2012 and ending on or about July 22, 2013.

9. From my review of the financial records of the cost-sharing programs, I determined that the total amount paid by the permittees for the Baby Beach TMDL in FY 2009-10 was $28,575.91, and in FY 2010-11 was $33,652.65. For the other cost-sharing requirements at issue in the Test Claim, the total amount paid by the permittees in FY 2009-10 was $256,350, in FY 2010-11 was $164,535.91 and FY 2011-12 was $124,240.65.

10. Documents reflecting the information set forth in this Declaration, including documents that I prepared or caused to be prepared, were distributed to representatives of the Joint Test Claimants in connection with the preparation of declarations in support of the Test Claim.

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

Executed January 6 2017 at Orange, California.

Chris Crompton
Manager, Water Quality Compliance
OC Public Works

DECLARATION OF LISA ZAWASKI ON BEHALF OF THE CITY OF DANA POINT IN SUPPORT OF TEST CLAIM

I, Lisa Zawaski, 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 would and would competently testify to the matters set forth herein under oath.

2. I am employed by the City of Dana Point (hereafter, "City") as the Senior Water Quality Engineer. I have knowledge of the requirements set forth in this declaration and the City's sources of funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately eleven (11) years. My duties include management of the City's storm water program.

4. I have reviewed California Regional Water Quality Control Board San Diego Region ("RWQCB"), Order No. R9-2009-0002 issued by the RWQCB on December 16, 2009 (the "Permit") and am familiar with the requirements of the Permit as it applies to the City. The City was a copermittee under that permit.

5. I have also reviewed and I am familiar with the requirements of the Order No. R9-2002-0001 issued by the San Diego RWQCB on February 13, 2002 (the "2002 Permit"). The City was a copermittee under that permit.

6. Based on my understanding of the requirements of the 2002 Permit and the requirements of the Permit, I believe that the Permit required the copermittees to perform the following new activities, among others, that were not required by the 2002 Permit, and which are unique to local government entities:

a. Non-Stormwater Discharges: Permit Section B removes from the list of exempted discharges all landscape irrigation, irrigation water, and lawn watering discharges originating from any location or source, including residential irrigation discharges from potable water sources, which was previously included in the category of exempted discharges in the 2002 Permit. The removal of this discharge exemption required the copermittees, including the City, to undertake various tasks, which could include adoption of new ordinances to address these flows, expending staff time to create new public education and outreach materials, the tracking, monitoring, and response to and investigate of incidents and complaints of irrigation runoff and improvement of municipal irrigation systems and landscaping. I am informed and believe and therefore state that the City had costs of $21,040 in Fiscal Year (FY) 2010-11 and $20,000 in FY2011-12 and first incurred these costs on or about July 6, 2010. In addition to these City costs, the copermittees, including the City, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. I am informed and believe and therefore state that the City's share of these costs was $27 in Fiscal Year (FY) 2009-10 and $519 in FY 2010-11. I am further informed and believe and therefore state that the City first incurred these costs when it was paid an invoice from the County for these and other services on or about December 21, 2009.

b. Non-Stormwater Dry Weather Action Levels: Permit Sections C and F.4.(d) and (e) required the copermittees, including the City, to implement new follow-up investigation and source tracking activities triggered by exceedances of dry-weather non-stormwater action levels (NALs) according to newly established, prescriptive concentration levels, and also required testing of new and expanded numbers of constituents as compared to the 2002 Permit. In the 2002 Permit, the copermittees, including the City, were allowed to set their own criteria for investigative and source tracking actions in the previously implemented dry weather program to meet basin

standards. As a consequence of this expanded NAL monitoring and follow-up investigation program, an exceedance of any NAL required each copermittee, including the City, to investigate and identify the source of the exceedance in a timely manner. If this was not possible, the copermittees, including the City, were required to submit a prioritization plan and timeline that identified the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the Copermittees were required to submit an action report dependent on the source of the pollutant exceedances following the identification process set forth in Permit Section C.2. The copermittees, including the City, collectively retained consultants on a cost-sharing basis to develop guidance on implementing the required compliance actions and to evaluate the action levels in Permit Tables 4 a-c. I am informed and believe and therefore state that the City's share of the cost for such consultant support was $922 in FY 2010-11 and $3,764 in FY 2011-12. I am further informed and believed and therefore state that the City first incurred costs for these mandated activities when it paid an invoice from the County for these and other services on or about January 24, 2011. In addition to the cost-share costs, I am informed and believe and therefore state that the City had costs of $3,125 in FY 2011-12 and first incurred these costs for such requirements on or about August 23, 2011.

c. Stormwater Action Levels: Permit Section D required the copermittees, including the City, to conduct end-of-pipe assessments during wet weather monitoring to determine stormwater action level (SAL) compliance metrics at major outfalls. The copermittees were required to develop their monitoring plans to sample a representative percentage of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceeded SALs would trigger additional monitoring in the subsequent year. Any station that did not exceed a SAL for 3 years were required to be replaced with a different station. SAL samples were required to be 24-hour

time weighted composites. Future requirements included, beginning in Year 3 after the Permit adoption date, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the United States that exceeded the SALs for the pollutants listed in Table 5 of the Permit would require the copermittees, including the City, to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutant(s). Additionally, the copermittees, including the City, were required to utilize the exceedance information when adjusting and executing annual work plans. To address these requirements, the City was part of a copermittee program to share the costs for monitoring elements of this mandated program and the initial development of SAL protocols. I am informed and believe and therefore state that the City's share of such costs was $1,156 in FY 2010-11 and $870 in FY 2011-12. I am further informed and believed and therefore state that the City first incurred costs for these mandated activities when it paid a County invoice for such activities and other requirements on or about January 24, 2011.

d. Low Impact Development (LID) and Hydromodification Requirements: Permit Sections F.1.d and F.1.h required the copermittees, including the City, to ensure that new development and significant redevelopment comply with low impact development ("LID") and hydromodification prevention requirements. These sections required the copermittees, including the City, to develop and implement LID principals set forth in the Permit and structural features into public agency Priority Development Projects (PDPs). In addition, the copermittees, including the City, were required under Permit Section F.1.d.4 to establish a land development program whereby each PDP was required to implement LID BMPs. This program required City staff to undertake various steps, including to develop this program and to train municipal staff on implementation requirements. Further Permit Section F.1.d.7 required the copermittees, including

the City, to develop an LID waiver program for incorporation into local SSMPs which met specific Permit requirements. Further, under Permit Section F.1.h, the copermittees, including the City, were required to collaborate to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all PDPs. Further, Permit Section F.1.h.5 required the copermittees, including the City, to implement interim hydromodification criteria prior to the development of the HMP. The copermittees, including the City, participated in a cost-sharing program with outside consultants and County staff to address these requirements. I am informed and believe and therefore state that the City's share of the cost of this program in FY 2009-10 was $10, 431 and in FY 2011-12 was $3,014. I am further informed and believe and therefore state that the City first incurred these costs when it paid an invoice to the County for these and other services on or about December 21, 2009. In addition to the cost-share costs, I am informed and believe and therefore state that the City had costs of $4,500 in FY2010-11 and $2,375 in FY2011-12 and first incurred these costs on or about August 1, 2010. I am further informed and believe and therefore state that most of the costs described above cannot be recouped through fees charged to private entities.

e. BMP Maintenance Tracking: Permit Section F.1.f required the copermittees, including the City, to develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance activities conducted within its jurisdiction since July 2001. This program required staff time to contact property owners for permission to inspect on-site BMPs or process self-certification statements. I am informed and believe and therefore state that the cost to the City for these requirements was $8,125 in FY 2010-11 and $7,375 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred these costs on or about June 1, 2010. I am further informed and believe and therefore

state that most of the costs described above regarding previously installed BMPs cannot be recouped through fees charged to private entities.

f. Retrofitting Existing Development: Permit Section F.3.d required the copermittees, including the City, to develop and implement a retrofitting program to meet the requirements set forth in that section. This new mandated program required the copermittees, including the City, to identify and inventory areas of existing development (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting; evaluate and rank the inventoried existing developments to prioritize retrofitting; consider the results of the evaluation in prioritizing work plans for the following year; and track and inspect completed retrofit BMPs. I am informed and believe and therefore state that the City's costs for these requirements was $38,250 in FY 2012-13. I am further informed and believe and therefore state that the City first incurred costs for these mandated activities on or about June 30, 2013.

g. Maintain MS4 Map: Permit Section F.4.b required the copermittees, including the City, to maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction, including the use of Geographical Information System (GIS) technology. The Copermittees, including the City, engaged in a cost-sharing effort to achieve this mapping. I am informed and believe, and therefore state that the City's share of such costs in FY 2009-10 was $514 and that the City's share of such costs in FY 2010-11 was $461. I am further informed and believe and therefore state that the City first incurred these costs on or about December 21, 2009 when it paid an invoice from the County for those services and others. In addition to the cost-share costs, I am informed and believe and therefore state, that the City had costs of $5,000 in FY 2010-11 and $4,000 in FY 2011-12 and first incurred these costs on or about July 27, 2010.

h. Reporting Requirements

(i) Program Effectiveness Assessment and Reporting and Jurisdictional Runoff Management Program (JRMP) Annual Reports: In addition to what was required in the 2002 Permit, Permit Section J required the copermittees, including the City, to develop a work plan, an effectiveness assessment system based on CASQA outcome levels, and an annual assessment review to address their high priority water quality problems in an iterative manner over the life of the Permit. The minimum requirements of this provision are set forth in pages Permit Section J at 79-82. Further, Permit Section F.1.d(7)(i) required the copermittees, including the City, to generate upgraded individual JRMP Annual Reports which cover implementation of their jurisdictional activities during the past annual reporting period. Additional requirements in the Permit compared to the 2002 Permit included: reporting of PDPs choosing to participate in the LID waiver program, including details of the feasibility analysis, implemented BMPs and funding details with the second year JRMP Annual Report. In addition, pursuant to Permit Section F.3.a.(4)(c), each copermittee, including the City, was required to evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device, and to submit this inventory and evaluation to the RWQCB. Such evaluation was also required to include a Reporting Checklist (Permit Section K.3.a.(3) and Attachment D). I am informed and believe and therefore state that the City had costs of $1,750 in FY 2009-10 and $4,375 in FY 2010-11 and first incurred these costs on or about April 29, 2010. In addition to the City costs, the copermittees, including the City, participated in a cost-sharing program to develop updated

reporting templates, conduct assessments for the Unified Annual Report and to develop watershed workplans. I am informed and believe and therefore state that the City's share of such costs in FY 2010-11 was $971 and that the costs in FY 2011-12 were $627. I am further informed and believe and therefore state that the City first incurred costs for these mandates when it paid an invoice from the County for these and other services on or about January 24, 2011.

(ii) Watershed Workplan Public Meetings: Permit Sections K.1.b.4 and G.6 required the copermittees, including the City, to hold an annual public Watershed Workplan Review Meetings to present updates to the Watershed Workplan. This public meeting requirement was not contained in the 2002 Permit. I am informed and believe and therefore state that the City had costs of $2,500 in FY 2011-12 and first incurred these costs on or about November 1, 2011. The copermittees, including the County, also participated in a cost-sharing effort to undertake these activities. I am informed and believe and therefore state that the city's cost share for such requirements was $56 in FY 2011-12 and $17 in FY 2012-13. I am further informed and believe and therefore state that the City first incurred costs with respect to such mandated activities when it paid an invoice from the County for these and other services on or about July 22, 2013.

i. Total Maximum Daily Loads (TMDLS): Permit Section I.1 required the City to comply with a series of new numeric effluent limits based on waste load allocations for the Baby Beach Bacterial Indicator TMDL. These new program requirements involved the imposition of numeric effluent limits from wasteload allocations from this TMDL, as set forth in Permit Tables 6, 7 and 8. This TMDL-related program was not required as a part of the 2002 Permit and thus constitutes a new program under the Permit. I am informed and believe and therefore state that

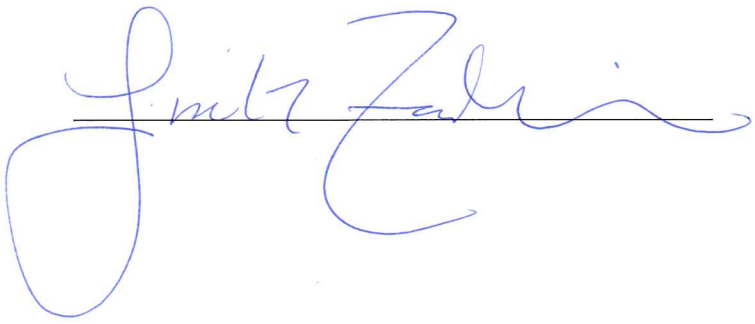
the City had costs of $3,125 in FY 2010-11 and first incurred these costs on or about November 1, 2010. The Baby Beach Watershed Agencies, including the City and County, also participated in a cost-sharing effort to undertake these activities. I am informed and believe and therefore state that the City's share of the costs for this mandated program was $2,006.54 in FY 2010-11 and $1,719.20 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred such costs when it paid an invoice from the County for such costs on or about August 12, 2011.

7. The City first incurred costs under the Permit in FY 2009-10, which began on July 1, 2009.

8. I am informed and believe that there are no dedicated State, Federal or regional funds that are or will be available to pay for any of these new programs or activities. I am not aware of any fee or tax which the City would have the discretion to impose under California law in order to recover any portion of these new programs or activities. I am further informed and believe that the only available sources to pay for these new programs or activities are and will be the City's General Fund.

Executed January 4, 2017 at Dana Point, California.

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



DECLARATION OF KENNETH H. ROSENFIELD, P.E.

FOR THE CITY OF LAGUNA HILLS

DECLARATION OF KENNETH H. ROSENFIELD ON BEHALF OF THE CITY OF LAGUNA HILLS, CALIFORNIA IN SUPPORT OF TEST CLAIM

I, Kenneth H. Rosenfield, 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 would and would competently testify to the matters set forth herein under oath.

2. I am employed by the City of Laguna Hills (hereafter, "City") as Director of Public Services and City Engineer and I have knowledge of the requirements set forth in this declaration and the City's sources of funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately 21 years. My duties include the implementation of the NPDES program, maintenance of all public facilities, traffic engineering, civil engineering and capital improvement construction programs.

4. I have reviewed California Regional Water Quality Control Board San Diego Region ("RWQCB"), Order No. R9-2009-0002 issued by the RWQCB on December 16, 2009 (the "Permit") and am familiar with the requirements of the Permit as it applies to the City. The City was a copermittee under that permit.

5. I have also reviewed and I am familiar with the requirements of the Order No. R9-2002-0001 issued by the San Diego RWQCB on February 13, 2002 (the "2002 Permit"). The City was a copermittee under that permit.

6. Based on my understanding of the requirements of the 2002 Permit and the requirements of the Permit, I believe that the Permit required the copermittees to perform the

following new activities, among others, that were not required by the 2002 Permit, and which are unique to local government entities:

a. Non-Stormwater Discharges: Permit Section B removes from the list of exempted discharges all landscape irrigation, irrigation water, and lawn watering discharges originating from any location or source, including residential irrigation discharges from potable water sources, which was previously included in the category of exempted discharges in the 2002 Permit. The removal of this discharge exemption required the copermittees, including the City, to undertake various tasks, which could include adoption of new ordinances to address these flows, expending staff time to create new public education and outreach materials, the tracking, monitoring, and response to and investigate of incidents and complaints of irrigation runoff and improvement of municipal irrigation systems and landscaping. In addition to these direct costs, the copermittees, including the City, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. I am informed and believe and therefore state that the City's share of these costs was $21 in Fiscal Year (FY) 2009-10 and $406 in FY 2010-11. I am further informed and believe and therefore state that the City first incurred these costs when it was paid an invoice from the County for these and other services on or about January 19, 2010.

b. Non-Stormwater Dry Weather Action Levels: Permit Sections C and F.4.(d) and (e) required the copermittees, including the City, to implement new follow-up investigation and source tracking activities triggered by exceedances of dry-weather non-stormwater action levels (NALs) according to newly established, prescriptive concentration levels, and also required testing of new and expanded numbers of constituents as compared to the 2002 Permit. In the 2002 Permit, the copermittees, including the City, were allowed to set their own criteria for investigative and source tracking actions in the previously implemented dry weather program to meet basin

standards. As a consequence of this expanded NAL monitoring and follow-up investigation program, an exceedance of any NAL required each copermittee, including the City, to investigate and identify the source of the exceedance in a timely manner. If this was not possible, the copermittees, including the City, were required to submit a prioritization plan and timeline that identified the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the Copermittees were required to submit an action report dependent on the source of the pollutant exceedances following the identification process set forth in Permit Section C.2. The copermittees, including the City, collectively retained consultants on a cost-sharing basis to develop guidance on implementing the required compliance actions and to evaluate the action levels in Permit Tables 4 a-c. I am informed and believe and therefore state that the City's share of the cost for such consultant support was $721 in FY 2010-11 and $2,943 in FY 2011-12. I am further informed and believed and therefore state that the City first incurred costs for these mandated activities when it paid an invoice from the County for these and other services on or about January 31, 2011.

c. Stormwater Action Levels: Permit Section D required the copermittees, including the City, to conduct end-of-pipe assessments during wet weather monitoring to determine stormwater action level (SAL) compliance metrics at major outfalls. The copermittees were required to develop their monitoring plans to sample a representative percentage of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceeded SALs would trigger additional monitoring in the subsequent year. Any station that did not exceed a SAL for 3 years were required to be replaced with a different station. SAL samples were required to be 24-hour time weighted composites. Future requirements included, beginning in Year 3 after the Permit adoption date, a running average of twenty percent or greater of exceedances of any discharge of

storm water from the MS4 to waters of the United States that exceeded the SALs for the pollutants listed in Table 5 of the Permit would require the copermittees, including the City, to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutant(s). Additionally, the copermittees, including the City, were required to utilize the exceedance information when adjusting and executing annual work plans. To address these requirements, the City was part of a copermittee program to share the costs for monitoring elements of this mandated program and the initial development of SAL protocols. I am informed and believe and therefore state that the City's share of such costs was $904 in FY 2010-11 and $680 in FY 2011-12. I am further informed and believed and therefore state that the City first incurred costs for these mandated activities when it paid a County invoice for such activities and other requirements on or about January 31, 2011.

d. Low Impact Development (LID) and Hydromodification Requirements: Permit Sections F.1.d and F.1.h required the copermittees, including the City, to ensure that new development and significant redevelopment comply with low impact development ("LID") and hydromodification prevention requirements. These sections required the copermittees, including the City, to develop and implement LID principals set forth in the Permit and structural features into public agency Priority Development Projects (PDPs). In addition, the copermittees, including the City, were required under Permit Section F.1.d.4 to establish a land development program whereby each PDP was required to implement LID BMPs. This program required City staff to undertake various steps, including to develop this program and to train municipal staff on implementation requirements. Further Permit Section F.1.d.7 required the copermittees, including the City, to develop an LID waiver program for incorporation into local SSMPs which met specific Permit requirements. Further, under Permit Section F.1.h, the copermittees, including the City,

were required to collaborate to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all PDPs. Further, Permit Section F.1.h.5 required the copermittees, including the City, to implement interim hydromodification criteria prior to the development of the HMP. The copermittees, including the City, participated in a cost-sharing program with outside consultants and County staff to address these requirements. I am informed and believe and therefore state that the City's share of the cost of this program in FY 2009-10 was $8,155 and in FY 2011-12 was $2,356. I am further informed and believe and therefore state that the City first incurred these costs when it paid an invoice to the County for these and other services on or about January 19, 2010. I am further informed and believe and therefore state that most of the costs described above cannot be recouped through fees charged to private entities.

e. BMP Maintenance Tracking: Permit Section F.1.f required the copermittees, including the City, to develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance activities conducted within its jurisdiction since July 2001. This program required staff time to contact property owners for permission to inspect on-site BMPs or process self-certification statements. I am informed and believe and therefore state that the City did not incur any costs pertaining to these requirements in FY 2010-11 or in FY 2011-12, but that the City did incur costs pertaining to these items in subsequent fiscal years during the Permit term. I am further informed and believe and therefore state that most of the costs incurred by the City during the Permit term regarding previously installed BMPs cannot be recouped through fees charged to private entities.

f. Retrofitting Existing Development: Permit Section F.3.d required the copermittees, including the City, to develop and implement a retrofitting program to meet the requirements set

forth in that section. This new mandated program required the copermittees, including the City, to identify and inventory areas of existing development (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting; evaluate and rank the inventoried existing developments to prioritize retrofitting; consider the results of the evaluation in prioritizing work plans for the following year; and track and inspect completed retrofit BMPs. I am informed and believe and therefore state that the City did not incur any costs pertaining to these requirements in FY 2010-11 or in FY 2011-12, but that the City did incur costs pertaining to these items in subsequent fiscal years during the Permit term.

g. Maintain MS4 Map: Permit Section F.4.b required the copermittees, including the City, to maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction, including the use of Geographical Information System (GIS) technology. The Copermittees, including the City, engaged in a cost-sharing effort to achieve this mapping. I am informed and believe, and therefore state, that the City's share of such costs in FY 2009-10 was $402 and that the City's share of such costs in FY 2010-11 was $360. I am further informed and believe and therefore state that the City first incurred these costs on or about January 19, 2010 when it paid an invoice from the County for those services and others.

h. Reporting Requirements

(i) Program Effectiveness Assessment and Reporting and Jurisdictional Runoff Management Program (JRMP) Annual Reports: In addition to what was required in the 2002 Permit, Permit Section J required the copermittees, including the City, to develop a work plan, an effectiveness assessment system based on CASQA outcome levels, and an annual assessment review to address their high priority water quality problems in an iterative manner over the life of the Permit. The minimum requirements of this provision

are set forth in pages Permit Section J at 79-82. Further, Permit Section F.1.d(7)(i) required the copermittees, including the City, to generate upgraded individual JRMP Annual Reports which cover implementation of their jurisdictional activities during the past annual reporting period. Additional requirements in the Permit compared to the 2002 Permit included: reporting of PDPs choosing to participate in the LID waiver program, including details of the feasibility analysis, implemented BMPs and funding details with the second year JRMP Annual Report. In addition, pursuant to Permit Section F.3.a.(4)(c), each copermittee, including the City, was required to evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device, and to submit this inventory and evaluation to the RWQCB. Such evaluation was also required to include a Reporting Checklist (Permit Section K.3.a.(3) and Attachment D). The copermittees, including the City, participated in a cost-sharing program to develop updated reporting templates, conduct assessments for the Unified Annual Report and to develop watershed workplans. I am informed and believe and therefore state that the City's share of such costs in FY 2010-11 was $759 and that the share in FY 2011-12 was $490. I am further informed and believe and therefore state that the City first incurred costs for these mandates when it paid an invoice from the County for these and other services on or about January 31, 2011.

(ii) Watershed Workplan Public Meetings: Permit Sections K.1.b.4 and G.6 required the copermittees, including the City, to hold an annual public Watershed Workplan Review Meetings to present updates to the Watershed Workplan. This public meeting requirement was not contained in the 2002 Permit. The copermittees, including

the County, participated in a cost-sharing effort to undertake these activities. I am informed and believe and therefore state that the city's cost share for such requirements was $44 in FY 2011-12 and $14 in FY 2012-13. I am further informed and believe and therefore state that the City first incurred costs with respect to such mandated activities when it paid an invoice from the County for these and other services on or about January 30, 2012.

7. The City first incurred costs under the Permit in FY 2009-10, which commenced on July 1, 2009.

8. I am informed and believe that there are no dedicated State, Federal or regional funds that are or will be available to pay for any of these new programs or activities. I am not aware of any fee or tax which the City would have the discretion to impose under California law in order to recover any portion of these new programs or activities. I am further informed and believe that the only available sources to pay for these new programs or activities are and will be the City's General Fund.

Executed this 4th day of January, 2017 at Laguna Hills, California.

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

Kenneth H. Rosenfield, P.E.
Director of Public Services and City Engineer
City of Laguna Hills, California

DECLARATION OF NANCY PALMER ON BEHALF OF THE CITY OF LAGUNA NIGUEL IN SUPPORT OF TEST CLAIM

I, Nancy Palmer, 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 competently testify to the matters set forth herein under oath.

2. I am employed by the City of Laguna Niguel (hereafter, "City") as the City Landscape Architect/Environmental Programs Manager. I have knowledge of the requirements set forth in this declaration and the City's sources of funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately 10 years. My duties include oversight of the City's National Pollutant Discharge Elimination system activities, and managing of capital improvement projects relating to urban runoff and environmental restoration .

4. I have reviewed California Regional Water Quality Control Board San Diego Region ("RWQCB"), Order No. R9-2009-0002 issued by the RWQCB on December 16, 2009 (the "Permit") and am familiar with the requirements of the Permit as it applies to the City. The City was a copermittee under that permit.

5. I have also reviewed and I am familiar with the requirements of the Order No. R9-2002-0001 issued by the San Diego RWQCB on February 13, 2002 (the "2002 Permit"). The City was a copermittee under that permit.

6. Based on my understanding of the requirements of the 2002 Permit and the requirements of the Permit, I believe that the Permit required the copermittees to perform the

following new activities, among others, that were not required by the 2002 Permit, and which are unique to local government entities:

a. Non-Stormwater Discharges: Permit Section B removes from the list of exempted discharges all landscape irrigation, irrigation water, and lawn watering discharges originating from any location or source, including residential irrigation discharges from potable water sources, which was previously included in the category of exempted discharges in the 2002 Permit. The removal of this discharge exemption required the copermittees, including the City, to undertake various tasks, which could include adoption of new ordinances to address these flows; expending of staff time to create new public education and outreach programs; tracking, monitoring, responding to and investigation of incidents and complaints of irrigation runoff; and improvement of municipal irrigation systems and landscaping. I am informed and believe and therefore state that efforts to address such requirements resulted in direct expenditures by the City of $9,161 in increased staff allocation costs in Fiscal Year (FY) 2010-11, $22,432 in increased staff allocation time and design costs for the Crown Valley Parkway Medians Runoff Elimination Project in FY 2011-12, and $28,206 in design costs for the Crown Valley Parkway Medians Runoff Elimination Project in FY 2012-13. The City first incurred direct costs under the Permit in FY 2010-11, which commenced on July 1, 2010. In addition to these direct costs, the copermittees, including the City, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. I am informed and believe and therefore state that the City's share of these costs was $55 in FY 2009-10 and $1,052 in FY 2010-11. I am further informed and believe and therefore state that the City first incurred these shared costs when it paid an invoice from the County for these and other services on or about January 11, 2010.

b. Non-Stormwater Dry Weather Action Levels: Permit Sections C and F.4.(d) and (e) required the copermittees, including the City, to implement new follow-up investigation and source tracking activities triggered by exceedances of dry-weather non-stormwater action levels (NALs) according to newly established, prescriptive concentration levels; and also required testing of new and expanded numbers of constituents as compared to the 2002 Permit. In the 2002 Permit, the copermittees, including the City, were allowed to set their own criteria for investigative and source tracking actions in the previously implemented dry weather program to meet Basin Plan standards. As a consequence of this expanded NAL monitoring and follow-up investigation program, an exceedance of any NAL required each copermittee, including the City, to investigate and identify the source of the exceedance in a timely manner. If this was not possible, the copermittees, including the City, were required to submit a prioritization plan and timeline that identified the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the Copermittees were required to submit an action report dependent on the source of the pollutant exceedances following the identification process set forth in Permit Section C.2. I am informed and believe and therefore state that efforts to address such requirements have resulted in direct expenditures by the City of $914 in increased staff allocation costs in FY 2010-11, and in direct expenditures by the City of $479 in increased staff allocation costs and $600 in laboratory analytical costs in FY 2011-12. The City first incurred direct costs under the Permit in FY 2010-11, which commenced on July 1, 2010. In addition to these direct costs, the copermittees, including the City, collectively retained consultants on a cost-sharing basis to develop guidance on implementing the required compliance actions and to evaluate the action levels in Permit Tables 4 a-c. I am informed and believe and therefore state that the City's share of the cost for

such consultant support was $1,870 in FY 2010-11 and $7,634 in FY 2011-12. I am further informed and believed and therefore state that the City first incurred shared costs for these mandated activities when it paid an invoice from the County for these and other services on or about December 23, 2010.

c. Stormwater Action Levels: Permit Section D required the copermittees, including the City, to conduct end-of-pipe assessments during wet weather monitoring to determine stormwater action level (SAL) compliance metrics at major outfalls. The copermittees were required to develop their monitoring plans to sample a representative percentage of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceeded SALs would trigger additional monitoring in the subsequent year. Any station that did not exceed a SAL for 3 years were required to be replaced with a different station. SAL samples were required to be 24-hour time weighted composites. Future requirements included, beginning in Year 3 after the Permit adoption date, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the United States that exceeded the SALs for the pollutants listed in Table 5 of the Permit would require the copermittees, including the City, to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutant(s). Additionally, the copermittees, including the City, were required to utilize the exceedance information when adjusting and executing annual work plans. To address these requirements, the City was part of a copermittee program to share the costs for monitoring elements of this mandated program and the initial development of SAL protocols. I am informed and believe and therefore state that the City's share of such costs was $2,344 in FY 2010-11 and $1,764 in FY 2011-12. I am further informed and believed and therefore state that the City first incurred shared costs for these mandated

activities when it paid a County invoice for such activities and other requirements on or about December 23, 2010.

d. Low Impact Development (LID) and Hydromodification Requirements: Permit Sections F.1.d and F.1.h required the copermittees, including the City, to ensure that new development and significant redevelopment comply with low impact development ("LID") and hydromodification prevention requirements. These sections required the copermittees, including the City, to develop and implement LID principals set forth in the Permit and structural features into public agency Priority Development Projects (PDPs). In addition, the copermittees, including the City, were required under Permit Section F.1.d.4 to establish a land development program whereby each PDP was required to implement LID BMPs. This program required City staff to undertake various steps, including to develop this program and to train municipal staff on implementation requirements. Further Permit Section F.1.d.7 required the copermittees, including the City, to develop an LID waiver program for incorporation into local SSMPs which met specific Permit requirements. Further, under Permit Section F.1.h, the copermittees, including the City, were required to collaborate to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all PDPs. Further, Permit Section F.1.h.5 required the copermittees, including the City, to implement interim hydromodification criteria prior to the development of the HMP. I am informed and believe and therefore state that efforts to address such requirements have resulted in direct expenditures by the City of $4,966 in increased staff allocation costs in FY 2010-11. The City first incurred direct costs under the Permit in FY 2010-11, which commenced on July 1, 2010. In addition to these direct costs, the copermittees, including the City, participated in a cost-sharing program with outside consultants and County staff to address these requirements. I

am informed and believe and therefore state that the City's share of the cost of this program in FY 2009-10 was $21,153 and in FY 2011-12 was $6,112. I am further informed and believe and therefore state that the City first incurred these shared costs when it paid an invoice to the County for these and other services on or about January 11, 2010. I am further informed and believe and therefore state that most of the costs described above cannot be recouped through fees charged to private entities.

e. BMP Maintenance Tracking: Permit Section F.1.f required the copermittees, including the City, to develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance activities conducted within its jurisdiction since July 2001. This program required staff time to contact property owners for permission to inspect on-site BMPs or process self-certification statements, and costs for contract inspectors to conduct BMP maintenance inspections. I am informed and believe and therefore state that the direct expenditures by the City to implement these requirements was $750 in increased staff allocation costs in FY 2010-11 and $4,880 in contract inspector costs in FY 2011-12. I am further informed and believe and therefore state that the City first incurred these costs on or about July 1, 2010. I am further informed and believe and therefore state that most of the costs described above regarding previously installed BMPs cannot be recouped through fees charged to private entities.

f. Retrofitting Existing Development: Permit Section F.3.d required the copermittees, including the City, to develop and implement a retrofitting program to meet the requirements set forth in that section. This new mandated program required the copermittees, including the City, to identify and inventory areas of existing development (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting; evaluate and rank the

inventoried existing developments to prioritize retrofitting; consider the results of the evaluation in prioritizing work plans for the following year; and track and inspect completed retrofit BMPs. I am informed and believe and therefore state that the City's direct costs for these requirements was $3,342 in increased staff allocation costs in FY 2010-11. I am further informed and believe and therefore state that the City first incurred costs for these mandated activities in FY 2010-11, which began on July 1, 2010.

g. Maintain MS4 Map: Permit Section F.4.b required the copermittees, including the City, to maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction, including the use of Geographical Information System (GIS) technology. The Copermittees, including the City, engaged in a cost-sharing effort to achieve this mapping. I am informed and believe, and therefore state, that the City's share of such costs in FY 2009-10 was $1,042 and that the City's share of such costs in FY 2010-11 was $934. I am further informed and believe and therefore state that the City first incurred these shared costs on or about January 11, 2010 when it paid an invoice from the County for those services and others.

h. Reporting Requirements

(i) Program Effectiveness Assessment and Reporting and Jurisdictional Runoff Management Program (JRMP) Annual Reports: In addition to what was required in the 2002 Permit, Permit Section J required the copermittees, including the City, to develop a work plan, an effectiveness assessment system based on CASQA outcome levels, and an annual assessment review to address their high priority water quality problems in an iterative manner over the life of the Permit. The minimum requirements of this provision are set forth in Permit Section J at pages 79-82. Further, Permit Section F.1.d(7)(i) required the copermittees, including the City, to generate upgraded individual

JRMP Annual Reports which cover implementation of their jurisdictional activities during the past annual reporting period. Additional requirements in the Permit compared to the 2002 Permit included: reporting of PDPs choosing to participate in the LID waiver program, including details of the feasibility analysis, implemented BMPs and funding details with the second year JRMP Annual Report. In addition, pursuant to Permit Section F.3.a.(4)(c), each copermittee, including the City, was required to evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device, and to submit this inventory and evaluation to the RWQCB. Such evaluation was also required to include a Reporting Checklist (Permit Section K.3.a.(3) and Attachment D). I am informed and believe and therefore state that efforts required to address such requirements have resulted in direct expenditures by the City of $10,464 in increased staff allocation time in FY 2010-11, and in expenditures by City of $450 in increased staff allocation in FY 2011-12. The City first incurred direct costs under the Permit in FY 2010-11, which commenced on July 1, 2010. In addition to these direct costs, the copermittees, including the City, participated in a cost-sharing program to develop updated reporting templates, conduct assessments for the Unified Annual Report and to develop watershed workplans. I am informed and believe and therefore state that the City's share of such costs in FY 2010-11 were $1,969 and that the costs in FY 2011-12 were $1,272. I am further informed and believe and therefore state that the City first incurred shared costs for these mandates when it paid an invoice from the County for these and other services on or about December 23, 2010.

(ii) Watershed Workplan Public Meetings: Permit Sections K.1.b.4 and G.6 required the copermittees, including the City, to hold an annual public Watershed Workplan Review Meetings to present updates to the Watershed Workplan. This public meeting requirement was not contained in the 2002 Permit. The copermittees, including the County, participated in a cost-sharing effort to undertake these activities. I am informed and believe and therefore state that the City's cost share for such requirements was $113 in FY 2011-12 and $35 in FY 2012-13. I am further informed and believe and therefore state that the City first incurred shared costs with respect to such mandated activities when it paid an invoice from the County for these and other services on or about January 19, 2012.

7. The City first incurred costs under the Permit in FY 2009-10, which commenced on July 1, 2009.

8. I am informed and believe that there are no dedicated State, Federal or regional funds that are or will be available to pay for any of these new programs or activities. I am not aware of any fee or tax which the City would have the discretion to impose under California law in order to recover any portion of these new programs or activities. I am further informed and believe that the only available sources to pay for these new programs or activities are and will be the City's General Fund.

Executed January 5, 2017 at Laguna Niguel, California.

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

Mary R Paden

DECLARATION OF DEVIN SLAVEN ON BEHALF OF THE CITY OF LAKE FOREST IN SUPPORT OF TEST CLAIM

I, Devin Slaven, 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 would and would competently testify to the matters set forth herein under oath.

2. I am employed by the City of Lake Forest (hereafter, "City") as the Environmental Manager. I have knowledge of the requirements set forth in this declaration and the City's sources of funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately twelve years. My duties include management of the City's Water Quality Division and directing the pollution prevention and enforcement program.

4. I have reviewed California Regional Water Quality Control Board San Diego Region ("RWQCB"), Order No. R9-2009-0002 issued by the RWQCB on December 16, 2009 (the "Permit") and am familiar with the requirements of the Permit as it applies to the City. The City was a copermittee under that permit.

5. I have also reviewed and I am familiar with the requirements of the Order No. R9-2002-0001 issued by the San Diego RWQCB on February 13, 2002 (the "2002 Permit"). The City was a copermittee under that permit.

6. Based on my understanding of the requirements of the 2002 Permit and the requirements of the Permit, I believe that the Permit required the copermittees to perform the

following new activities, among others, that were not required by the 2002 Permit, and which are unique to local government entities:

a. Non-Stormwater Discharges: Permit Section B removes from the list of exempted discharges all landscape irrigation, irrigation water, and lawn watering discharges originating from any location or source, including residential irrigation discharges from potable water sources, which was previously included in the category of exempted discharges in the 2002 Permit. The removal of this discharge exemption required the copermittees, including the City, to undertake various tasks, which included adoption of a new ordinance to address these flows, expending staff time to create new public education and outreach materials, the tracking, monitoring, and response to and investigation of incidents and complaints of irrigation runoff and improvement of municipal irrigation systems and landscaping. I am informed and believe and therefore state that the City's direct costs were at least $450 in Fiscal Year (FY) 2010-11 and $360 in FY 2011-12. I am informed and believe and therefore state that the City first incurred these costs in January 2010. In addition to these direct costs, the copermittees, including the City, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. The copermittees, including the City, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. I am informed and believe and therefore state that the City's share of these costs was $21 in FY 2009-10 and $392 in FY 2010-11. I am further informed and believe and therefore state that the City first incurred these costs when it was paid an invoice from the County for these and other services on or about January 21, 2010.

b. Non-Stormwater Dry Weather Action Levels: Permit Sections C and F.4.(d) and (e) required the copermittees, including the City, to implement new follow-up investigation and source tracking activities triggered by exceedances of dry-weather non-stormwater action levels

(NALs) according to newly established, prescriptive concentration levels, and also required testing of new and expanded numbers of constituents as compared to the 2002 Permit. In the 2002 Permit, the copermittees, including the City, were allowed to set their own criteria for investigative and source tracking actions in the previously implemented dry weather program to meet basin standards. As a consequence of this expanded NAL monitoring and follow-up investigation program, an exceedance of any NAL required each copermittee, including the City, to investigate and identify the source of the exceedance in a timely manner. If this was not possible, the copermittees, including the City, were required to submit a prioritization plan and timeline that identified the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the Copermittees were required to submit an action report dependent on the source of the pollutant exceedances following the identification process set forth in Permit Section C.2. I am informed and believe and therefore state that the City's direct costs were approximately $2,250 in FY 2011-12. I am informed and believe and therefore state that the City first incurred these costs on or about August 16, 2011. In addition, the copermittees, including the City, collectively retained consultants on a cost-sharing basis to develop guidance on implementing the required compliance actions and to evaluate the action levels in Permit Tables 4 a-c. I am informed and believe and therefore state that the City's share of the cost for such consultant support was $698 in FY 2010-11 and $2,848 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred costs for these mandated activities when it paid an invoice from the County for these and other services on or about March 3, 2011.

c. Stormwater Action Levels: Permit Section D required the copermittees, including the City, to conduct end-of-pipe assessments during wet weather monitoring to determine

stormwater action level (SAL) compliance metrics at major outfalls. The copermittees were required to develop their monitoring plans to sample a representative percentage of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceeded SALs would trigger additional monitoring in the subsequent year. Any station that did not exceed a SAL for 3 years were required to be replaced with a different station. SAL samples were required to be 24-hour time weighted composites. Future requirements included, beginning in Year 3 after the Permit adoption date, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the United States that exceeded the SALs for the pollutants listed in Table 5 of the Permit would require the copermittees, including the City, to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutant(s). Additionally, the copermittees, including the City, were required to utilize the exceedance information when adjusting and executing annual work plans. To address these requirements, the City was part of a copermittee program to share the costs for monitoring elements of this mandated program and the initial development of SAL protocols. I am informed and believe and therefore state that the City's share of such costs was $874 in FY 2010-11 and $658 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred costs for these mandated activities when it paid a County invoice for such activities and other requirements on or about March 3, 2011.

d. Low Impact Development (LID) and Hydromodification Requirements: Permit Sections F.1.d and F.1.h required the copermittees, including the City, to ensure that new development and significant redevelopment comply with low impact development ("LID") and hydromodification prevention requirements. These sections required the copermittees, including the City, to develop and implement LID principals set forth in the Permit and structural features

into public agency Priority Development Projects (PDPs). In addition, the copermittees, including the City, were required under Permit Section F.1.d.4 to establish a land development program whereby each PDP was required to implement LID BMPs. This program required City staff to undertake various steps, including to develop this program and to train municipal staff on implementation requirements. Further, Permit Section F.1.d.7 required the copermittees, including the City, to develop an LID waiver program for incorporation into local SSMPs which met specific Permit requirements. Further, under Permit Section F.1.h, the copermittees, including the City, were required to collaborate to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all PDPs. Further, Permit Section F.1.h.5 required the copermittees, including the City, to implement interim hydromodification criteria prior to the development of the HMP. I am informed and believe and therefore state that the City's direct costs were at least $1,350 in FY 2011-12. I am informed and believe and therefore state that the City first incurred these costs in on or about August 2, 2012. The copermittees, including the City, participated in a cost-sharing program with outside consultants and County staff to address these requirements. I am informed and believe and therefore state that the City's share of the cost of this program in FY 2009-10 was $7,891 and in FY 2011-12 was $2,280. I am further informed and believe and therefore state that the City first incurred these costs when it paid an invoice to the County for these and other services on or about January 21, 2010. I am further informed and believe and therefore state that most of the costs described above cannot be recouped through fees charged to private entities.

e. BMP Maintenance Tracking: Permit Section F.1.f required the copermittees, including the City, to develop and maintain a watershed-based database to track and inventory all

approved post-construction BMPs and BMP maintenance activities conducted within its jurisdiction since July 2001. This program required staff time to contact property owners for permission to inspect on-site BMPs or process self-certification statements. I am informed and believe and therefore state that the cost to the City for these requirements was $2,208 in FY 2010-11 and $552 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred these costs on or about July 31, 2010. I am further informed and believe and therefore state that most of the costs described above regarding previously installed BMPs cannot be recouped through fees charged to private entities.

f. Retrofitting Existing Development: Permit Section F.3.d required the copermittees, including the City, to develop and implement a retrofitting program to meet the requirements set forth in that section. This new mandated program required the copermittees, including the City, to identify and inventory areas of existing development (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting; evaluate and rank the inventoried existing developments to prioritize retrofitting; consider the results of the evaluation in prioritizing work plans for the following year; and track and inspect completed retrofit BMPs. The City received partial funding through a grant from the Orange County Transportation Authority. I am informed and believe and therefore state that the City's direct General Fund costs for these requirements were $900 in FY 2010-11 and approximately $155,852 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred costs for these mandated activities on or about July 11, 2010.

g. Maintain MS4 Map: Permit Section F.4.b required the copermittees, including the City, to maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction, including the use of Geographical Information System (GIS) technology.

The Copermittees, including the City, engaged in a cost-sharing effort to achieve this mapping. I am informed and believe, and therefore state, that the City's share of such costs in FY 2009-10 was $389 and that the City's share of such costs in FY 2010-11 was $349. I am further informed and believe and therefore state that the City first incurred these costs on or about January 21, 2010 when it paid an invoice from the County for those services and others.

h. Reporting Requirements

(i) Program Effectiveness Assessment and Reporting and Jurisdictional Runoff Management Program (JRMP) Annual Reports: In addition to what was required in the 2002 Permit, Permit Section J required the copermittees, including the City, to develop a work plan, an effectiveness assessment system based on CASQA outcome levels, and an annual assessment review to address their high priority water quality problems in an iterative manner over the life of the Permit. The minimum requirements of this provision are set forth in pages Permit Section J at 79-82. Further, Permit Section F.1.d(7)(i) required the copermittees, including the City, to generate upgraded individual JRMP Annual Reports which cover implementation of their jurisdictional activities during the past annual reporting period. Additional requirements in the Permit compared to the 2002 Permit included: reporting of PDPs choosing to participate in the LID waiver program, including details of the feasibility analysis, implemented BMPs and funding details with the second year JRMP Annual Report. In addition, pursuant to Permit Section F.3.a.(4)(c), each copermittee, including the City, was required to evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device, and to submit

this inventory and evaluation to the RWQCB. Such evaluation was also required to include a Reporting Checklist (Permit Section K.3.a.(3) and Attachment D). The copermittees, including the City, participated in a cost-sharing program to develop updated reporting templates, conduct assessments for the Unified Annual Report and to develop watershed workplans. I am informed and believe and therefore state that the City's share of such costs in FY 2010-11 were $735 and that the costs in FY 2011-12 were $475. I am further informed and believe and therefore state that the City first incurred costs for these mandates when it paid an invoice from the County for these and other services on or about March 3, 2011.

(ii) Watershed Workplan Public Meetings: Permit Sections K.1.b.4 and G.6 required the copermittees, including the City, to hold an annual public Watershed Workplan Review Meetings to present updates to the Watershed Workplan. This public meeting requirement was not contained in the 2002 Permit. The copermittees, including the County, participated in a cost-sharing effort to undertake these activities. I am informed and believe and therefore state that the city's cost share for such requirements was $42 in FY 2011-12 and $13 in FY 2012-13. I am further informed and believe and therefore state that the City first incurred costs with respect to such mandated activities when it paid an invoice from the County for these and other services on or about February 10, 2012.

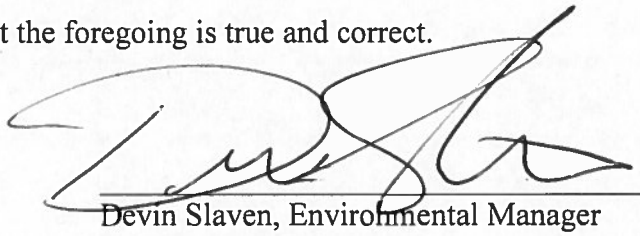
7. The City first incurred costs under the Permit in FY 2009-10, which commenced on July 1, 2009.

8. I am informed and believe that there are no dedicated State, Federal or regional funds that are or will be available to pay for any of these new programs or activities. I am not

aware of any fee or tax which the City would have the discretion to impose under California law in order to recover any portion of these new programs or activities. I am further informed and believe that the only available sources to pay for these new programs or activities are and will be the City's General Fund.

Executed January 6, 2017 at Lake Forest, California.

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



Devin Slaven, Environmental Manager
City of Lake Forest

DECLARATION OF RICHARD SCHLESINGER ON BEHALF OF THE CITY OF MISSION VIEJO IN SUPPORT OF TEST CLAIM

I, Richard Schlesinger, 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 would and would competently testify to the matters set forth herein under oath.

2. I am employed by the City of Mission Viejo (hereafter, "City") as the City Engineer. I have knowledge of the requirements set forth in this declaration and the City's sources of funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately 12 years. My duties include managing the Public Works Department and overseeing divisional supervisors in Engineering Services and Water Quality.

4. I have reviewed California Regional Water Quality Control Board San Diego Region ("RWQCB"), Order No. R9-2009-0002 issued by the RWQCB on December 16, 2009 (the "Permit") and am familiar with the requirements of the Permit as it applies to the City. The City was a copermittee under that permit.

5. I have also reviewed and I am familiar with the requirements of the Order No. R9-2002-0001 issued by the San Diego RWQCB on February 13, 2002 (the "2002 Permit"). The City was a copermittee under that permit.

6. Based on my understanding of the requirements of the 2002 Permit and the requirements of the Permit, I believe that the Permit required the copermittees to perform the following new activities, among others, that were not required by the 2002 Permit, and which are unique to local government entities:

a. Non-Stormwater Discharges: Permit Section B removes from the list of exempted discharges all landscape irrigation, irrigation water, and lawn watering discharges originating from any location or source, including residential irrigation discharges from potable water sources, which was previously included in the category of exempted discharges in the 2002 Permit. The removal of this discharge exemption required the copermittees, including the City, to undertake various tasks, which could include adoption of new ordinances to address these flows, expending staff time to create new public education and outreach materials, the tracking, monitoring, and response to and investigate of incidents and complaints of irrigation runoff and improvement of municipal irrigation systems and landscaping. The direct cost to the City to comply with these requirements was $30,000 in Fiscal Year (FY) 2010-11 and $30,000 in FY 2011-12. The City first incurred costs for these mandated activities on August 16, 2010. In addition, the copermittees, including the City, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. I am informed and believe and therefore state that the City's share of these costs was $76 in FY 2009-10 and $1,449 in FY 2010-11. I am further informed and believe and therefore state that the City first incurred these costs when it was paid an invoice from the County for these and other services on or about December 22, 2009.

b. Non-Stormwater Dry Weather Action Levels: Permit Sections C and F.4.(d) and (e) required the copermittees, including the City, to implement new follow-up investigation and source tracking activities triggered by exceedances of dry-weather non-stormwater action levels (NALs) according to newly established, prescriptive concentration levels, and also required testing of new and expanded numbers of constituents as compared to the 2002 Permit. In the 2002 Permit, the copermittees, including the City, were allowed to set their own criteria for investigative and source tracking actions in the previously implemented dry weather program to meet basin

standards. As a consequence of this expanded NAL monitoring and follow-up investigation program, an exceedance of any NAL required each copermittee, including the City, to investigate and identify the source of the exceedance in a timely manner. If this was not possible, the copermittees, including the City, were required to submit a prioritization plan and timeline that identified the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the Copermittees were required to submit an action report dependent on the source of the pollutant exceedances following the identification process set forth in Permit Section C.2. The copermittees, including the City, collectively retained consultants on a cost-sharing basis to develop guidance on implementing the required compliance actions and to evaluate the action levels in Permit Tables 4 a-c. I am informed and believe and therefore state that the City's share of the cost for such consultant support was $2,577 in FY 2010-11 and $10,517 in FY 2011-12. I am further informed and believed and therefore state that the City first incurred costs for these mandated activities when it paid an invoice from the County for these and other services on or about January 19, 2011. In addition, the City was required to incur additional direct costs to implement this program, including staff costs to identify the source of pollutants, documenting their findings and reporting them to the RWQCB, analytical costs incurred to aid in source identification and evaluation of NALs, and the costs of discharge abatement and other compliance efforts to attempt to comply with the new mandated program. I am informed and therefore state that the City incurred costs of $1,875 during FY 2010-11 and $1,875 during FY 2011-12 to address these requirements. The City first incurred costs for these mandated activities on July 1, 2010.

c. Stormwater Action Levels: Permit Section D required the copermittees, including the City, to conduct end-of-pipe assessments during wet weather monitoring to determine

stormwater action level (SAL) compliance metrics at major outfalls. The copermittees were required to develop their monitoring plans to sample a representative percentage of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceeded SALs would trigger additional monitoring in the subsequent year. Any station that did not exceed a SAL for 3 years were required to be replaced with a different station. SAL samples were required to be 24-hour time weighted composites. Future requirements included, beginning in Year 3 after the Permit adoption date, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the United States that exceeded the SALs for the pollutants listed in Table 5 of the Permit would require the copermittees, including the City, to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutant(s). Additionally, the copermittees, including the City, were required to utilize the exceedance information when adjusting and executing annual work plans. To address these requirements, the City was part of a copermittee program to share the costs for monitoring elements of this mandated program and the initial development of SAL protocols. I am informed and believe and therefore state that the City's share of such costs was $3,229 in FY 2010-11 and $2,431 in FY 2011-12. I am further informed and believed and therefore state that the City first incurred costs for these mandated activities when it paid a County invoice for such activities and other requirements on or about January 19, 2011. Additionally, the City incurred direct costs to implement this new mandated program, including the follow up, exceedance triggered compliance actions, and staff costs to conduct field investigations, and to evaluate, abate, and take other actions to comply with this program. I am informed and believe and therefore state that the City first incurred costs of $1,875 in FY 2010-11 and $1,875 in FY 2011-12 for these

direct costs. I am informed and believe and thereon state that the City first incurred costs for these mandated activities on December 10, 2010.

d. Low Impact Development (LID) and Hydromodification Requirements: Permit Sections F.1.d and F.1.h required the copermittees, including the City, to ensure that new development and significant redevelopment comply with low impact development ("LID") and hydromodification prevention requirements. These sections required the copermittees, including the City, to develop and implement LID principals set forth in the Permit and structural features into public agency Priority Development Projects (PDPs). In addition, the copermittees, including the City, were required under Permit Section F.1.d.4 to establish a land development program whereby each PDP was required to implement LID BMPs. This program required City staff to undertake various steps, including to develop this program and to train municipal staff on implementation requirements. Further Permit Section F.1.d.7 required the copermittees, including the City, to develop an LID waiver program for incorporation into local SSMPs which met specific Permit requirements. Further, under Permit Section F.1.h, the copermittees, including the City, were required to collaborate to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all PDPs. Further, Permit Section F.1.h.5 required the copermittees, including the City, to implement interim hydromodification criteria prior to the development of the HMP. The copermittees, including the City, participated in a cost-sharing program with outside consultants and County staff to address these requirements. I am informed and believe and therefore state that the City's share of the cost of this program in FY 2009-10 was $29,141 and in FY 2011-12 was $8,420. I am further informed and believe and therefore state that the City first incurred these costs when it paid an invoice to the County for these and other services on or about December 22, 2009. In addition, the City incurred

direct increased costs to implement these mandated requirements. I am informed and believe and therefore state that the direct cost to the City in FY 2010-11 for these requirements was $1,875 and in FY 2011-12 was $1,875. I am further informed and believe and therefore state that the City first incurred this cost on or about August 1, 2010. I am further informed and believe and therefore state that most of the costs described above cannot be recouped through fees charged to private entities.

e. BMP Maintenance Tracking: Permit Section F.1.f required the copermittees, including the City, to develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance activities conducted within its jurisdiction since July 2001. This program required staff time to contact property owners for permission to inspect on-site BMPs or process self-certification statements, maintain a database, and write letters of violation for property owners that did not respond to City requests for information. I am informed and believe and therefore state that the cost to the City for these requirements was $1,900 in FY 2010-11 and $1,900 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred these costs on or about August 1, 2010. I am further informed and believe and therefore state that most of the costs described above relating to previously installed BMPs cannot be recouped through fees charged to private entities.

f. [Reserved]

g. Maintain MS4 Map: Permit Section F.4.b required the copermittees, including the City, to maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction, including the use of Geographical Information System (GIS) technology. The Copermittees, including the City, engaged in a cost-sharing effort to achieve this mapping. I am informed and believe, and therefore state, that the City's share of such costs in FY 2009-10 was

$1,436 and that the City's share of such costs in FY 2010-11 was $1,287. I am further informed and believe and therefore state that the City first incurred these costs on or about December 22, 2009 when it paid an invoice from the County for those services and others. I am informed and believe and therefore state that the City's direct costs to develop, implement and initially comply with these mandated requirements were $30,000 for FY 2010-11. I am further informed and believe and therefore state that the City first incurred these costs for these mandated activities on or about July 1, 2009.

h. Reporting Requirements

(i) Program Effectiveness Assessment and Reporting and Jurisdictional Runoff Management Program (JRMP) Annual Reports: In addition to what was required in the 2002 Permit, Permit Section J required the copermittees, including the City, to develop a work plan, an effectiveness assessment system based on CASQA outcome levels, and an annual assessment review to address their high priority water quality problems in an iterative manner over the life of the Permit. The minimum requirements of this provision are set forth in pages Permit Section J at 79-82. Further, Permit Section F.1.d(7)(i) required the copermittees, including the City, to generate upgraded individual JRMP Annual Reports which cover implementation of their jurisdictional activities during the past annual reporting period. Additional requirements in the Permit compared to the 2002 Permit included: reporting of PDPs choosing to participate in the LID waiver program, including details of the feasibility analysis, implemented BMPs and funding details with the second year JRMP Annual Report. In addition, pursuant to Permit Section F.3.a.(4)(c), each copermittee, including the City, was required to evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to

reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device, and to submit this inventory and evaluation to the RWQCB. Such evaluation was also required to include a Reporting Checklist (Permit Section K.3.a.(3) and Attachment D). The copermittees, including the City, participated in a cost-sharing program to develop updated reporting templates, conduct assessments for the Unified Annual Report and to develop watershed workplans. I am informed and believe and therefore state that the City's share of such costs in FY 2010-11 were $2,712 and that the costs in FY 2011-12 were $1,753. I am further informed and believe and therefore state that the City first incurred costs for these mandates when it paid an invoice from the County for these and other services on or about January 19, 2011. The City also incurred direct increased costs to implement these requirements. I am informed and believe and therefore state that the cost to the City of these mandated requirements in FY 2010-11 was $1,875 and that the cost in FY 2011-12 was $1,875. I am further informed and believe and therefore state that the City first incurred costs for these mandates on or about July 1, 2010.

(ii) Watershed Workplan Public Meetings: Permit Sections K.1.b.4 and G.6 required the copermittees, including the City, to hold an annual public Watershed Workplan Review Meetings to present updates to the Watershed Workplan. This public meeting requirement was not contained in the 2002 Permit. The copermittees, including the County, participated in a cost-sharing effort to undertake these activities. I am informed and believe and therefore state that the city's cost share for such requirements was $156 in FY 2011-12 and $49 in FY 2012-13. I am further informed and believe and therefore state that the City first incurred costs with respect to such mandated activities when it paid an

invoice from the County for these and other services on or about January 18, 2012.

7. The City first incurred costs under the Permit in FY 2009-10, which commenced on July 1, 2009.

8. I am informed and believe that there are no dedicated State, Federal or regional funds that are or will be available to pay for any of these new programs or activities. I am not aware of any fee or tax which the City would have the discretion to impose under California law in order to recover any portion of these new programs or activities. I am further informed and believe that the only available sources to pay for these new programs or activities are and will be the City's General Fund.

Executed January 5, 2017 at Mission Viejo, California.

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

Richard Schlesinger
City Engineer

DECLARATION OF BENJAMIN SIEGEL ON BEHALF OF THE CITY OF SAN JUAN CAPISTRANO IN SUPPORT OF TEST CLAIM

I, Benjamin Siegel, 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 would and would competently testify to the matters set forth herein under oath.

2. I am employed by the City of San Juan Capistrano (hereafter, "City") as the City Manager. I have knowledge of the requirements set forth in this declaration and the City's sources of funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately one year. My duties include overseeing all departments in the City, including the Public Works Department and its stormwater management duties.

4. I have reviewed California Regional Water Quality Control Board San Diego Region ("RWQCB"), Order No. R9-2009-0002 issued by the RWQCB on December 16, 2009 (the "Permit") and am familiar with the requirements of the Permit as it applies to the City. The City was a copermittee under that permit.

5. I have also reviewed and I am familiar with the requirements of the Order No. R9-2002-0001 issued by the San Diego RWQCB on February 13, 2002 (the "2002 Permit"). The City was a copermittee under that permit.

6. Based on my understanding of the requirements of the 2002 Permit and the requirements of the Permit, I believe that the Permit required the copermittees to perform the

following new activities, among others, that were not required by the 2002 Permit, and which are unique to local government entities:

a. Non-Stormwater Discharges: Permit Section B removes from the list of exempted discharges all landscape irrigation, irrigation water, and lawn watering discharges originating from any location or source, including residential irrigation discharges from potable water sources, which was previously included in the category of exempted discharges in the 2002 Permit. The removal of this discharge exemption required the copermittees, including the City, to undertake various tasks, which could include adoption of new ordinances to address these flows, expending staff time to create new public education and outreach materials, the tracking, monitoring, and response to and investigation of incidents and complaints of irrigation runoff and improvement of municipal irrigation systems and landscaping. In addition to these direct costs, the copermittees, including the City, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. The copermittees, including the City, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. I am informed and believe and therefore state that the City's share of these costs was $38 in Fiscal Year (FY) 2009-10 and $722 in FY 2010-11. I am further informed and believe and therefore state that the City first incurred these costs when it paid an invoice from the County for these and other services on or about December 21, 2009. In addition, the City incurred direct costs in connection with this mandate. I am informed and believe and therefore state that the cost to the City to comply with these requirements in FY 2010-11 was $8,567 and in FY 2011-12 was $4,283. I am further informed and believe and therefore state that the City first incurred costs for these activities in October 2010.

b. Non-Stormwater Dry Weather Action Levels: Permit Sections C and F.4.(d) and (e) required the copermittees, including the City, to implement new follow-up investigation and source tracking activities triggered by exceedances of dry-weather non-stormwater action levels (NALs) according to newly established, prescriptive concentration levels, and also required testing of new and expanded numbers of constituents as compared to the 2002 Permit. In the 2002 Permit, the copermittees, including the City, were allowed to set their own criteria for investigative and source tracking actions in the previously implemented dry weather program to meet basin standards. As a consequence of this expanded NAL monitoring and follow-up investigation program, an exceedance of any NAL required each copermittee, including the City, to investigate and identify the source of the exceedance in a timely manner. If this was not possible, the copermittees, including the City, were required to submit a prioritization plan and timeline that identified the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the Copermittees were required to submit an action report dependent on the source of the pollutant exceedances following the identification process set forth in Permit Section C.2. The copermittees, including the City, collectively retained consultants on a cost-sharing basis to develop guidance on implementing the required compliance actions and to evaluate the action levels in Permit Tables 4 a-c. I am informed and believe and therefore state that the City's share of the cost for such work was $1,285 in FY 2010-11 and $5,243 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred costs for these mandated activities when it paid an invoice from the County for those and other services on or about January 18, 2011. In addition, the City incurred direct costs to implement this new mandated program, including staff costs to identify the source of pollutants, documenting their findings and

reporting them to the RWQCB, analytical costs incurred to aid in source identification and evaluation of NALs, and the costs of discharge abatement and other compliance efforts to attempt to comply with the new mandated program. I am informed and believe and therefore state that the City incurred costs of $4,197 during FY 2011-12 to address these requirements. I am further informed and believe and therefore state that the City first incurred costs for these activities on or about August 29, 2011.

c. Stormwater Action Levels: Permit Section D required the copermittees, including the City, to conduct end-of-pipe assessments during wet weather monitoring to determine stormwater action level (SAL) compliance metrics at major outfalls. The copermittees were required to develop their monitoring plans to sample a representative percentage of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceeded SALs would trigger additional monitoring in the subsequent year. Any station that did not exceed a SAL for 3 years were required to be replaced with a different station. SAL samples were required to be 24-hour time weighted composites. Future requirements included, beginning in Year 3 after the Permit adoption date, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the United States that exceeded the SALs for the pollutants listed in Table 5 of the Permit would require the copermittees, including the City, to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutant(s). Additionally, the copermittees, including the City, were required to utilize the exceedance information when adjusting and executing annual work plans. To address these requirements, the City was part of a copermittee program to share the costs for monitoring elements of this mandated program and the initial development of SAL protocols. I am informed and believe and therefore state that the City's

share of such costs was $1,610 in FY 2010-11 and $1,212 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred costs for these mandated activities when it paid a County invoice for those and other services on or about January 18, 2011. Additionally, the City incurred direct costs to implement this new mandated program, including followup, exceedance-triggered compliance actions, and staff costs to conduct field investigations, and to evaluate, abate and take other actions to comply with this program. I am informed and believe and therefore state that the City incurred costs of $343 in FY 2010-11 and $1,456 in FY 2011-12 for these direct costs. I am further informed and believe and therefore state that the City first incurred these costs on or about November 21, 2010.

d. Low Impact Development (LID) and Hydromodification Requirements: Permit Sections F.1.d and F.1.h required the copermittees, including the City, to ensure that new development and significant redevelopment comply with low impact development ("LID") and hydromodification prevention requirements. These sections required the copermittees, including the City, to develop and implement LID principals set forth in the Permit and structural features into public agency Priority Development Projects (PDPs). In addition, the copermittees, including the City, were required under Permit Section F.1.d.4 to establish a land development program whereby each PDP was required to implement LID BMPs. This program required City staff to undertake various steps, including to develop this program and to train municipal staff on implementation requirements. Further Permit Section F.1.d.7 required the copermittees, including the City, to develop an LID waiver program for incorporation into local SSMPs which met specific Permit requirements. Further, under Permit Section F.1.h, the copermittees, including the City, were required to collaborate to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all

PDPs. Further, Permit Section F.1.h.5 required the copermittees, including the City, to implement interim hydromodification criteria prior to the development of the HMP. The copermittees, including the City, participated in a cost-sharing program with outside consultants and County staff to address these requirements. I am informed and believe and therefore state that the City's share of the cost of this program in FY 2009-10 was $14,527 and in FY 2011-12 was $4,197. I am further informed and believe and therefore state that the City first incurred these costs when it paid an invoice to the County for these and other services on or about December 21, 2009. I am further informed and believe and therefore state that the City incurred direct costs in response to these mandated activities, including the development of these programs in the City. I am informed and believe and therefore state that the cost to the City in FY 2010-11 for these requirements was $5,996 and in FY 2011-12 was $5,139. I am further informed and believe and therefore state that the City first incurred these direct costs on or about May 19, 2011. I am further informed and believe and therefore state that most of the costs described above cannot be recouped through fees charged to private entities.

e. BMP Maintenance Tracking: Permit Section F.1.f required the copermittees, including the City, to develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance activities conducted within its jurisdiction since July 2001. This program required staff time to contact property owners for permission to inspect on-site BMPs or process self-certification statements. I am informed and believe and therefore state that the cost to the City for these requirements was $3,427 in FY 2010-11 and $1,071 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred these costs on or about September 14, 2010. I am further informed and

believe and therefore state that most of the costs described above regarding previously installed BMPs cannot be recouped through fees charged to private entities.

f. Retrofitting Existing Development: Permit Section F.3.d required the copermittees, including the City, to develop and implement a retrofitting program to meet the requirements set forth in that section. This new mandated program required the copermittees, including the City, to identify and inventory areas of existing development (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting; evaluate and rank the inventoried existing developments to prioritize retrofitting; consider the results of the evaluation in prioritizing work plans for the following year; and track and inspect completed retrofit BMPs. I am informed and believe and therefore state that the City's direct costs for these requirements were $4,883 in FY 2010-11 and $2,656 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred costs for these mandated activities on or about December 7, 2010.

g. Maintain MS4 Map: Permit Section F.4.b required the copermittees, including the City, to maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction, including the use of Geographical Information System (GIS) technology. The Copermittees, including the City, engaged in a cost-sharing effort to achieve this mapping. I am informed and believe, and therefore state, that the City's share of such costs in FY 2009-10 was $716 and that the City's share of such costs in FY 2010-11 was $642. I am further informed and believe and therefore state that the City first incurred these costs on or about December 21, 2009 when it paid an invoice from the County for those services and others. In addition, the City incurred direct costs in the implementation of this mandate. I am informed and believe and therefore state that the City's direct costs to develop, implement and comply with these

mandated requirements were $6,853 for FY 2010-11 and $1,285 for FY 2011-12. I am further informed and believe and therefore state that the City first incurred these costs for these mandated activities on or about September 14, 2010.

h. Reporting Requirements

(i) Program Effectiveness Assessment and Reporting and Jurisdictional Runoff Management Program (JRMP) Annual Reports: In addition to what was required in the 2002 Permit, Permit Section J required the copermittees, including the City, to develop a work plan, an effectiveness assessment system based on CASQA outcome levels, and an annual assessment review to address their high priority water quality problems in an iterative manner over the life of the Permit. The minimum requirements of this provision are set forth in pages Permit Section J at 79-82. Further, Permit Section F.1.d(7)(i) required the copermittees, including the City, to generate upgraded individual JRMP Annual Reports which cover implementation of their jurisdictional activities during the past annual reporting period. Additional requirements in the Permit compared to the 2002 Permit included: reporting of PDPs choosing to participate in the LID waiver program, including details of the feasibility analysis, implemented BMPs and funding details with the second year JRMP Annual Report. In addition, pursuant to Permit Section F.3.a.(4)(c), each copermittee, including the City, was required to evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device, and to submit this inventory and evaluation to the RWQCB. Such evaluation was also required to include a Reporting Checklist (Permit Section K.3.a.(3) and Attachment D). The copermittees, including the City, participated in a cost-sharing program to develop updated reporting templates, conduct assessments for the Unified Annual Report and to develop watershed workplans. I am informed and believe and therefore state that the

City's share of such costs in FY 2010-11 were $1,352 and that the costs in FY 2011-12 were $874. I am further informed and believe and therefore state that the City first incurred costs for these mandates when it paid an invoice from the County for these and other services on or about January 18, 2011. In addition, the City incurred direct costs with respect to the JRMP annual reports of $3,426 in FY 2010-11 and $3,426 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred these directs costs on or about October 1, 2010.

(ii) Watershed Workplan Public Meetings: Permit Sections K.1.b.4 and G.6 required the copermittees, including the City, to hold an annual public Watershed Workplan Review Meetings to present updates to the Watershed Workplan. This public meeting requirement was not contained in the 2002 Permit. The copermittees, including the County, participated in a cost-sharing effort to undertake these activities. I am informed and believe and therefore state that the city's cost share for such requirements was $78 in FY 2011-12 and $24 in FY 2012-13. I am further informed and believe and therefore state that the City first incurred costs with respect to such mandated activities when it paid an invoice from the County for these and other services on or about January 17, 2012.

7. The City first incurred costs under the Permit in FY 2009-10, which commenced on July 1, 2009.

8. I am informed and believe that there are no dedicated State, Federal or regional funds that are or will be available to pay for any of these new programs or activities. I am not aware of any fee or tax which the City would have the discretion to impose under California law in order to recover any portion of these new programs or activities. I am further informed and

believe that the only available sources to pay for these new programs or activities are and will be the City's General Fund.

Executed January 4, 2017 at San Juan Capistrano, California.

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

Benjamin Siegel, City Manager
City of San Juan Capistrano

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SECTION 7 –

DOCUMENTATION

IN SUPPORT OF TEST CLAIMS IN RE SAN DIEGO RWQCB

ORDER NO. R9-2009-0002

(NPDES NO. CAS0108740)

VOLUME I

FEDERAL AND STATE CASES

AND STATUTES

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TAB "1"

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Environmental Law > Federal & State Interrelationships > Federal Preemption
Environmental Law > Water Quality > General Overview
[HN2]The Clean Water Act, 33 U.S.C.S. § 1251 et seq., preempts an action based on the law of the affected state and that the only state law applicable to an interstate discharge is the law of the state in which the point source is located.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > General Overview
[HN3]When a new permit is being issued by the source state's permit-granting agency, the downstream state does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. An affected state's only recourse is to apply to the Environmental Protection Agency Administrator, who then has the discretion to disapprove the permit if he concludes that the discharges will have an undue impact on interstate waters. 33 U.S.C.S. § 1342(d)(2). Thus the Clean Water Act, 33 U.S.C.S. § 1251 et seq., makes it clear that affected states occupy a subordinate position to source states in the federal regulatory program.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN4]If the Environmental Protection Agency (EPA) recommends changes to the standards and the state fails to comply with that recommendation, the Clean Water Act, 33 U.S.C.S. § 1251 et seq., authorizes the EPA to promulgate water quality standards for the state. 33 U.S.C.S. § 1313(c).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > General Overview
[HN5]Section 402(b) of the Clean Water Act authorizes each state to establish its own permit program for discharges into navigable waters within its jurisdiction. 33 U.S.C.S. § 1342(b). Although these provisions do not authorize the downstream state to veto the issuance of a permit for a new point source in another state, the Administrator retains authority to block the issuance of any state-issued permit that is outside the guidelines and requirements of the Act. 33 U.S.C.S. § 1342(d)(2).

Environmental Law > Water Quality > General Overview
[HN6]See 33 U.S.C.S. § 1342(b).

Environmental Law > Water Quality > Ocean Dumping
[HN7]See 33 U.S.C.S. § 1442(d)(2).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications
[HN8]In the absence of an approved state program, the Environmental Protection Agency (EPA) may issue a National Pollution Discharge Elimination System permit under 33 U.S.C.S. § 1341(a). The EPA's permit program is subject to the same terms, conditions, and requirements as a state permit program. 33 U.S.C.S. § 1342(a)(3).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications
[HN9]See 33 U.S.C.S. § 1341(a)(2).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > General Overview
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN10]Environmental Protection Agency regulations have provided that a National Pollution Discharge Elimination System permit shall not be issued when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States. 40 C.F.R. § 122.4(d) (1991).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > General Overview
[HN11]Section 402(a)(2) of the Clean Water Act provides that for Environmental Protection Agency-issued permits the Administrator shall prescribe conditions to assure compliance with the requirements of § 402(a)(1) of the Clean Water Act and such other requirements as he deems appropriate. 33 U.S.C.S. § 1342(a)(2).

Environmental Law > Water Quality > General Overview
[HN12]See 33 U.S.C.S. § 1342(d)(2).

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

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Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN13]A court reviewing an agency's adjudicative action should accept the agency's factual findings if those findings are supported by substantial evidence on the record as a whole. The court should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence.

Administrative Law > Judicial Review > Reviewability > Factual Determinations
Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review
[HN14]An agency ruling is arbitrary and capricious if the agency has entirely failed to consider an important aspect of the problem.

DECISION:

EPA's issuance of discharge permit to sewage plant, based on finding that discharges would not cause detectable violation of downstream state's water quality standards, held authorized by Clean Water Act.

SUMMARY:

An Arkansas city, in an application to the United States Environmental Protection Agency (EPA), sought a permit for the city's new sewage treatment plant under the National Pollution Discharge Elimination System (NPDES). The EPA, pursuant to 402(a)(1) of the Clean Water Act (33 USCS 1342(a)(1)), issued a permit which (1) authorized the plant to discharge up to half of its effluent into a stream whose waters ultimately entered a river which flowed into Oklahoma, but (2) imposed various conditions, including a provision that the permit would be modified if a pending study determined that more stringent limitations were necessary to insure compliance with Oklahoma's water quality standards. Oklahoma authorities, challenging the permit before the EPA, alleged that the plant's discharge violated Oklahoma standards prohibiting any degradation of water quality in the river in question. An administrative law judge (ALJ) affirmed the issuance of the permit on the ground that the discharge would not have an "undue impact" on Oklahoma waters; but the EPA's Chief Judicial Officer (CJO), remanding for application of a different standard of review, interpreted Oklahoma's ban on degradation of the river in question as allowing the permit to be upheld if the record showed by a preponderance of the evidence that the authorized discharges would not cause an actual detectable violation of Oklahoma water quality standards. On remand, the ALJ made detailed factual findings and determined that the CJO's standard had been met. The CJO sustained the issuance of the permit. However, the United States Court of Appeals for the Tenth Circuit, on judicial review, reversed the issuance of the permit, as the court (1) interpreted the Act as providing that a proposed source may not be permitted where it would discharge effluent that would contribute to conditions currently constituting a violation of applicable water quality standards, (2) found that the river in question was already degraded in water quality and that effluent from the sewage treatment plant could be expected to contribute to the river's ongoing deterioration even though it would not detectably affect water quality, and (3) determined that the EPA's decision was arbitrary and capricious because the EPA had misinterpreted Oklahoma water quality standards and failed to consider the important and relevant fact of the river's degraded status (908 F2d 595).

On certiorari, the United States Supreme Court reversed. In an opinion by Stevens, J., expressing the unanimous view of the court, it was held that the EPA's decision to issue the NPDES permit was authorized by the Clean Water Act, as (1) the Act did not prohibit any discharge of effluent that would reach waters already in violation of existing water quality standards; (2) the CJO's interpretation of the Oklahoma water quality standards was reasonable and consistent with the purposes and principles of the Act, and the EPA's reasonable, consistently held interpretation of the Oklahoma standards was entitled to substantial deference since the standards had been incorporated into EPA regulations, and thus had a federal character at least insofar as they affected the issuance of a permit in another state; (3) the ALJ's findings that the sewage plant discharge would not lead to a detectable change in four primary measures of water quality under the Oklahoma standards were supported by substantial evidence; and (4) although it might arguably be wise to prohibit any discharge into the river in question, it was not arbitrary for the EPA to conclude, given perceived benefits to the river and in Arkansas, that allowing the discharge would be even wiser, and such policy decisions were properly made by the EPA rather than by the courts.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

ENVIRONMENTAL LAW §30

Clean Water Act -- discharge permit --

Headnote:[1A][1B][1C][1D][1E]

A decision by the United States Environmental Protection Agency (EPA) to issue a National Pollution Discharge Elimination System (NPDES) permit, pursuant to 402(a)(1) of the Clean Water Act (33 USCS 1341(a)(1)), to an Arkansas city for a sewage treatment plant located

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upstream from Oklahoma, based on the EPA's finding that discharges from the new source would not cause a detectable violation of Oklahoma's water quality standards, is authorized by the Act, notwithstanding a Federal Court of Appeals' findings on judicial review that effluent from the plant would reach a river in Oklahoma which was already "degraded" in water quality and that such effluent could be expected to contribute to the deterioration of the river, as (1) the Act does not prohibit any discharge of effluent that would reach waters already in violation of existing water quality standards; (2) the interpretation of the Oklahoma standards by the EPA's Chief Judicial Officer, who ruled that the standard requiring no degradation of the river in question would be violated only if the discharge effected an actual detectable or measurable change in water quality, is reasonable and consistent with the purposes and principles of the Act, and the EPA's reasonable, consistently held interpretation of the Oklahoma standards is entitled to substantial deference, since the standards, at least insofar as they affect the issuance of a permit in another state, have a federal character; (3) an administrative law judge's findings that the sewage plant discharge would not lead to a detectable change in four primary measures of water quality under the Oklahoma standards are supported by substantial evidence; and (4) although it might arguably be wise to prohibit any discharge into the river in question, even if that discharge would have no adverse impact on water quality, it is not arbitrary for the EPA to conclude--given the benefits to the river from the increased flow of relatively clean water and the benefits achieved in Arkansas by allowing the new plant to operate as designed--that allowing the discharge would be even wiser, and such policy decisions are properly made by the EPA rather than by the courts.

[***LEdHN2]

ENVIRONMENTAL LAW §32

Clean Water Act -- state and federal standards --

Headnote:[2]

Water quality standards, which are generally promulgated by the states, supplement the effluent limitations promulgated by the United States Environmental Protection Agency under 301 and 304 of the Clean Water Act (33 USCS 1311, 1314), so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.

[***LEdHN3]

ENVIRONMENTAL LAW §18

scope of judicial review --

Headnote:[3A][3B]

In determining the propriety of the issuance of a discharge permit by the United States Environmental Protection Agency (EPA) to a sewage treatment plant pursuant to 402(a)(1) of the Clean Water Act (33 USCS 1341(a)(1)), it is neither necessary nor prudent for the United States Supreme Court to resolve the question whether the Act requires the EPA, in crafting and issuing a permit to a point source in one state, to apply the water quality standards of a downstream state, where (1) in issuing the permit in question, the EPA assumed that it was obligated by both the Act and its own regulation to insure that the sewage plant discharge would not violate a downstream state's standards, (2) this assumption was permissible and reasonable, and therefore, there is no need for the Supreme Court to address whether the Act requires as much, and (3) much of the analysis and argument in the parties' briefs relied on statutory provisions which govern not only federal permits issued pursuant to 401(a) and 402(a) of the Act (33 USCS 1341(a), 1342(a)), but also state permits issued under 402(b) of the Act (33 USCS 1342(b)), and it would be unwise to evaluate those arguments in a case which involves only a federal permit; the Supreme Court's decision not to determine the scope of the EPA's statutory obligations, however, does not affect the Supreme Court's resolution of a question concerning the EPA's statutory authority to mandate compliance with a downstream state's water quality standards.

[***LEdHN4]

ENVIRONMENTAL LAW §30

Clean Water Act -- discharge permits -- enforcement of state standards --

Headnote:[4A][4B][4C]

The Clean Water Act (33 USCS 1251-1376) does not limit the authority of the United States Environmental Protection Agency (EPA) to mandate that point sources receiving National Pollution Discharge Elimination System (NPDES) permits from the EPA pursuant to 402(a)(1) of the Act (33 USCS 1341(a)(1)) comply with a downstream state's water quality standards; an EPA regulation (40 CFR 122.4(d)) which provides that NPDES permits shall not be issued when the imposition of conditions cannot insure compliance with the applicable water quality requirements of all affected states constitutes a reasonable exercise of the EPA's statutory authority, as (1) the application of state water quality standards in the interstate context is wholly consistent with the Act's broad purpose of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters, and (2) 301(b)(1)(C) of the Act (33 USCS 1311(b)(1)(C)) expressly identifies the achievement of

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state water quality standards as one of the Act's central objectives; the EPA's requirement, as a condition of issuing an NPDES permit to an Arkansas sewage treatment plant located upstream from Oklahoma, that the discharge from the plant comply with Oklahoma water quality standards is a reasonable exercise of the EPA's substantial statutory discretion.

[***LEdHN5]

ENVIRONMENTAL LAW §30

Clean Water Act -- discharge permits --

Headnote:[5]

The Administrator of the United States Environmental Protection Agency (EPA) is vested by Congress with (1) broad discretion to establish conditions for National Pollution Discharge Elimination System (NPDES) permits issued by the EPA pursuant to 402(a)(1) of the Clean Water Act (33 USCS 1341(a)(1)), and (2) broad authority to oversee state permit programs.

[***LEdHN6]

ENVIRONMENTAL LAW §30

Clean Water Act -- state and federal authority --

Headnote:[6]

The Clean Water Act (33 USCS 1251-1376) vests in the United States Environmental Protection Agency and in the states broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution.

[***LEdHN7]

APPEAL §1535

harmless error -- EPA decisions --

Headnote:[7A][7B]

The error of an administrative law judge (ALJ) and of the Chief Judicial Officer of the United States Environmental Protection Agency (EPA) in misinterpreting a provision of Oklahoma's water quality standards as governing only the discharge of phosphorus into lakes, rather than the discharge of phosphorus into lakes and into all perennial and intermittent streams--which misinterpretation was made in the course of a determination that a National Pollution Discharge Elimination System (NPDES) permit was properly issued by the EPA to an Arkansas sewage treatment plant upstream from Oklahoma based on a finding that discharges from the plant would not cause a detectable violation of Oklahoma water quality standards--is harmless, because (1) the ALJ found that the discharge into a particular lake would comply with the Oklahoma phosphorus standard, and (2) it was undisputed that such discharge produced a greater threat to the slow-moving water of the lake than to the rapid flow in an affected river.

[***LEdHN8]

APPEAL §1535

harmless error -- EPA decisions --

Headnote:[8A][8B]

The error of an administrative law judge (ALJ) and of the Chief Judicial Officer of the United States Environmental Protection Agency (EPA) in relying on the 1985 version of Oklahoma's water quality standards, rather than the 1982 version, for purposes of a determination that an Arkansas municipality's 1985 application for a National Pollution Discharge Elimination System (NPDES) permit for a sewage treatment plant located upstream from Oklahoma was properly granted by the EPA based on a finding that discharges from the plant would not cause a detectable violation of Oklahoma water quality standards, is harmless, because the portions of the two versions relevant to the determination did not differ materially.

[***LEdHN9]

ENVIRONMENTAL LAW §18

scope of judicial review --

Headnote:[9A][9B][9C][9D][9E]

A Federal Court of Appeals' determination that the United States Environmental Protection Agency (EPA) acted arbitrarily and capriciously in granting an Arkansas city's 1985 application for a National Pollution Discharge Elimination System (NPDES) permit for a sewage treatment plant located upstream from Oklahoma exceeds the legitimate scope of judicial review of an agency adjudication, in that the Court of Appeals (1) in finding that the EPA had misinterpreted water quality standards promulgated by the state of Oklahoma, failed to give due regard and deference to the EPA's interpretation of its own regulations, as those regulations incorporated the Oklahoma standards by providing (40 CFR 122.4(d)) that NPDES permits shall not be issued when the imposition of conditions cannot insure compliance with the applicable water quality requirements of all affected states; (2) in reviewing the EPA's findings that the sewage plant effluent would not cause a detectable violation of Oklahoma water quality standards, disregarded established standards for reviewing the factual findings of agencies and improperly made its own factual findings by determining that there was substantial evidence to support findings which the Court of Appeals thought were appropriate but

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which were contrary to those made by an administrative law judge; and (3) incorrectly concluded that the EPA's decision was arbitrary and capricious due to the EPA's failure to consider the allegedly important and relevant fact that the affected Oklahoma river was, by the Court of Appeals' assessment, already degraded in water quality, a circumstance which was an "important aspect" of the case only because of the Court of Appeals' novel and erroneous interpretation of the controlling law as banning any effluent sources that would contribute to conditions constituting a violation of applicable water quality standards.

[***LEdHN10]

ENVIRONMENTAL LAW §30

Clean Water Act -- incorporating state regulations --

Headnote:[10]

A United States Environmental Protection Agency (EPA) regulation (40 CFR 122.4(d)), which provides that National Pollution Discharge Elimination System permits shall not be issued pursuant to 402(a)(1) of the Clean Water Act (33 USCS 1341(a)(1)) when the imposition of conditions cannot insure compliance with the applicable water quality requirements of all affected states, effectively incorporates into federal law those state-law standards which the EPA determines to be applicable.

[***LEdHN11]

ADMINISTRATIVE LAW §265

judicial review -- factual findings --

Headnote:[11]

A court reviewing an administrative agency's adjudicative action should accept the agency's factual findings if those findings are supported by substantial evidence on the record as a whole; the court should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence.

[***LEdHN12]

ADMINISTRATIVE LAW §250

judicial review --

Headnote:[12]

An administrative agency ruling is arbitrary and capricious, for purposes of judicial review, if the agency has entirely failed to consider an important aspect of the problem.

SYLLABUS

The Clean Water Act provides for two sets of water quality measures: effluent limitations, which are promulgated by the Environmental Protection Agency (EPA or Agency), and water quality standards, which are promulgated by the States. The Act generally prohibits the discharge of effluent into a navigable body of water unless the point source obtains a National Pollution Discharge Elimination System (NPDES) permit from a State with an EPA-approved permit program or from the EPA itself. A Fayetteville, Arkansas, sewage treatment plant received an EPA-issued permit, authorizing it to discharge effluent into a stream that ultimately reaches the Illinois River upstream from the Oklahoma border. Respondents, Oklahoma and other Oklahoma parties, challenged the permit before the EPA, alleging, *inter alia*, that the discharge violated Oklahoma water quality standards, which allow no degradation of water quality in the upper Illinois River. The EPA's Chief Judicial Officer remanded the initial affirmance of the permit by the Administrative Law Judge (ALJ), ruling that the Act requires an NPDES permit to impose any effluent limitations necessary to comply with applicable state water quality standards, and that those standards would be violated only if the record shows by a preponderance of the evidence that the discharge would cause an actual *detectable* violation of Oklahoma's water quality standards. The ALJ then made detailed findings of fact, concluding that Fayetteville had satisfied the Chief Judicial Officer's standard, and the Chief Judicial Officer sustained the permit's issuance. The Court of Appeals reversed, ruling that the Act does not allow a permit to be issued where a proposed source would discharge effluent that would contribute to conditions currently constituting a violation of applicable water quality standards. It concluded that the Illinois River was already degraded, that the Fayetteville effluent would reach the river in Oklahoma, and that the effluent would contribute to the river's deterioration even though it would not detectably affect the river's water quality.

Held: The EPA's action was authorized by the Clean Water Act. Pp. 98-114.

(a) Where interstate discharge is involved, both federal common law of nuisance, *Milwaukee* v. *Illinois*, 451 U.S. 304, 68 L. Ed. 2d 114, 101 S. Ct. 1784, and an affected State's common law, *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 493, 93 L. Ed. 2d 883, 107 S. Ct. 805, are pre-empted. Affected States may not block a permit, but must apply to the EPA Administrator, who may disapprove a plan if he concludes that the discharge will have an undue impact on interstate waters. *Id.*, at 490-491. Pp. 98-101.

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(b) The EPA has construed the Act as requiring that EPA-issued permits comply with the requirements for a permit issued under an approved state plan and with § 401(a) of the Act, which appears to prohibit the issuance of a federal permit over the objection of an affected State unless compliance with the affected State's water quality requirements can be insured. Pp. 101-103.

(c) The EPA's requirement that the Fayetteville discharge comply with Oklahoma's water quality standards is a reasonable exercise of the substantial statutory discretion Congress has vested in the Agency. There is no need to address the question whether the Act requires compliance with affected States' standards, for it clearly does not limit the EPA's authority to mandate such compliance. EPA regulations, which since 1973 have required that an NPDES permit not be issued when compliance with affected States' water quality standards cannot be insured, are a reasonable exercise of the Agency's discretion and are a well-tailored means of reaching the Act's goal of achieving state water quality standards. The EPA's authority is not constrained by the limits in *Ouellette, supra*, concerning an affected State's direct input into the permit process, does not conflict with the Act's legislative history and statutory scheme, and is not incompatible with the balance among competing policies and interests that Congress struck in the Act. Pp. 104-107.

(d) Contrary to the Court of Appeals' interpretation, nothing in the Act mandates a complete ban on discharges into a waterway that is in violation of existing water quality standards. Instead, the Act vests in the EPA and the States broad authority to develop long-range, areawide programs to alleviate and eliminate existing pollution. Pp. 107-108.

(e) The Court of Appeals exceeded the legitimate scope of judicial review of an agency adjudication when it invalidated the EPA's issuance of the permit on the ground that the Agency misinterpreted Oklahoma's water quality standards. It substituted its own reading of the law for the EPA's. Thus, it failed to give substantial deference to the Agency's reasonable, consistently held interpretation of its own regulations, which incorporate the Oklahoma standards. It also disregarded well-established standards for reviewing factual findings of agencies by making its own factual findings when the ALJ's findings were supported by substantial evidence. See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 95 L. Ed. 456, 71 S. Ct. 456. As a result, the court's conclusion that the river's degradation was an important and relevant factor which the EPA failed to consider was based on its own erroneous interpretation of the controlling law. Had it been properly respectful of the EPA's permissible reading of the Act -- that what matters is not the river's current status, but whether the proposed discharge will have a detectable effect on that status -- it would not have adjudged the Agency's decision arbitrary and capricious. Pp. 109-114.

COUNSEL: Edward W. Warren argued the cause for petitioners in No. 90-1262. With him on the briefs were Winston Bryant, Attorney General of Arkansas, Mary B. Stallcup, Angela S. Jegley, David G. Norrell, James N. McCord, Walter R. Niblock, and Nancy L. Hamm. Deputy Solicitor General Wallace argued the cause for petitioner in No. 90-1266. With him on the briefs were Solicitor General Starr, Assistant Attorney General Stewart, Harriet S. Shapiro, Michael A. McCord, Anne S. Almy, Gary S. Guzy, and E. Donald Elliott.

Robert A. Butkin, Assistant Attorney General of Oklahoma, argued the cause for respondents in both cases. With him on the brief for respondents State of Oklahoma et al. were Susan B. Loving, Attorney General, Brita Haugland Cantrell, Assistant Attorney General, and Julian Fite. Theodore E. Dinsmoor and Susan Hedman filed a brief for respondent Oklahoma Wildlife Federation. +

+ Briefs of amici curiae urging reversal were filed for the State of Colorado by Gale A. Norton, Attorney General, Raymond T. Slaughter, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Martha E. Rudolph, Assistant Attorney General, and Martha Phillips Allbright; for the State of Nevada et al. by Nicholas J. Spaeth, Attorney General of North Dakota, Frankie Sue Del Papa, Attorney General of Nevada, John P. Arnold, Attorney General of New Hampshire, and Mark Barnett, Attorney General of South Dakota; for the Association of Metropolitan Sewerage Agencies et al. by Lee C. White, Benjamin L. Brown, Howard Holme, Don A. Zimmerman, Geoff Wilson, Thomas W. Kelty, James M. Kaup, Fred G. Stickel III, Robert E. Johnson, John E. Gotherman, Mark I. Wallach, Roy D. Bates, Ogden Stokes, Thomas S. Smith, Robert J. Alfton, and John Dodge; for Champion International Corp. et al. by J. Jeffrey McNealey, Michael K. Glenn, Theodore L. Garrett, Corinne A. Goldstein, Charles R. Nestrud, Richard A. Flye, Jerry C. Jones, and Jess Askew III; for the Colorado Water Congress by Mark T. Pifher; and for the Mountain States Legal Foundation et al. by William Perry Pendley.

Briefs of amici curiae urging affirmance were filed for the State of Illinois et al. by Roland W. Burris, Attorney General of Illinois, Rosalyn Kaplan, Solicitor General, and James L. Morgan, Assistant Attorney General, Charles W. Burson,

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JUDGES: STEVENS, J., delivered the opinion for a unanimous Court.

OPINION BY: STEVENS

OPINION

[*94] [***247] [**1050] JUSTICE STEVENS delivered the opinion of the Court.

[***LEdHR1A] [1A]Pursuant to the Clean Water Act, 86 Stat. 816, as amended, 33 U. S. C. § 1251 *et seq.*, the Environmental Protection Agency (EPA or Agency) issued a discharge permit to a new point source in Arkansas, about 39 miles upstream from the Oklahoma state line. The question presented in this litigation is whether the EPA's finding that discharges from the new source would not cause a detectable [**1051] violation of Oklahoma's [*95] water quality standards satisfied the EPA's duty to protect the interests of the downstream State. Disagreeing with the Court of Appeals, we hold that the Agency's action was authorized by the statute.

I

In 1985, the city of Fayetteville, Arkansas, applied to the EPA, seeking a permit for the city's new sewage treatment plant under the National Pollution Discharge Elimination System (NPDES). After the appropriate procedures, the EPA, pursuant to § 402(a)(1) of the Act, 33 U. S. C. § 1342(a)(1), issued a permit authorizing the plant to discharge up to half of its effluent (to a limit of 6.1 million gallons per day) into an unnamed [***248] stream in northwestern Arkansas. [1] That flow passes through a series of three creeks for about 17 miles, and then enters the Illinois River at a point 22 miles upstream from the Arkansas-Oklahoma border.

1 The permit also authorized the plant to discharge the remainder of its effluent into the White River, a river that does not flow into Oklahoma; this aspect of the permit is not at issue in this litigation.

The permit imposed specific limitations on the quantity, content, and character of the discharge and also included a number of special conditions, including a provision that if a study then underway indicated that more stringent limitations were necessary to ensure compliance with Oklahoma's water quality standards, the permit would be modified to incorporate those limits. App. 84.

Respondents challenged this permit before the EPA, alleging, *inter alia*, that the discharge violated the Oklahoma water quality standards. Those standards provide that "no degradation [of water quality] shall be allowed" in the upper Illinois River, including the portion of the river immediately downstream from the state line. [2]

2 Section 5 of the Oklahoma water quality standards provides:

"All streams and bodies of water designated as (a) are protected by prohibition of any new point source discharge of wastes or increased load from an existing point source except under conditions described in Section 3.

"All streams designated by the State as 'scenic river areas,' and such tributaries of those streams as may be appropriate will be so designated. Best management practices for control of nonpoint source discharge should be initiated when feasible." App. 46-47.

Oklahoma has designated the portion of the Illinois River immediately downstream from the state line as a "scenic river." Okla. Stat., Tit. 82, § 1452(b)(1) (Supp. 1989); see also App. 54.

Section 3 of the Oklahoma water quality standards provides, in relevant part:

"The intent of the Anti-degradation Policy is to protect all waters of the State from quality degradation. Existing instream water uses shall be

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maintained and protected. No further water quality degradation which would interfere with or become injurious to existing instream water uses shall be allowed. Oklahoma's waters constitute a valuable State resource and shall be protected, maintained and improved for the benefit of all the citizens.

. . . .

"No degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance. These include water bodies located in national and State parks, Wildlife Refuges, and those designated 'Scenic Rivers' in Appendix A." App. 27-28.

[*96] Following a hearing, the Administrative Law Judge (ALJ) concluded that the Oklahoma standards would not be implicated unless the contested discharge had "something more than a mere *de minimis* impact" on the State's waters. He found that the discharge would not have an "undue impact" on Oklahoma's waters and, accordingly, affirmed the issuance of the permit. App. to Pet. for Cert. in No. 90-1262, pp. 101a-103a (emphasis deleted).

On a petition for review, the EPA's Chief Judicial Officer first ruled that § 301(b)(1)(C) of the Clean Water Act "requires an NPDES permit to impose any effluent limitations necessary to comply with applicable state water quality standards." [3] *Id.*, at 116a-117a. He [**1052] then held that [***249] the Act [*97] and EPA regulations offered greater protection for the downstream State than the ALJ's "undue impact" standard suggested. He explained the proper standard as follows:

> "[A] mere theoretical impairment of Oklahoma's water quality standards -- *i. e.*, an infinitesimal impairment predicted through modeling but not expected to be actually detectable or measurable -- should not by itself block the issuance of the permit. In this case, the permit should be upheld if the record shows by a preponderance of the evidence that the authorized discharges would not cause an actual *detectable* violation of Oklahoma's water quality standards." *Id.*, at 117a (emphasis in original).

3 Section 301(b)(1)(C) provides, in relevant part, that

> "there shall be achieved --
>
> . . . .
>
> "(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet *water quality standards . . . established pursuant to any State law or regulations* . . . or required to implement any applicable water quality standard established pursuant to this chapter." 33 U. S. C. § 1311(b)(1)(C) (emphasis added).

On remand, the ALJ made detailed findings of fact and concluded that the city had satisfied the standard set forth by the Chief Judicial Officer. Specifically, the ALJ found that there would be no detectable violation of any of the components of Oklahoma's water quality standards. *Id.*, at 127a-143a. The Chief Judicial Officer sustained the issuance of the permit. *Id.*, at 145a-153a.

Both the petitioners in No. 90-1262 (collectively Arkansas) and the respondents in this litigation sought judicial review. [4] Arkansas argued that the Clean Water Act did not require an Arkansas point source to comply with Oklahoma's water quality standards. Oklahoma challenged the EPA's determination that the Fayetteville discharge would not produce a detectable violation of the Oklahoma standards.

4 The Arkansas petition was filed in the Court of Appeals for the Eighth Circuit and transferred to the Tenth Circuit where it was consolidated with the petition filed by the respondents.

The Court of Appeals did not accept either of these arguments. The court agreed with the EPA that the statute required compliance with Oklahoma's water quality standards, [*98] see 908 F.2d 595, 602-615 (CA10 1990), and did not disagree with the Agency's determination that the discharges from the Fayetteville plant would not produce a detectable violation of those standards. *Id.*, at 631-633. Nevertheless, relying on a theory that neither party had advanced, the Court of Appeals reversed the Agency's issuance of the Fayetteville permit. The court first ruled that the statute requires that "where a proposed source would discharge effluents that would contribute to conditions currently constituting a violation of applicable water quality standards, such [a] proposed source may not be permitted." *Id.*, at 620. Then the court found that the Illinois River in Oklahoma was "already degraded," that the Fayetteville effluent would reach the Illinois River in Oklahoma, and that that effluent could "be expected to contribute to the ongoing deterioration of the scenic [Illinois R]iver" in Oklahoma even though it

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would not detectably affect the river's water quality. *Id.*, at 621-629.

The importance and the novelty of the Court of Appeals' decision persuaded us to grant certiorari. 499 U.S. 946 (1991). We now reverse.

II

Interstate waters have been a font [***250] of controversy since the founding of the Nation. *E. g.*, *Gibbons* v. *Ogden*, 22 U.S. 1, 9 Wheat. 1, 6 L. Ed. 23 (1824). This Court has frequently resolved disputes between States that are separated by a common river, see, *e. g.*, *Ohio* v. *Kentucky*, 444 U.S. 335, 62 L. Ed. 2d 530, 100 S. Ct. 588 (1980), that border the same body of water, see, *e. g.*, *New York* v. *New Jersey*, 256 U.S. 296, 65 L. Ed. 937, 41 S. Ct. 492 [**1053] (1921), or that are fed by the same river basin, see, *e. g.*, *New Jersey* v. *New York*, 283 U.S. 336, 75 L. Ed. 1104, 51 S. Ct. 478 (1931).

Among these cases are controversies between a State that introduces pollutants to a waterway and a downstream State that objects. See, *e. g.*, *Missouri* v. *Illinois*, 200 U.S. 496, 50 L. Ed. 572, 26 S. Ct. 268 (1906). In such cases, this Court has applied principles of common law tempered by a respect for the sovereignty of the States. Compare *id.*, at 521, with *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237, 51 L. Ed. 1038, 27 S. Ct. 618 (1907). In forging what "may [*99] not improperly be called interstate common law," *Illinois* v. *Milwaukee*, 406 U.S. 91, 105-106, 31 L. Ed. 2d 712, 92 S. Ct. 1385 (1972) (*Milwaukee I*), however, we remained aware "that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." *Id.*, at 107.

In *Milwaukee* v. *Illinois*, 451 U.S. 304, 68 L. Ed. 2d 114, 101 S. Ct. 1784 (1981) (*Milwaukee II*), we held that the Federal Water Pollution Control Act Amendments of 1972 did just that. In addressing Illinois' claim that Milwaukee's discharges into Lake Michigan constituted a nuisance, we held that the comprehensive regulatory regime created by the 1972 amendments pre-empted Illinois' federal common law remedy. We observed that Congress had addressed many of the problems we had identified in *Milwaukee I* by providing a downstream State with an opportunity for a hearing before the source State's permitting agency, by requiring the latter to explain its failure to accept any recommendations offered by the downstream State, and by authorizing the EPA, in its discretion, to veto a source State's issuance of any permit if the waters of another State may be affected. *Milwaukee II*, 451 U.S. at 325-326.

In *Milwaukee II*, the Court did not address whether the 1972 amendments had supplanted *state* common law remedies as well as the federal common law remedy. See *id.*, at 310, n. 4. On remand, Illinois argued that § 510 of the Clean Water Act, 33 U. S. C. § 1370, expressly preserved the State's right to adopt and enforce rules that are more stringent than federal standards. [5] The Court of Appeals accepted Illinois' reading of § 510, but held that that section did "no more than [*100] to save the right and jurisdiction [***251] of a state to regulate activity occurring within the confines of its boundary waters." *Illinois* v. *Milwaukee*, 731 F.2d 403, 413 (CA7 1984), cert. denied, 469 U.S. 1196 (1985).

5 [HN1]Section 510 provides in relevant part:

> "Except as expressly provided in this [Act], nothing in this [Act] shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution [with exceptions]; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States *with respect to the waters (including boundary waters) of such States*." 33 U. S. C. § 1370 (emphasis added).

This Court subsequently endorsed that analysis in *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 93 L. Ed. 2d 883, 107 S. Ct. 805 (1987), in which Vermont property owners claimed that the pollution discharged into Lake Champlain by a paper company located in New York constituted a nuisance under Vermont law. The Court held [HN2]the Clean Water Act taken "as a whole, its purposes and its history" pre-empted an action based on the law of the affected State and that the only state law applicable to an interstate discharge is "the law of the State in which the point source is located." *Id.*, at 493, 487. Moreover, in reviewing § 402(b) of the Act, the Court pointed out that [HN3]when a new permit is being issued by the source State's permit-granting agency, the downstream State

> " [**1054] does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator, who then has the discretion to disapprove the permit if he concludes that the discharges will have an undue impact on interstate waters. § 1342(d)(2). . . . Thus the Act makes it clear that affected States occupy a subordinate position to source States in the federal regulatory program." *Id.*, at 490-491. [6]

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6 This description of the downstream State's role in the issuance of a new permit by a source State was apparently consistent with the EPA's interpretation of the Act at the time. The Government's *amicus curiae* brief in *Ouellette* stated that "the affected neighboring state [has] only an advisory role in the formulation of applicable effluent standards or limitations. The affected state may try to persuade the federal government or the source state to increase effluent requirements, but *ultimately possesses no statutory authority to compel that result, even when its waters are adversely affected by out-of-state pollution.* See 33 U. S. C. § 1341(a)(2), 1342(b)(3) and (5) . . . ." Brief for United States as *Amicus Curiae*, O. T. 1986, No. 85-1233, p. 19 (emphasis added; footnote omitted).

[*101] Unlike the foregoing cases, this litigation involves not a state-issued permit, but a federally issued permit. To explain the significance of this distinction, we comment further on the statutory scheme before addressing the specific issues raised by the parties.

III

[***LEdHR2] [2]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 this end, the Act provides for two sets of water quality measures. "Effluent limitations" are promulgated by the EPA and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. See §§ 1311, 1314. "Water quality standards" are, in general, promulgated by the States and establish the desired condition of a waterway. [***252] 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, 48 L. Ed. 2d 578, 96 S. Ct. 2022 (1976).

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, § 303 of the Act requires, *inter alia*, that state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards. [HN4]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).

The primary means for enforcing these limitations and standards is the NPDES, enacted in 1972 as a critical part of Congress' "complete rewriting" of federal water pollution [*102] law. *Milwaukee II*, 451 U.S. at 317. Section 301(a) of the Act, 33 U. S. C. § 1311(a), generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit. Section 402 establishes the NPDES permitting regime, and describes two types of permitting systems: state permit programs that must satisfy federal requirements and be approved by the EPA, and a federal program administered by the EPA.

[HN5]Section 402(b) authorizes each State to establish "its own permit program for discharges into navigable waters within its jurisdiction." 33 U. S. C. § 1342(b). Among the requirements the state program must satisfy [**1055] are the procedural protections for downstream States discussed in *Ouellette* and *Milwaukee II*. See §§ 1342(b)(3), (5). [7] Although these provisions do not authorize the downstream State to veto the issuance of a permit for a new point source in another State, the Administrator retains authority to block the issuance of any state-issued permit that is " [***253] outside the guidelines and requirements" of the Act. § 1342(d)(2). [8]

7 [HN6]Section 402(b) requires state permit programs

"(3) to insure that . . . 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;

. . . .

"(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." 33 U. S. C. § 1342(b).

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Although § 402(b) focuses on state-issued permits, § 402(a)(3) requires that, in issuing an NPDES permit, the Administrator follow the same procedures required of state permit programs. See 33 U. S. C. § 1342(a)(3); see also § 1341(a)(2).

8 [HN7]Section 402(d)(2) provides:

"(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." 33 U. S. C. § 1342(d)(2).

[*103] [HN8]In the absence of an approved state program, the EPA may issue an NPDES permit under § 402(a) of the Act. (In these cases, for example, because Arkansas had not been authorized to issue NPDES permits when the Fayetteville plant was completed, the permit was issued by the EPA itself.) The EPA's permit program is subject to the "same terms, conditions, and requirements" as a state permit program. 33 U. S. C. § 1342(a)(3). Notwithstanding this general symmetry, the EPA has construed the Act as requiring that EPA-issued NPDES permits also comply with § 401(a). That section, which predates § 402 and the NPDES, applies to a broad category of federal licenses, and sets forth requirements for "any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters." 33 U. S. C. § 1341(a). Section 401(a)(2) appears to prohibit the issuance of any federal license or permit over the objection of an affected State unless compliance with the affected State's water quality requirements can be ensured. [9]

9 [HN9]Section 401(a)(2) provides, in relevant part:

"Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator . . . shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit." 33 U. S. C. § 1341(a)(2).

[*104] [**1056] IV

The parties have argued three analytically distinct questions concerning the interpretation of the Clean Water Act. First, does the Act require the EPA, in crafting and issuing a permit to a point source in one State, to apply the water quality standards of downstream States? Second, even if the Act does not *require* as much, does the Agency have the statutory authority to mandate such compliance? Third, does the Act provide, as the Court of Appeals held, that once a body of [***254] water fails to meet water quality standards no discharge that yields effluent that reach the degraded waters will be permitted?

[***LEdHR3A] [3A]In these cases, it is neither necessary nor prudent for us to resolve the first of these questions. In issuing the Fayetteville permit, the EPA assumed it was obligated by both the Act and its own regulations to ensure that the Fayetteville discharge would not violate Oklahoma's standards. See App. to Pet. for Cert. in No. 90-1262, pp. 116a-117a, and n. 14. As we discuss below, this assumption was permissible and reasonable and therefore there is no need for us to address whether the Act requires as much. Moreover, much of the analysis and argument in the briefs of the parties relies on statutory provisions that govern not only federal permits issued pursuant to §§ 401(a) and 402(a), but also state permits issued under § 402(b). It seems unwise to evaluate those arguments in a case such as these, which only involve a federal permit.

[*105] [***LEdHR3B] [3B] [***LEdHR4A] [4A]Our decision not to determine at this time the scope of the Agency's statutory *obligations* does not affect our

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resolution of the second question, which concerns the Agency's statutory *authority*. Even if the Clean Water Act itself does not require the Fayetteville discharge to comply with Oklahoma's water quality standards, the statute clearly does not limit the EPA's authority to mandate such compliance.

[***LEdHR4B] [4B]Since 1973, [HN10]EPA regulations have provided that an NPDES permit shall not be issued "when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." [10] 40 CFR § 122.4(d) (1991); see also 38 Fed. Reg. 13533 (1973); 40 CFR § 122.44(d) (1991). Those regulations -- relied upon by the EPA in the issuance of the Fayetteville permit -- constitute a reasonable exercise of the Agency's statutory authority.

> 10 This restriction applies whether the permit is issued by the EPA or by an approved state program. See 40 CFR § 123.25 (1991).

[***LEdHR5] [5]Congress has vested in the Administrator broad discretion to establish conditions for NPDES permits. [HN11]Section 402(a) (2) provides that for EPA-issued permits "the Administrator shall prescribe conditions . . . to assure compliance with the requirements of [§ 402(a)(1)] and *such other requirements as he deems appropriate.*" 33 U. S. C. § 1342(a)(2) (emphasis added). Similarly, Congress preserved for the Administrator broad authority to oversee state permit programs:

> [HN12]"No permit shall issue . . . if the Administrator . . . objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter." § 1342(d)(2).

[***LEdHR4C] [4C]The regulations relied on by the EPA were a perfectly reasonable exercise of the Agency's statutory discretion. The application of state water quality standards in the interstate context is wholly consistent with the Act's broad purpose "to restore and maintain the chemical, physical, and [*106] biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Moreover, as noted above, § 301(b)(1)(C) expressly identifies the achievement of state water quality standards as [***255] one of the Act's central objectives. The Agency's regulations conditioning NPDES permits are a well-tailored means of achieving this goal.

Notwithstanding this apparent reasonableness, Arkansas argues that our description [**1057] in *Ouellette* of the role of affected States in the permit process and our characterization of the affected States' position as "subordinate," see 479 U.S. at 490-491, indicates that the EPA's application of the Oklahoma standards was error. We disagree. Our statement in *Ouellette* concerned only an affected State's input into the permit process; that input is clearly limited by the plain language of § 402(b). Limits on an affected State's direct participation in permitting decisions, however, do not in any way constrain the *EPA's* authority to require a point source to comply with downstream water quality standards.

Arkansas also argues that regulations requiring compliance with downstream standards are at odds with the legislative history of the Act and with the statutory scheme established by the Act. Although we agree with Arkansas that the Act's legislative history indicates that Congress intended to grant the Administrator discretion in his oversight of the issuance of NPDES permits, [11] we find nothing in that history to indicate that Congress intended to preclude the EPA from establishing a general requirement that such permits be conditioned to ensure compliance with downstream water quality standards.

> 11 See, *e. g.*, 1 Legislative History of Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-1, pp. 322, 388-389, 814 (1973); see also 33 U. S. C. § 1342(d)(3).

Similarly, we agree with Arkansas that in the Clean Water Act Congress struck a careful balance among competing policies and interests, but do not find the EPA regulations concerning [*107] the application of downstream water quality standards at all incompatible with that balance. Congress, in crafting the Act, protected certain sovereign interests of the States; for example, § 510 allows States to adopt more demanding pollution-control standards than those established under the Act. Arkansas emphasizes that § 510 preserves such state authority only as it is applied to the waters of the regulating State. Even assuming Arkansas' construction of § 510 is correct, cf. *id.*, at 493, that section only concerns *state* authority and does not constrain the *EPA's* authority to promulgate reasonable regulations requiring point sources in one State to comply with water quality standards in downstream States.

For these reasons, we find the EPA's requirement that the Fayetteville discharge comply with Oklahoma's water quality standards to be a reasonable exercise of the Agency's substantial statutory discretion. Cf. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

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[***LEdHR1B] [1B]The Court of Appeals construed the Clean Water Act to prohibit any discharge of effluent that would reach waters already in violation of existing water quality standards. [12] [***256] We find nothing in the Act to support this reading.

> 12 "We hold that the Clean Water Act prohibits granting an NPDES permit under the circumstances of this case (i. e., where applicable water quality standards have already been violated) and reverse EPA's decision to permit Fayetteville to discharge any part of its effluent to the Illinois River Basin." 908 F.2d 595, 616 (CA10 1990).
>
> "Congress cannot reasonably be presumed to have intended to exclude from the CWA's 'all-encompassing program,' 451 U.S. at 318, a permitting decision arising in circumstances such as those of this case. It is even more unfathomable that Congress fashioned a *'comprehensive . . .* policy for the *elimination* of water pollution,' *id.*, which sanctions continued pollution once minimum water quality standards have been transgressed. More likely, Congress simply never contemplated that EPA or a state would consider it permissible to authorize further pollution under such circumstances. We will not ascribe to the Act either the gaping loophole or the irrational purpose necessary to uphold EPA's action in this case." *Id.*, at 632 (footnotes omitted).

[*108] [**1058] The interpretation of the statute adopted by the court had not been advanced by any party during the Agency or court proceedings. Moreover, the Court of Appeals candidly acknowledged that its theory "has apparently never before been addressed by a federal court." 908 F.2d at 620, n. 39. The only statutory provision the court cited to support its legal analysis was § 402(h), see *id.*, at 633, which merely authorizes the EPA (or a state permit program) to prohibit a publicly owned treatment plant that is violating a condition of its NPDES permit from accepting any additional pollutants for treatment until the ongoing violation has been corrected. See 33 U. S. C. § 1342(h).

[***LEdHR1C] [1C] [***LEdHR6] [6]Although the Act contains several provisions directing compliance with state water quality standards, see, *e. g.*, § 1311(b)(1)(C), the parties have pointed to nothing that mandates a complete ban on discharges into a waterway that is in violation of those standards. The statute does, however, contain provisions designed to remedy existing water quality violations and to allocate the burden of reducing undesirable discharges between existing sources and new sources. See, *e. g.*, § 1313(d). Thus, rather than establishing the categorical ban announced by the Court of Appeals -- which might frustrate the construction of new plants that would improve existing conditions -- the Clean Water Act vests in the EPA and the States broad authority to develop long-range, areawide programs to alleviate and eliminate existing pollution. See, *e.g.*, § 1288(b)(2).

To the extent that the Court of Appeals relied on its interpretation of the Act to reverse the EPA's permitting decision, that reliance was misplaced.

[*109] VI

[***LEdHR7A] [7A] [***LEdHR8A] [8A] [***LEdHR9A] [9A]The Court of Appeals also concluded that the EPA's issuance of the Fayetteville permit was arbitrary and capricious because the Agency misinterpreted Oklahoma's water quality standards. The primary difference [13] between the court's [***257] and the Agency's interpretation of the standards derives from the court's construction of the Act. Contrary to the EPA's interpretation of the Oklahoma standards, the Court of Appeals read those standards as containing the same categorical ban on new discharges that the court had found in the Clean Water Act itself. Although we do not believe the text of the Oklahoma standards supports the court's reading (indeed, we note that Oklahoma itself had not advanced that interpretation in its briefs in the Court of Appeals), we reject it for a more fundamental reason -- namely, that the Court of Appeals exceeded the legitimate scope of judicial review of an agency adjudication. To emphasize the importance of this point, we shall first briefly assess the soundness of the EPA's interpretation and application of the Oklahoma [*110] standards and then comment more specifically on the Court of Appeals' approach.

[***LEdHR7B] [7B]

> 13 The court identified three errors in the EPA's reading of the Oklahoma standards. First, the court correctly observed that the ALJ and the Chief Judicial Officer misinterpreted § 4.10(c) of the standards as governing only the discharge of phosphorus into lakes, rather than the discharge of phosphorus into lakes and into all "perennial and intermittent streams." *Id.*, at 617 (emphasis omitted). This error was harmless because the ALJ found that the discharge into Lake Francis would comply with § 4.10(c) and it is undisputed that that discharge produced a greater threat to the slow-moving water of the lake than to the rapid flow in the river.
>
> [***LEdHR8B] [8B]
>
> The second flaw identified by the court was the ALJ's mistaken reliance on the 1985, rather than the 1982 version, of the Oklahoma stan-

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dards. We agree with the Chief Judicial Officer, who also noted this error, that the portions of the two versions relevant to this case "do not differ materially." App. to Pet. for Cert. in No. 90-1262, p. 150a. Therefore, this error was also harmless.

Because these two errors were harmless, we have focused in the text on the major difference between the court's and the EPA's readings of the Oklahoma standards: the "no degradation" provision.

[***LEdHR10] [10]As discussed above, an EPA regulation requires an NPDES permit to comply "with the applicable water quality requirements of [**1059] all affected States." 40 CFR § 122.4(d) (1991). This regulation effectively incorporates into federal law those state-law standards the Agency reasonably determines to be "applicable." In such a situation, then, state water quality standards -- promulgated by the States with substantial guidance from the EPA [14] and approved by the Agency -- are part of the federal law of water pollution control.

14 See *supra*, at 101. Oklahoma's water quality standards closely track the EPA's model standards in effect at that time. Compare § 3 of the Oklahoma standards with 40 CFR § 35.1550(e)(1) (1981).

Two features of the body of law governing water pollution support this conclusion. First, as discussed more thoroughly above, we have long recognized that interstate water pollution is controlled by *federal* law. See *supra*, at 98-100. Recognizing that the system of federally approved state standards as applied in the interstate context constitutes federal law is wholly consistent with this principle. Second, treating state standards in interstate controversies as federal law accords with the Act's purpose of authorizing the EPA to create and manage a uniform system of interstate water pollution regulation.

[***LEdHR1D] [1D]Because we recognize that, at least insofar as they affect the issuance of a permit in another State, the Oklahoma standards have a federal character, the EPA's reasonable, consistently held interpretation of those standards is entitled to substantial deference. Cf. *INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 189-190, 116 L. Ed. 2d 546, 112 S. Ct. 551 (1991); *Chevron U. S. A. Inc. v. Natural Resources Defense* [***258] *Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). In these cases, the Chief Judicial Officer ruled that the Oklahoma standards -- which require that there be "no degradation" of the upper Illinois River -- would [*111] only be violated if the discharge effected an "actually detectable or measurable" change in water quality. App. to Pet. for Cert. in No. 90-1262, p. 117a.

This interpretation of the Oklahoma standards is certainly reasonable and consistent with the purposes and principles of the Clean Water Act. As the Chief Judicial Officer noted, "unless there is some method for measuring compliance, there is no way to ensure compliance." *Id.*, at 118a, n. 16 (internal quotation marks omitted; citation omitted). Moreover, this interpretation of the Oklahoma standards makes eminent sense in the interstate context: If every discharge that had some theoretical impact on a downstream State were interpreted as "degrading" the downstream waters, downstream States might wield an effective veto over upstream discharges.

The EPA's application of those standards in these cases was also sound. On remand, the ALJ scrutinized the record and made explicit factual findings regarding four primary measures of water quality under the Oklahoma standards: eutrophication, [15] esthetics, [16] dissolved oxygen, [17] and [**1060] metals. [18] [*112] In each case, the ALJ found that the Fayetteville discharge would not lead to a detectable change in water quality. He therefore concluded that the Fayetteville discharge would not violate the Oklahoma water quality standards. Because we agree with the Agency's Chief Judicial Officer that these findings are supported by substantial evidence, we conclude that the Court of Appeals should have affirmed both the EPA's construction of the regulations and the issuance of the Fayetteville permit.

15 Eutrophication is the "normally slow aging process by which a lake evolves into a bog or marsh . . . . During eutrophication the lake becomes so rich in nutritive compounds (especially nitrogen and phosphorus) that algae and other microscopic plant life become superabundant, thereby 'choking' the lake . . . ." App. 57-58. With regard to eutrophication, the ALJ found that the Fayetteville plant would discharge 30 pounds of phosphorus per day, only about 6 pounds of which would reach the Arkansas/Oklahoma border, and that such a small amount would not result in an increase in eutrophication. App. to Pet. for Cert. in No. 90-1262, p. 129a.

16 With regard to esthetics, the ALJ concluded that the only discharged compound that would affect esthetics was phosphorus and that, again, the amount of that substance crossing the border would not affect the esthetic quality of Oklahoma's waters. *Id.*, at 135a-136a.

17 With regard to dissolved oxygen, the ALJ found that in the 39 miles between discharge and the border the effluent would experience "complete oxygen recovery" and therefore would not

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affect the dissolved oxygen levels in the river. *Id.*, at 140a.

18 With regard to metals, the ALJ concluded that the concentrations of metals would be so low as not to violate the Oklahoma standards. *Id.*, at 143a.

[***LEdHR9B] [9B]In its review of the EPA's interpretation and application of the Oklahoma standards, the Court of Appeals committed three mutually compounding errors.

First, the court failed to give due regard to the EPA's interpretation of its own regulations, as those regulations incorporate the Oklahoma standards. Instead the court voiced its own interpretation of the governing law and concluded that "where a [***259] proposed source would discharge effluents that would contribute to conditions currently constituting a violation of applicable water quality standards, such [a] proposed source may not be permitted." 908 F.2d at 620. As we have already pointed out, that reading of the law is not supported by the statute or by any EPA regulation. The Court of Appeals sat in review of an agency action and should have afforded the EPA's interpretation of the governing law an appropriate level of deference. See generally *Chevron, supra*, at 842-844.

[***LEdHR9C] [9C] [***LEdHR11] [11]Second, the court disregarded well-established standards for reviewing the factual findings of agencies and instead made its own factual findings. The troubling nature of the court's analysis appears on the face of the opinion itself: At least four times, the court concluded that "there was substantial evidence before the ALJ to support" particular findings which the court thought appropriate, but which were [*113] contrary to those actually made by the ALJ. 908 F.2d at 620, 625, 627, 629. Although we have long recognized the "substantial evidence" standard in administrative law, the court below turned that analysis on its head. [HN13]A court reviewing an agency's adjudicative action should accept the *agency's* factual findings if those findings are supported by substantial evidence on the record as a whole. See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 95 L. Ed. 456, 71 S. Ct. 456 (1951). The court should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence.

[***LEdHR9D] [9D]Third, the court incorrectly concluded that the EPA's decision was arbitrary and capricious. This error is derivative of the court's first two errors. Having substituted its reading of the governing law for the Agency's, and having made its own factual findings, the Court of Appeals concluded that the EPA erred in not considering an important and relevant fact -- namely, that the upper Illinois River was (by the court's assessment) already degraded.

[***LEdHR9E] [9E] [***LEdHR12] [12]As we have often recognized, [HN14]an agency ruling is "arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).However, in these cases, the degraded status of the river is only an "important aspect" because of the Court of Appeals' novel and erroneous interpretation of the controlling law. Under the EPA's interpretation of that law, what matters is not the river's current status, but rather whether the proposed discharge will have a "detectable effect" on that status. If the Court of Appeals had been properly respectful of the Agency's permissible reading of the Act and [**1061] the Oklahoma standards, the court would not have adjudged the Agency's decision arbitrary and capricious for this reason.

[***LEdHR1E] [1E]In sum, the Court of Appeals made a policy choice that it was not authorized to make. Arguably, as that court suggested, [*114] it might be wise to prohibit any discharge into the Illinois River, even if that discharge would have no adverse impact on water quality. But it was surely not arbitrary for the EPA to conclude -- given the benefits to the river from the increased flow of relatively [***260] clean water [19] and the benefits achieved in Arkansas by allowing the new plant to operate as designed -- that allowing the discharge would be even wiser. It is not our role, or that of the Court of Appeals, to decide which policy choice is the better one, for it is clear that Congress has entrusted such decisions to the Environmental Protection Agency.

19 Justice Holmes recognized this potential benefit years ago:

"There is no pretence that there is a nuisance of the simple kind that was known to the older common law. There is nothing which can be detected by the unassisted senses -- no visible increase of filth, no new smell. On the contrary, it is proved that the great volume of pure water from Lake Michigan which is mixed with the sewage at the start has improved the Illinois River in these respects to a noticeable extent. Formerly it was sluggish and ill smelling. Now it is a comparatively clear stream to which edible fish have returned. Its water is drunk by the fisherman, it is said, without evil results." *Missouri v. Illinois*, 200 U.S. 496, 522, 50 L. Ed. 572, 26 S. Ct. 268 (1906).

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Accordingly, the judgment of the Court of Appeals is

Reversed.

REFERENCES

61A Am Jur 2d, Pollution Control 133-135, 144, 148, 153-158, 170-173, 179-181

11 Federal Procedure, L Ed, Environmental Protection 32:259, 32:294-32:404

9 Federal Procedural Forms, L Ed, Environmental Protection 29:71-29:94

20 Am Jur Pl & Pr Forms (Rev), Pollution Control, Forms 81-92

25 Am Jur Proof of Facts 233, Water Pollution--Sewage and Industrial Wastes

33 USCS 1342(a)(1)

L Ed Digest, Environmental Law 30

L Ed Index, Effluent Standards; Environmental Law; Pollution; Water Pollution

Index to Annotations, Environmental Law; Federal Water Pollution Control Act; Pollution; Water Pollution

Annotation References:

Supreme Court's views as to construction and application of Federal Water Pollution Control (Clean Water) Act (33 USCS 1251 -1376). 84 L Ed 2d 895.

Supreme Court's views as to weight and effect to be given, on subsequent judicial construction, to prior administrative construction of statute. 39 L Ed 2d 942.

Federal common law of nuisances as basis for relief in environmental pollution cases. 29 ALR Fed 137.

Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency. 60 ALR3d 665.

Validity and construction of anti-water pollution statutes and ordinances. 32 ALR3d 215.

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TAB "2"

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LEXSEE

Caution
As of: Jun 17, 2010

CITY OF ARCADIA, et al., Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants, - and - NATURAL RESOURCES DEFENSE COUNCIL, et al., Defendants-Intervenors.

No. C 02-5244 SBA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

265 F. Supp. 2d 1142; 2003 U.S. Dist. LEXIS 9044

May 16, 2003, Decided
May 16, 2003, Filed

SUBSEQUENT HISTORY: Affirmed by City of Arcadia v. United States EPA, 411 F.3d 1103, 2005 U.S. App. LEXIS 11240 (9th Cir. Cal., 2005)
Related proceeding at City of Arcadia v. State Water Res. Control Bd., 2006 Cal. App. LEXIS 92 (Cal. App. 4th Dist., Jan. 26, 2006)

DISPOSITION: [**1] Defendants' motion to dismiss granted; plaintiffs' motion for partial summary judgment denied, and objections overruled. Action dismissed in its entirety, without leave to amend in part and with prejudice in part. Intervenors' evidentiary objections overruled as moot.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, California cities, sued defendants, including the United States Environmental Protection Agency (EPA), for declarative and injunctive relief under, inter alia, 5 U.S.C.S. § 706 of the Administrative Procedure Act (APA), 5 U.S.C.S. § 551 et seq. Defendants sought dismissal of the operative complaint. The cities sought partial summary judgment.

OVERVIEW: The first claim for relief alleged APA violations. Generally, it alleged that numerous EPA actions were arbitrary and capricious, and contrary to law, such as the EPA's establishing the EPA Trash Total Daily Maximum Loads (TMDLs) prior to receiving for review the California Trash TMDLs. Violations alleged in the second claim appeared to relate mostly to procedural requirements under the Regulatory Flexibility Act, 5 U.S.C.S. § 601 et seq., and the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C.S. § 801 et seq. The third claim sought a declaration as to which party's interpretation of the law was correct and a judicial determination of the cities' rights and duties. The court concluded that all of the cities' claims were moot, meritless, or unripe. The cities' challenges to the EPA Trash TMDLs were obviously mooted the minute that EPA approved the State Trash TMDLs. The cities' challenge to EPA's authority to approve the State Trash TMDLs following its establishment of the EPA Trash TMDLs and their challenge to the "de facto TMDL procedure" were patently meritless. Finally, the cities' challenges to the "merits" of the State Trash TMDLs were premature.

OUTCOME: The EPA's motion to dismiss, in which intervenor environmental organizations joined, was granted. The cities' motion for summary adjudication of issues was denied as moot. Various objections to declarations made by the parties were either overruled or overruled as moot.

CORE TERMS: epa, trash, regional, declaration, approve, de facto, moot, water quality, agency actions, partial, summary judgment, consent decree, monitoring, pollutant, pollution, leave to amend, capriciously, reduction, npdes, intervenors, waterbody, deadline, heading, reply, declaratory relief, acted arbitrarily, injunctive, wasteload, hardship, matter jurisdiction

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LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
[HN1]"Extra-record evidence" may be considered by the court in connection with a motion to dismiss for lack of subject matter jurisdiction.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
[HN2]Fed. R. Civ. P. 12(b)(1) authorizes a party to seek dismissal of an action for lack of subject matter jurisdiction. When subject matter jurisdiction is challenged under Fed. R. Civ. P. 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion. A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment. In adjudicating such a motion, the court is not limited to the pleadings, and may properly consider extrinsic evidence. The court presumes lack of jurisdiction until the plaintiff proves otherwise.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
[HN3]A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of a claim. A motion to dismiss should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The complaint is construed in the light most favorable to the plaintiff, and all properly pleaded factual allegations are taken as true. Dismissal is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory. In adjudicating a motion to dismiss, the court need not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court
Civil Procedure > Dismissals > Involuntary Dismissals > Failures to State Claims
[HN4]When the complaint is dismissed for failure to state a claim, leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency. Leave to amend is properly denied where the amendment would be futile.

Environmental Law > Water Quality > General Overview
[HN5]No authority supports the conclusion that the Environmental Protection Agency (EPA) lacks authority to approve state-submitted Total Daily Maximum Loads (TMDLs) after EPA has established its own TMDLs, nor does this conclusion logically follow from the proposition that EPA is required to approve or disapprove a state-submitted TMDL within 30 days of submission.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Civil Procedure > Judgments > Relief From Judgment > General Overview
[HN6]See 5 U.S.C.S. § 551(13).

Administrative Law > Judicial Review > Reviewability > Ripeness
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Constitutional Law > The Judiciary > Case or Controversy > Ripeness
[HN7]The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. Unripe claims are subject to dismissal for lack of subject matter jurisdiction. In determining whether a case is ripe for review, a court must consider two main issues: the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. To address these issues in the context of a challenge to the lawfulness of administrative action, the United States Supreme Court has identified three factors to consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.

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Civil Procedure > Justiciability > Ripeness > General Overview
Civil Procedure > Justiciability > Standing > General Overview
[HN8]Injury-in-fact is a concept that relates to the issue of standing, not ripeness.

COUNSEL: For Plaintiff: Noam I. Duzman, Richard Montevideo, Robert S. Bower, Rutan & Tucker LLP, Costa Mesa, CA.

For USA, Defendant: Charles M. O'Connor, AUSA & Chief, Environment & Natural Resources, United States Attorney's Office, San Francisco, CA. AND-- S. Randall Humm - Trial Attorney, Pamela Tonglao - Trial Attorney, U.S. Dept. of Justice, Washington, DC.

JUDGES: SAUNDRA BROWN ARMSTRONG, United States District Judge.

OPINION BY: SAUNDRA BROWN ARMSTRONG

OPINION

[*1143] **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, DENYING AS MOOT PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, AND DISMISSING ACTION**

[Docket Nos. 18, 28, 31, 43, 47]

Plaintiffs City of Arcadia and other California cities (collectively, "Plaintiffs") bring this action against defendants United States Environmental Protection Agency ("EPA"), the EPA Administrator, and the EPA Region IX Administrator (collectively, "Defendants") for injunctive and declaratory relief. The Natural Resources Defense Council, Santa Monica BayKeeper, and Heal the Bay (collectively, "Intervenors") have intervened as defendants.

Now before the Court are Defendants' [**2] Motion to Dismiss Second Amended Complaint (the "Motion to Dismiss"), in which Intervenors join, and Plaintiffs' Motion for Summary Adjudication of Issues (the "Motion for Partial Summary Judgment"). Having read and considered the papers submitted and being fully informed, the Court GRANTS the Motion to Dismiss, DENIES AS MOOT the Motion for Partial Summary Judgment, and DISMISSES this action. [1]

1 These matters are suitable for disposition without a hearing. *See* Fed. R. Civ. P. 78; Civ. L.R. 7-1(b).

I. BACKGROUND

[2]

2 Over the years the Court has had the pleasure and privilege of reading some excellent moving papers. Some of these submissions stand out as truly superlative. Defendants' opening and reply briefs for their Motion to Dismiss are shining examples of such superlative submissions. In these briefs Defendants discuss three areas of federal law generally regarded as highly complex--environmental regulation, administrative law, and justiciability--in direct, succinct, well-supported, and powerfully illuminating fashion. Whereas a poor presentation of the statutory and regulatory framework and Defendants' arguments might have required the Court to spend hours to apprehend their arguments, the high quality of Defendants' writing enabled the Court to grasp them in a matter of minutes. Defendants' briefs also thankfully avoid leveling the sorts of thinly veiled (or, at times, not-at-all-veiled) *ad hominem* attacks that unfortunately pervade too much legal writing nowadays. The Court thus commends Defendants' counsel for their outstanding writing and expresses its appreciation for it.

[**3] **A. *Statutory and Regulatory Background***

1. *Water Pollution Control Under the Clean Water Act*

TheClean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, utilizes two fundamental approaches to control water pollution: technology-based regulations and water quality standards. Technology-based [*1144] regulations seek to reduce pollution by requiring a discharger to effectuate equipment or process changes, without reference to the effect on the receiving water; water quality standards fix the permissible level of pollution in a specific body of water regardless of the source of pollution.

The National Pollutant Discharge Elimination System ("NPDES") permit program is a key means of implementing both technology-based requirements and water quality standards. 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(1); 40 C.F.R. § 122.44(a), (d)(1). An NPDES permit establishes specific limits of pollution for an individual discharger. A discharge of pollutants (other than dredged or fill material) from any "point source," which is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may [**4] be discharged," 33 U.S.C. § 1362(14), into the waters of the United States is prohibited unless that discharge complies with the discharge limits and other requirements of an NPDES permit. *Id.* §§ 1311(a), 1362(12). At

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present, 45 states, including California, are authorized to administer the NPDES permit program. State Program Status, *at* http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=general. In the remaining states, EPA issues the permits. 33 U.S.C. § 1342(a).

2. Total Maximum Daily Loads ("TMDLs")

Section 303(d) of the CWA and EPA's implementing regulations require states to identify and prioritize waterbodies where technology-based effluent limitations and other required controls are insufficiently stringent to attain water quality standards. *See* 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7(b). States must develop a "total maximum daily load," or "TMDL," for each pollutant of concern in each waterbody so identified. A TMDL represents the maximum amount of pollutant "loading" that a waterbody can receive from all combined sources without exceeding applicable [**5] state water quality standards. Although the term "total maximum daily load" is not expressly defined in the CWA, EPA's regulations define a TMDL for a pollutant as the sum of: (1) the "wasteload allocations," which is the amount of pollutant that can be discharged to a waterbody from point sources, (2) the "load allocations," which represent the amount of a pollutant in a waterbody attributable to nonpoint sources or natural background, and (3) a margin of safety. 40 C.F.R. §§ 130.2(g)-(i), 130.7(c)(1).

Under CWA Section 303(d)(2), EPA is required to review and approve or disapprove TMDLs established by states for impaired waters within thirty days of submission. 33 U.S.C. § 1313(d)(2). If EPA disapproves a state TMDL submission, EPA must issue its own TMDL for that waterbody within thirty days. *Id.*

3. Implementation of TMDLs

TMDLs established under Section 303(d)(1) of the CWA function primarily as planning devices and are not self-executing. *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002) ("TMDLs are primarily informational tools that allow the states to proceed from the identification of [**6] waters requiring additional planning to the required plans.") (citing *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 984-85 (9th Cir. 1994)). 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 controls. *See, e.g., Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002) ("Each TMDL serves as the goal for the level of that pollutant in the waterbody to which that TMDL applies. . . . The theory is that individual-discharge permits [*1145] will be adjusted and other measures taken so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL."); *Idaho Sportsmen's Coalition v. Browner*, 951 F. Supp. 962, 966 (W.D. Wash. 1996) ("TMDL development in itself does not reduce pollution. . . . TMDLs inform the design and implementation of pollution control measures."); *Pronsolino*, 291 F.3d at 1129 ("TMDLs serve as a link in an implementation chain that includes . . . state or local plans for point and nonpoint [**7] source pollution reduction . . . ."); *Idaho Conservation League v. Thomas*, 91 F.3d 1345, 1347 (9th Cir. 1996) (noting that a TMDL sets a goal for reducing pollutants). Thus, a TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and waterbodies.

For point sources, limitations on pollutant loadings may be implemented through the NPDES permit system. 40 C.F.R. § 122.44(d)(1)(vii)(B). EPA regulations require that effluent limitations in NPDES permits be "consistent with the assumptions and requirements of any available wasteload allocation" in a TMDL. *Id.* 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 against those responsible for the pollution only to the extent that a state institutes such reductions as regulatory requirements pursuant to state authority. *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1355-56 (N.D. Cal. 2000), *aff'd sub nom. Prosolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002). [**8]

4. California Water Quality Control Statutory and Regulatory Framework

California effectuates the foregoing requirements of the CWA primarily through institutions and procedures set out in certain provisions of the California Water Code (the "Water Code"), including those of the California Porter-Cologne Water Quality Control Act (the "Porter-Cologne Act"), Cal. Water Code § 13000 *et seq.* These Water Code provisions established the State Water Resources Control Board (the "State Board") within the California Environmental Protection Agency to formulate and adopt state policy for water quality control. Cal. Water Code §§ 174-186, 13100, 13140. The State Board is designated as the state water pollution control agency for all purposes stated in the CWA and is the agency authorized to exercise powers delegated to it under the CWA. 33 U.S.C. § 1313; Cal. Water Code § 13160.

The Porter-Cologne Act established nine California Regional Water Quality Control Boards (individually, a "Regional Board"; collectively, the "Regional Boards"), Cal. Water Code §§ 13200, 13201, which operate under the purview of the State Board, *see id.* § 13225. Each Regional [**9] Board is comprised of nine members, *id.* § 13201, and is required to appoint an executive of-

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ficer, *id.* § 13220(c), to whom the Regional Board may delegate all but some of its powers and duties, *id.* § 13223. Each Regional Board is required to formulate and adopt water quality control plans for all areas within the region. *Id.* § 13240. The State Board may approve such plan, or it may return it to the Regional Board for further submission and resubmission to the State Board. *Id.* § 13245. It must act on any water quality control plan within 60 days of a Regional Board's submission of such plan to the State Board, or 90 days after resubmission of such plan. *Id.* § 13246. A water quality control plan will not become effective unless and until it is approved by the State Board, followed by approval by the state's Office of Administrative Law ("OAL") in accordance with the appropriate procedures. [*1146] *Id.* § 13245; Cal. Gov't Code §§ 11340.2, 11349.3, 11353(b)(5).

The State Board is required to formulate, adopt, and revise general procedures for the formulation, adoption, and implementation of water quality control plans by the Regional Boards. Cal. Water Code §13164. [**10] The State Board may adopt water quality control plans for purposes of the CWA that include the regional water quality control plans submitted by the Regional Boards. *See id.* § 13170. Such plans, when adopted by the State Board, supersede any regional water quality control plans for the same waters to the extent of any conflict. *Id.*

B. *Factual Summary and Procedural History*

1. *The Consent Decree*

The events underlying the instant action were set in motion by the disposition of *Heal the Bay, Inc., et al. v. Browner, et al.*, No. C 98-4825 SBA ("*Heal the Bay*"), an action previously before this Court. In *Heal the Bay*, an individual and two environmental groups (which groups are now two of the three Intervenors in the instant action) brought a civil action against EPA, the EPA Administrator, and the EPA Region IX Administrator. Their suit primarily concerned EPA's alleged failure to perform its alleged duty under the CWA either to approve or to disapprove TMDLs submitted to EPA by the state of California.

On March 23, 1999, the Court filed an Amended Consent Decree (the "Consent Decree") [3] in which "EPA agreed to ensure that a TMDL [would] [**11] be completed for each and every pairing of a [Water Quality Limited Segment, as defined in 40 C.F.R. 130.2(j),] and an associated pollutant in the Los Angeles Region" set forth in an attachment to the Consent Decree by specified deadlines. (Consent Decree PP2a, 2b, 3, 3c.) [4] Pursuant to the Consent Decree, for each pairing EPA was required either to approve a TMDL submitted by California by a specified deadline or, if it did not approve a TMDL by the date specified, to establish a TMDL within one year of the deadline, unless California submitted and EPA approved a TMDL prior to EPA's establishing the TMDL within the one-year period. (*Id.* P3a.) By March 24, 2002, EPA was required either to have approved a state-submitted TMDL for trash in the Los Angeles River or to have established the TMDL itself. (*Id.* PP2d, 3a; *id.* Att. 2, 3.) [5]

3 No original consent decree was entered. Rather, according to Defendants' representations in their opening brief, the Consent Decree incorporated amendments from an original proposal at the urging of proposed intervenors California Association of Sanitation Agencies and California Alliance of POTWs. (*See* Mot. to Dismiss at 6.)

[**12]

4 The Court takes judicial notice of the existence of the Consent Decree and the contents thereof. *See, e.g.*, *Egan v. Teets*, 251 F.2d 571, 577 n.10 (9th Cir. 1957) (holding that district court was entitled to take judicial notice of prior proceedings involving same petitioner before same district court). The Consent Decree is filed as Docket No. 25 in *Heal the Bay*, No. C 98-4825 SBA.

5 Defendants contend that the relevant deadline was March 22, 2002, (Mot. to Dismiss at 6), and Plaintiffs echo this contention in their Second Amended Complaint, (Second Am. Compl. P25). Review of the terms of the Consent Decree, however, reveal that the deadline was a different date. The Consent Decree defines "effective date" as the date on which the Consent Decree is entered. (*Id.* P2d.) Although the Court signed the Consent Decree on March 22, 1999, (*id.* at 29), it was not entered on the docket until March 24, 1999. Under the terms of Attachments 2 and 3 of the Consent Decree, TMDLs for trash for all Water Quality Limited Segments the Los Angeles River were to be submitted by California within two years of the effective date--March 24, 2001. (*Id.* Atts. 2, 3.) Since EPA was required to ensure that a TMDL was in place within one year of California's deadline to submit a proposed TMDL, (*id.* P3a), the deadline for final approval or establishment of a TMDL was March 24, 2002.

Nevertheless, based on the evidence tendered by EPA, it is clear that EPA believed that the deadline was March 22, 2002. (*See* Decl. of David W. Smith in Supp. of EPA's Mot. to Dismiss, Ex. B at 2.) As is evident from the discussion below, this discrepancy is immaterial to the Court's analysis of the merits of the Motion to Dismiss.

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[**13] [*1147] 2. *EPA's Issuance of TMDLs and Approval of State-submitted TMDLs*

One of the responsibilities of the Regional Board for the Los Angeles region (the "Los Angeles Regional Board") is to develop TMDLs under the CWA for waterbodies in Los Angeles and Ventura Counties. (Decl. of Dennis Dickerson in Supp. of EPA's Mot. to Dismiss (the "Dickerson Declaration") P2.) With few exceptions, TMDLs are developed as draft TMDLs by Los Angeles Regional Board staff and then submitted to the board to be adopted as amendments to the Los Angeles Regional Board's Water Quality Control Plan, which is known as the Basin Plan. (*Id.*) Basin Plan amendments are then submitted to the State Board, and then subsequently to the OAL; after they have been approved by both of these agencies, they are submitted to EPA. (*Id.*)

On September 19, 2001, the Los Angeles Regional Board adopted TMDLs for trash for the Los Angeles River watershed. (*Id.* P3.) "Trash" was defined as man-made litter, as defined in California Government Code § 68055.1(g). (*Id.* Ex. A at 2). These TMDLs (the "State Trash TMDLs") were approved by the State Board on February 19, 2002, by OAL on July 16, 2002, and ultimately [**14] by EPA by letter dated August 1, 2002. (*Id.* P3, Ex. C; Second Am. Compl. for Injunctive & Declaratory Relief ("SAC") PP27, 30.) Prior to its approval of the State Trash TMDLs, however, EPA issued its own TMDLs for trash for the Los Angeles River Basin (the "EPA Trash TMDLs") on March 19, 2002. (SAC P26; Decl. of David W. Smith in Supp. of EPA's Mot. to Dismiss (the "Smith Declaration") Ex. B.) The EPA's August 1, 2002, letter approving the State Trash TMDLs announced that they "superceded" the EPA Trash TMDLs. (SAC P31; Smith Decl. P7, Ex. C.)

3. *TMDLs Now in Effect and Implementation Provisions*

Under the provisions of the TMDLs now in effect--the State Trash TMDLs--the numeric target is zero trash in the Los Angeles River. (Dickerson Decl. Ex. A at 16, 29.) Based on this target, California has determined that the wasteload allocations for trash in the Los Angeles River also must be zero. (*Id.*)

To achieve this goal, California has provided, along with the State Trash TMDLs, implementation provisions that specify a phasing-in of progressive reductions in municipal stormwater wasteload allocations over a ten-year period, following completion of a two-year initial [**15] baseline monitoring period. (*Id.* Ex. A at 21.) While the baseline monitoring program is taking place, cities will be deemed to be in compliance with the wasteload allocations provided that all of the trash that is collected during this period is disposed of in compliance with all applicable regulations. (*Id.* Ex. A at 27.) A baseline monitoring report is due to the Los Angeles Regional Board by February 15, 2004. (*Id.* P6.) [6]

6 Plaintiffs have filed Plaintiffs' Objections to Declarations of David W. Smith and Dennis Dickerson Offered by Defendants in Support of Defendants' Motion to Dismiss Second Amended Complaint ("Plaintiffs' Objections"). Plaintiffs' Objections challenge the admissibility of, *inter alia*, the statements in paragraph 6 of the Dickerson Declaration. The Court considers and resolves the objections to these statements in note 20, *infra*. Although Plaintiffs have objected to all the statements in paragraph 6, careful review of the arguments advanced in these objections reveals that they are not in fact objecting to the statement in paragraph 6 that "the baseline monitoring report is due to the [Los Angeles] Regional Board by February 15, 2004." (Dickerson Decl. P6; *see* Pls.' Objections at 3-4.) To the extent that Plaintiffs are in fact objecting to this statement, however, the Court OVERRULES their objections to this statement for the reasons set forth in note 20, *infra*.

[**16] [*1148] The State Trash TMDLs and incremental wasteload allocations will be implemented through the Los Angeles stormwater permit, which the Los Angeles Regional Board will need to amend to incorporate specific, enforceable permit requirements. (*Id.* P8.) [7] The implementation provisions in the TMDLs allow permittees to "employ a variety of strategies to meet the progressive reductions in their Waste Load Allocations" and maintain that they "are free to implement trash reduction in any manner they choose." (*Id.* Ex. A at 29.) The wasteload reduction strategies are broadly classified as either end-of-pipe full capture structural controls, partial capture control systems, and/or institutional controls. (*Id.*) The provisions state that permittees will be deemed to be in compliance with the final wasteload allocation for their associated drainage areas if they utilize "full capture systems" that are adequately sized and maintained and maintenance records are available for inspection by the Los Angeles Regional Board. (*Id.* Ex. A at 30.)

7 Under heading II.2 of Plaintiffs' Objections, Plaintiffs object to the statements in paragraph 8 of the Dickerson Declaration relating to the Los Angeles Regional Board's understanding of how the State Trash TMDLs will be implemented. (Pls.' Objections at 4.) All of the grounds on which Plaintiffs object are meritless. First, Plaintiffs contend that the statements are objectionable as [HN1]"extra-record evidence." Such evidence, however, may be considered by the Court in

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connection with a motion to dismiss for lack of subject matter jurisdiction. *See Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). Since Defendants contend that Plaintiffs' challenges to the merits of EPA's approval of the State Trash TMDLs are unripe, and since the Court considers how these TMDLs will be implemented at least in part for this purpose, this evidence is properly before the Court. Second, Plaintiffs contend that the statements constitute inadmissible hearsay. These statements, however, do not contain or even implicitly rely on any out-of-court statement by one other than Mr. Dickerson for the truth of the matter stated.

Third, Plaintiffs claim that the statements lack foundation, although they do not explain what they mean by this. To the extent Plaintiffs are asserting that the declarant lacks personal knowledge of the Los Angeles Regional Board's intentions, that assertion is refuted by the fact that Mr. Dickerson has been Executive Officer of the board since 1997. (Dickerson Decl. P1.) Fourth, Plaintiffs insist that "the statements are objectionable and inadmissible as the best evidence of the implementation requirements vis-a-vis the TMDLs, is set forth in the TMDLs themselves, as well as in the terms of other enforceable documents, documenting the actions taken by the [Los Angeles] Regional Board, such as the terms of the Municipal Storm Water Permit referenced in the declaration." (Pls.' Objections at 4.) This objection misunderstands the nature of the "best evidence" rule: that rule applies *only* where the witness attempts to testify as to the *contents of a writing, recording, or photograph. See* Fed. R. Evid. 1002. Such is not the case here. Moreover, this objection reflects a fundamental misunderstanding of the nature of TMDLs. TMDLs are *not* self-executing; they require the appropriate state to issue regulations implementing them. It is also not clear what Plaintiffs mean by their assertion that documents "documenting the actions taken by the Regional Board" constitute "enforceable documents." Finally, Plaintiffs assail the statements at issue as "not competent." (*Id.*) Plaintiffs do not explain what they mean by this objection. The Court thus disregards it. Accordingly, the Court OVERRULES the objections under Heading II.2 of Plaintiffs' Objections.

[**17] [*1149] **4. *The Instant Action***

Plaintiffs filed their initial complaint on June 28, 2002, in the United States District Court for the Central District of California. On August 30, 2002, they filed an amended complaint. On October 30, 2002, the case was transferred to this Court, the United States District Court for the Northern District of California. Pursuant to the parties' stipulation and the Court's Order thereon, Plaintiffs filed a Second Amended Complaint for Injunctive and Declaratory Relief (the "SAC" or "Complaint") on December 12, 2002.

The SAC is the operative complaint for purposes of the Motion to Dismiss and the Motion for Partial Summary Judgment. The SAC purports to assert three claims for relief. The First Claim for Relief is ostensibly brought pursuant to a provision of the Administrative Procedure Act (the "APA"), 5 U.S.C. § 706, (SAC at 34), although certain allegations thereunder also invoke the CWA, the Regulatory Flexibility Act (the "RFA"), and the Small Business Regulatory Enforcement Fairness Act of 1996 (the "SBREFA"), (*id.* PP84-85). [8] The First Claim for Relief alleges several violations of the APA: (1) EPA acted without authority [**18] and acted arbitrarily and capriciously by establishing the EPA Trash TMDLs prior to receiving for review the State Trash TMDLs, (SAC PP78-79); (2) EPA acted without authority and arbitrarily and capriciously by reviewing and approving the State Trash TMDLs because EPA had already established the EPA Trash TMDLs, (*id.* PP80, 83); (3) EPA acted arbitrarily and capriciously and in excess of its jurisdiction with regard to the manner by which it established the EPA Trash TMDLs, (*id.* PP81-82); (4) the collective actions of California and EPA relating to issuance of the EPA Trash TMDLs and subsequent approval of the State Trash TMDLs constitute a "*de facto* TMDL procedure" that is arbitrary, capricious, and contrary to law, (*id.* PP84-86); [9] and (5) EPA acted arbitrarily and capriciously by approving the State Trash TMDLs because those TMDLs were "patently defective" and established not in accordance with the procedures of the CWA and California law, (*id.* P87). [10] The Second Claim for Relief challenges [*1150] the validity of two alleged agency actions, the EPA Trash TMDLs and the "*de facto* TMDL procedure," under the APA, 5 U.S.C. § 551 *et seq.*; the [**19] RFA, 5 U.S.C. § 601 *et seq.*; and the SBREFA, 5 U.S.C. § 801 *et seq.* (SAC at 40; *id.* PP89-99.) The violations alleged under the Second Claim for Relief, however, appear to relate mostly to procedural requirements under the RFA and the SBREFA. (*See id.* PP91-93, 95-98 (invoking 5 U.S.C. §§ 601(5), 601(6), 603, 604(a), 604(b), 605(b), and 611).) [11] The Third Claim for Relief is derivative of the first two claims. It seeks a declaration under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, as to which party's interpretation of the law is correct and a judicial determination of Plaintiffs' rights and duties. (*Id.* PP100-105.)

8 With respect to the First Claim for Relief, the SAC comes perilously close to violating Federal

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Rule of Civil Procedure 8(a)'s mandate of providing "a *short and plain* statement of the claim showing that the pleader is entitled to relief...." Fed. R. Civ. P. 8(a) (emphasis added). In particular, Plaintiffs' practice of indicating that the First Claim for Relief is based exclusively on the APA, (SAC at 34), yet at the same time claiming in the allegations thereunder that the actions at issue violate other statutes, (*id.* PP84-85), is confusing. Aside from potentially misleading Defendants as to the nature of the claims against them, it has required the Court to spend needless additional time and effort scrutinizing the allegations of the SAC because the Court cannot trust the accuracy of the headings of the SAC. The practice is especially reprehensible because the Court has already been forced to spend undue time and effort identifying and parsing out the five independent, discrete claims for relief that are set out in stream-of-consciousness fashion in the allegations underlying the "First Claim for Relief"--which heading necessarily suggests a *single* claim. *See infra.*

[**20]

9 This alleged *de facto* TMDL procedure is also claimed to violate the CWA, the RFA, and the SBREFA. (*Id.* PP84-85.)

10 Although not clearly stated, this last claim (claim (5)) within the First Claim for Relief appears to challenge the *merits* of EPA's approval of the State Trash TMDLs, as opposed to, for example, challenging EPA's authority to approve *any* state-submitted TMDLs after it issued the EPA Trash TMDLs, (*see id.* PP80, 83). Presumably, this last claim encompasses challenges to, for example, EPA's approval of the State Trash TMDLs where these TMDLs covered "unlisted" waters. (*See id.* PP42, 49, 62.) Defendants appear to have also construed this claim as challenging the merits of EPA's approval of the State Trash TMDLs, and they move to dismiss this claim as unripe. (*See* Mot. to Dismiss at 20-24.) Plaintiffs appear to concur in Defendants' construction of this claim. (*See* Pls.' Opp. Br. at 16-20.) Accordingly, the Court construes this last claim as challenging the merits of EPA's approval of the State Trash TMDLs.

11 This is yet another example of Plaintiffs' objectionable drafting of the SAC. In particular, the paragraph alleging improper agency action supposedly giving rise to the Second Claim for Relief, paragraph 96, identifies four bases on which the CWA, the APA, the RFA, and the SBREFA were violated. (*Id.* P96.) Of these four bases, however, only the first (denoted reason "(a)") appears to have anything to do with the APA; the remaining three ("(b)," "(c)," and "(d)") appear to relate solely to provisions of the RFA and SBREFA, at least based on the allegations of the previous paragraphs under the heading "Second Claim for Relief." (*Id.; compare id.* (*e.g.*, alleging that EPA failed to perform an initial screening of the EPA Trash TMDLs to determine whether they would have a significant economic impact on a substantial number of small entities) *with id.* PP91-93, 95 (*e.g.*, alleging that RFA requires agencies to screen all proposed rules and identify whether such rules would have such an impact, (*id.* P92))).

The Court is thus left with the distinct impression that either Plaintiffs have been careless in drafting the Second Claim for Relief or they have invoked various statutes and inserted a number of allegations in scattershot fashion in the hope that something will slip by Defendants undetected and "stick." Aside from arguably violating Rule 8(a), this practice is unfair not only to Defendants, but also to the Court, because it makes the Court's resolution of Defendants' arguments considerably more difficult. (Nor is the Court interested in any supporting evidence or clarification from Plaintiffs' counsel regarding the nature of their claims that is not in the four corners of the SAC or incorporated therein by reference. The SAC speaks for itself on that score.) Based on its review of the SAC, the Court construes the allegations underlying the Second Claim for Relief as alleging violation of the APA, the RFA, and the SBREFA only with respect to EPA's alleged failure to provide Plaintiffs with notice and an opportunity for comment with regard to the *de facto* TMDL procedure, discussed *infra*, and the establishment of the EPA Trash TMDLs; the Court construes them to allege violation of the RFA and the SBREFA, but not the APA, with regard to the remaining allegations under the heading of "Second Claim for Relief." (*See* SAC P96.)

[**21] On January 13, 2003, Defendants and Intervenors filed answers to the SAC. On that same day, Defendants also filed the instant Motion to Dismiss, which seeks dismissal of the entire action pursuant to Federal Rules of Civil Procedure 12(b)(1)and 12(b)(6). Intervenors filed Intervenors' Notice in Support of Defendants' Motion to Dismiss on February 3, 2003, indicating in brief fashion that they agreed with the arguments in the Motion to Dismiss and therefore supported the motion. On March 10, 2003, Plaintiffs filed their Motion for Partial Summary Judgment.

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Most of the plaintiffs in the instant action are currently plaintiffs in a California state court action against the Los Angeles Regional Board and the State Board challenging the legality of the State Trash TMDLs. (*Id.* P33.) Three other lawsuits have similarly been filed challenging either [*1151] California's establishment of the State Trash TMDLs or EPA's approval of the same. (*Id.*)

II. LEGAL STANDARD

A. *Rule 12(b)(1)*

[HN2]Federal Rule of Civil Procedure 12(b)(1) authorizes a party to seek dismissal of an action for lack of subject matter jurisdiction. "When subject matter jurisdiction is challenged under [**22] Federal Rule of Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001). "'A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment.'" *Id.* (quoting *Smith v. McCullough*, 270 U.S. 456, 459, 70 L. Ed. 682, 46 S. Ct. 338 (1926)). In adjudicating such a motion, the court is not limited to the pleadings, and may properly consider extrinsic evidence. *See Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). The court presumes lack of jurisdiction until the plaintiff proves otherwise. *See Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

B. *Rule 12(b)(6)*

[HN3]A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a claim. [**23] *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). A motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); *accord Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997). The complaint is construed in the light most favorable to the plaintiff, and all properly pleaded factual allegations are taken as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969); *see also Everest & Jennings, Inc. v. Am. Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). "Dismissal is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro*, 250 F.3d at 731. In adjudicating a motion to dismiss, the court need not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). [**24]

[HN4]When the complaint is dismissed for failure to state a claim, "leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Leave to amend is properly denied "where the amendment would be futile." *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

III. DISCUSSION

Defendants have filed a Motion to Dismiss; Plaintiffs have filed a Motion for Partial Summary Judgment. The Motion for Partial Summary Judgment seeks adjudication of issues pertaining to Plaintiffs' challenge to the procedural legitimacy of the State Trash TMDLs. Because the Court grants the Motion to Dismiss (as discussed below), it does not reach the merits of the Motion for Partial Summary Judgment and therefore denies it as moot. Accordingly, the following discussion pertains [*1152] only to the Motion to Dismiss, except where noted.

At the outset, the Court notes that it need not analyze all the arguments presented in Defendants' opening brief because Plaintiffs [**25] concede that certain of their claims are moot. In particular, Defendants contend in their opening brief for the Motion to Dismiss that the EPA Trash TMDLs no longer have any force or effect because EPA has announced that the State Trash TMDLs "supercede" the EPA Trash TMDLs; consequently, Defendants maintain, Plaintiffs' claims that EPA lacked authority to establish the EPA Trash TMDLs, (SAC P78-79), and that the procedures by which EPA established them were unlawful, (*id.* PP81-82, 90, 94, 96-97, 99), are moot. (Mot. to Dismiss at 12-15.) In their opposition brief, Plaintiffs express satisfaction with Defendants' assurances that the EPA Trash TMDLs are no longer (and can never be) in effect and therefore "withdraw their claims directly challenging the validity of EPA's TMDLs . . . ." (Pls.' Opp. Br. at 4 n.6.) Defendants acknowledge this withdrawal in their reply brief. (Defs.' Reply Br. at 1.) As a result, the Court GRANTS the Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) with regard to claims (1) and (3) (SAC PP78-79 and SAC PP81-82, respectively) within the First Claim for Relief of the SAC identified in Part I.B.4 of this Order, *supra*. The Court [**26] also GRANTS the Motion to Dismiss pursuant to Rule 12(b)(1) with regard to the Second Claim for Relief of the SAC to the extent it challenges the validity of the EPA Trash

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TMDLs. (*See* SAC PP90, 94, 96-97, 99.) The Court now addresses the parties' arguments in relation to the remaining claims.

A. Challenge to EPA's Authority to Approve the State Trash TMDLs

Plaintiffs claim that EPA lacked authority to approve the State Trash TMDLs because it had already established the EPA Trash TMDLs. (SAC PP80, 83.) Defendants move to dismiss this claim pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. (Mot. to Dismiss at 19-20.) Defendants contend that EPA in fact has a statutory *obligation* under 33 U.S.C. § 1313 to review any proposed TMDLs submitted by a state and either approve them or disapprove them. (*Id.*) Defendants assert that nothing in the CWA or otherwise divests EPA of jurisdiction to approve a state-submitted TMDL once EPA has issued its own TMDLs, and in fact, recognizing such a principle would thwart Congressional intent to vest states with the primary responsibility of implementing the CWA's provisions. [**27] (*Id.* at 20.) Plaintiffs counter (in less than straightforward fashion) that by allowing California to submit the State Trash TMDLs to EPA after EPA established the EPA Trash TMDLs, EPA effectively "remanded" a "TMDL submission" to California, and EPA lacked authority to "remand" this submission and subsequently approve California's "resubmission." (*See* Pls.' Opp. Br. at 15-16.) [12]

> 12 Plaintiffs also argue that EPA lacked authority to approve the State Trash TMDLs because these TMDLs cover "unlisted" waters; according to Plaintiffs, EPA has authority only to approve TMDLs for "listed" waters. (*Id.* at 14-15.) As Defendants correctly point out, this argument goes to the merits of EPA's approval of the State Trash TMDLs, not to the issue of whether EPA had any authority to approve any state-submitted TMDLs after issuing its own TMDLs--the issue raised by this claim. (Defs.' Reply Br. at 10 n.9.) Plaintiffs' argument is relevant only to their own Motion for Partial Summary Judgment, not to the arguments raised in the Motion to Dismiss.

[**28] Plaintiffs' counterargument is meritless. [HN5]No authority supports the conclusion that EPA lacks authority to approve [*1153] state-submitted TMDLs after EPA has established its own TMDLs, nor does this conclusion logically follow from the proposition that EPA is required to approve or disapprove a state-submitted TMDL within 30 days of submission. Moreover, as Defendants astutely note, recognizing such a principle "would lead to absurd results. Under this scenario, once EPA establishes a TMDL, the State could never update it or modify it based on changed circumstances." (Mot. to Dismiss at 20.) Finally, like Defendants, (*see* Defs.' Reply Br. at 10), the Court is at a loss to understand what Plaintiffs mean by their contention that EPA "remanded" the EPA Trash TMDLs to California for revision and resubmission. Nothing in the allegations of the Complaint remotely suggest any sort of sending back of TMDLs to California for revision or additional development. And even if there were such a "remand," it does not follow that EPA lacked authority to approve the State Trash TMDLs.

For these reasons, the Court GRANTS the Motion to Dismiss with respect to claim (2) within the First Claim for Relief, [**29] (SAC PP80, 83), *see supra* Part I.B.4. Additionally, it is evident that Plaintiffs cannot amend the SAC to allege facts sufficient to rehabilitate this claim because it is meritless as a matter of law. Accordingly, this claim is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE.

B. The "De_Facto TMDL Procedure"

Under claim (4) within their First Claim for Relief, *see supra* Part I.B.4, and the Second Claim for Relief, Plaintiffs challenge the "*de facto* TMDL procedure," [13] which they consider to consist of:

> the establishment by the [Los Angeles] Regional Board of the TMDL, followed by the preparation and notice of the TMDL by USEPA, followed by the approval of the TMDL by the State Board, followed by the "establishment" by USEPA of the EPA TMDL, followed by the determination by USEPA to review and/or approve the subsequently submitted State TMDL, and to thereafter find the USEPA established TMDL is "superceded" . . . .

(SAC P85.) Plaintiffs assert that this procedure violates the APA, the RFA, and the SBREFA. (*Id.* PP84-85, 96-98.) Plaintiffs allege not only that they have previously suffered from the effectuation of the *de facto* [**30] TMDL procedure, but also that they will suffer from the effectuation of the procedure in the future. (*See id.* PP84-86.)

> 13 Plaintiffs do not expressly use the phrase "*de facto* TMDL procedure" in the SAC. Instead, they refer to this procedure as the "TMDL Procedure" and contend that EPA has effected a "*de facto* adoption" of the "TMDL Procedure." (SAC P85.) For ease of reference, the Court will refer to

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what Plaintiffs call the "TMDL Procedure" as the "*de facto* TMDL procedure."

Defendants move to dismiss these claims by pointing out that the APA and the RFA, which was amended by the SBREFA, permit challenges *only* to "final agency action." (Mot. to Dismiss at 16-19.) [14] They explain that the APA defines [HN6]"agency action" to include "the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." (*Id.* at 16 (quoting 5 U.S.C. § 551(13).) (They do not indicate whether this definition applies to the RFA and [**31] SBREFA as well.) Defendants assert that what Plaintiffs characterize as a *de* [*1154] *facto* TMDL procedure is not an "agency action," much less a final agency action, but in fact a sequence of events; as such, they maintain, the procedure cannot give rise to a challenge under the APA or under the RFA, as amended by the SBREFA.

14 Defendants also contend that the RFA, as amended by the SBREFA, provides a narrow and exclusive means of judicial review that is not available here due to the nature of Plaintiffs' challenge to the *de facto* TMDL procedure. (*See id.* at 16.)

Plaintiffs respond to Defendants' arguments somewhat curiously. Despite vehemently asserting that Defendants' arguments are incorrect, they do not dispute that a challenge will lie only to final agency action. Instead, they contend that the *de facto* TMDL procedure "led up to and resulted in 'final agency action,'" (Pls.' Opp. Br. at 22), namely the August 1, 2002, approval of the State Trash TMDLs. Plaintiffs also argue at great length that [**32] their challenge to this procedure is not moot because it falls under the "capable of repetition, yet evading review" exception to the mootness doctrine. (*Id.* at 22-25.)

Defendants' arguments are persuasive, and Plaintiffs' responses are both uncompelling and nonresponsive. As Defendants correctly note, (*see* Defs.' Reply Br. at 4-5), Plaintiffs' suggestion that they are challenging EPA's approval of the State Trash TMDLs, as opposed to the so-called "TMDL procedure," is belied by the allegations of the SAC: by their plain language, the allegations of paragraphs 84 through 86 and paragraphs 96 through 98 challenge the "TMDL procedure," (SAC 84-86, 96-98); Plaintiffs' challenge to EPA's approval of the State Trash TMDLs is set out in paragraph 87, (*see id.* P87), the justiciability of which challenge is discussed in Part III.C of this Order, *infra*. Plaintiffs do not demonstrate how the "procedure" is "the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act" or falls within any other definition, statutory or otherwise, of final agency action. [15] Indeed, as Defendants also correctly note, (*see* [**33] Defs.' Reply Br. at 4-5), Plaintiffs' assertion that the TMDL procedure *consummated in* final agency action, namely EPA's approval of the State Trash TMDLs, is an implicit admission that the "procedure" itself is not final agency action. Nor do Plaintiffs make any effort to distinguish or refute any of the authorities cited by Defendants in support of their arguments. Finally, as Defendants yet again correctly point out, Plaintiffs' mootness argument is nonresponsive because Defendants do not contend that this claim is moot. (*Id.* at 8.) [16]

15 Even though the Court has not been able to locate a statutory definition of "agency action" for purposes of the RFA and SBREFA, Plaintiffs have put forward no argument to suggest that it should be given a meaning substantially different than that provided in the APA. The Court sees no reason to conclude that "agency action" should be given a significantly more expansive definition than that provided for purposes of the APA.

16 Plaintiffs do not respond to Defendants' argument that judicial review is unavailable under the RFA, as amended by the SBREFA, for alleged violations of 5 U.S.C. § 603. (Mot. to Dismiss at 18.) The Court agrees with Defendants that the implication of this lack of response is that any opposition to this argument is waived. (*See* Defs.' Reply Br. at 3-4.) The Court disagrees with Defendants, however, that Plaintiffs have failed to respond to Defendants' arguments that the *de facto* TMDL procedure does not constitute "final agency action" under the RFA, as amended by the SBREFA; but the Court finds their response to this argument meritless for the reasons stated above.

[**34] In sum, it is apparent that the alleged *de facto* TMDL procedure, consisting of the various events identified in paragraph 85 of the SAC, is not subject to challenge under the APA, RFA, or SBREFA because it is not final agency action within the meaning of those statutes. *Cf.* *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990) (rejecting challenge to alleged land withdrawal [*1155] review program on grounds that alleged program was not final agency action within meaning of APA). Accordingly, the Court GRANTS Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) with respect to claim (4) within the First Claim for Relief, (SAC PP84-86). The Court also GRANTS Defendants' motion pursuant to Rule 12(b)(6) with regard to the Second Claim for Relief. Given that the Second Claim for Relief challenges the validity of the EPA Trash TMDLs and the alleged *de facto* TMDL procedure alone, and given that Plaintiffs have withdrawn their challenge to the validity

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of the EPA Trash TMDLs, the Second Claim for Relief is now dismissed in its entirety.

It is further evident that Plaintiffs cannot amend the SAC to allege [**35] facts sufficient to rehabilitate these claims because they are not actionable as a matter of law. Accordingly, both claim (4) within the First Claim for Relief and the Second Claim for Relief are DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE.

C. Ripeness of Plaintiffs' Challenge to EPA's Approval of State Trash TMDLs

Plaintiffs' remaining claim (aside from the Third Claim for Relief, which is dependent on the First and Second Claims for Relief) challenges the merits of EPA's approval of the State Trash TMDLs. (*See id.* P87.) Defendants move to dismiss this claim as unripe for judicial review. Specifically, Defendants contend that the issues are not yet sufficiently developed to be fit for judicial review under the APA because Plaintiffs' existing NPDES permit imposes no obligations on Plaintiffs in connection with the State Trash TMDLs and because the Los Angeles Regional Board intends to revisit these TMDLs at the end of the monitoring period. (Mot. to Dismiss at 21-23.) Defendants further contend that Plaintiffs will not suffer any immediate hardship if review is withheld because EPA's approval of the State Trash TMDLs imposes no present, affirmative duties on [**36] Plaintiffs and requires no immediate changes in Plaintiffs' conduct. (*Id.* at 23-24.)

Plaintiffs respond by arguing that they have suffered "injury in fact," both economic and non-economic. (Pls.' Opp. Br. at 16-17.) Citing to the text of the State Trash TMDLs, a copy of which is appended to the Declaration of Richard Montevideo in Support of Plaintiffs' Motion for Summary Adjudication of Issues, and in Opposition to Defendants' Motion to Dismiss (the "Montevideo Declaration") as Exhibit 3, Plaintiffs claim that they are impacted by these TMDLs:

> By the terms of the TMDL itself, most Plaintiffs are directly impacted by its terms and presently have express monitoring obligations to comply with, not to mention pending compliance dates requiring annual reductions in trash. Moreover, the TMDL calls out very specific and expensive implementation measures, including possible implementation through full capture vortex systems totaling $ 109.3 million for all affected entities within the County [of Los Angeles] by the end of Year 1, and a total of $ 2,053,100,000 for the first 12 years of implementation. Even the Trash TMDL itself concludes that "Trash abatement in the Los Angeles [**37] River system may be expensive."

(Pls.' Opp. Br. at 18 (citing Montevideo Decl., Ex. 3 (State Trash TMDLs)) (internal citations and emphasis omitted).) Similarly, Plaintiffs maintain that "to come into compliance by the Compliance Dates, [they] must begin employing strategies now to meet the progressive reductions in Waste Load Allocations required by the State Trash TMDL[s]." (*Id.* at 19.) [*1156] Plaintiffs further allege that the NPDES permit that applies to all of Plaintiffs provides that the State Trash TMDLs are "effective and enforceable." (*Id.* at 18 (citing Montevideo Decl., Ex. 5, at 10 PI4).) Citing paragraph 36 of the SAC, they also contend that they have suffered from the TMDLs' being in effect because they are exposed to "unwarranted enforcement action and third party citizen suits." (*Id.*) Finally, Plaintiffs contend that they have suffered "procedural injuries," to wit, their being "forced to submit comments to two different levels of government (the State of California and the EPA) on two sets of TMDL over a series of many months and several hearings." (*Id.* at 20.)

Defendants dispute all of Plaintiffs' arguments in their reply. Defendants note that [**38] "Plaintiffs point to no present effect of the TMDLs on their day-to-day conduct." (Defs.' Reply Br. at 12.) They point out that, contrary to Plaintiffs' contention, Plaintiffs in fact have no monitoring obligations with which to comply because the Los Angeles County Department of Public Works has assumed that responsibility for all of Plaintiffs. (*Id.*) Defendants clarify that the first compliance date under the TMDLs is not until 2006, and the TMDLs identify several potential compliance options without mandating the use of any particular measure. (*Id.*) They further note that Plaintiffs fail to respond to the record evidence that the Los Angeles Regional Board will revisit the TMDLs at the conclusion of the monitoring period, that is, prior to the first compliance deadline, and that such reconsideration has been considered a rational basis for delaying judicial review. (*Id.* at 13 (citing *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998), and *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1323 (9th Cir. 1992)).) Finally, Defendants assail Plaintiffs' reliance on the aforementioned [**39] statement in Plaintiffs' NPDES permit because this statement does not establish that the State Trash TMDLs are effective or enforceable against *Plaintiffs. (Id.)*

[HN7]The "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential

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reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 n.18, 125 L. Ed. 2d 38, 113 S. Ct. 2485 (1993). Unripe claims are subject to dismissal for lack of subject matter jurisdiction. *See Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 784 n.9 (9th Cir. 2000). In determining whether a case is ripe for review, a court must consider two main issues: "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). To address these issues in the context of a challenge to the lawfulness of administrative action, the Supreme Court has identified three factors to consider: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further [**40] administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998).

In light of these three factors, the Court finds this claim unripe for review. First, delayed review would cause, at most, minimal hardship to the parties. Indeed, Plaintiffs have not demonstrated that they will suffer *any* hardship if review is delayed. Despite their preoccupation with various official pronouncements that the State Trash TMDLs are "effective" and "enforceable," Plaintiffs cannot point to a single future event or condition that is fairly certain to occur and will adversely [*1157] impact *Plaintiffs* themselves. [17] That is because the TMDLs do not presently impose any obligations on Plaintiffs and because they are subject to revision before such obligations will be imposed. Nor do Plaintiffs provide any evidence or explanation whatever of the "unwarranted enforcement action and third party citizen suits" to which they claim to be exposed.

> 17 The Court notes parenthetically that Plaintiffs' invocation of "injury in fact" in their opposition brief, (Pls.' Opp. Br. at 16-17), is inapposite. [HN8]Injury-in-fact is a concept that relates to the issue of standing, not ripeness. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). Plaintiffs appear to confuse Defendants' arguments as relating to standing, not ripeness. (Pls.' Opp. Br. at 20 ("Federal courts have long recognized procedural injuries, as well as actual injuries, as an alternative basis for standing.").) Nevertheless, the Court construes Plaintiffs' allegations of "injury in fact" as allegations of hardship.

[**41] Equally unsupported is Plaintiffs' contention that they will bear economic costs in complying with the State Trash TMDLs. The sole evidentiary basis of this allegation, set out in paragraph 35 of the SAC and discussed more thoroughly in Plaintiffs' Opposition, is the estimates provided in the text of the TMDLs themselves. (*See* SAC P35; Pls.' Opp. Br. at 18.) But this matter is inadmissible hearsay because it is offered by an out-of-court declarant, *i.e.*, the Los Angeles Regional Board, for the truth of the matter stated, *i.e.*, that the TMDLs will in fact impose these costs. [18] Yet even if this evidence were admissible, it would be insufficient to support Plaintiffs' contention that they will suffer economic injury: the cited portions of the State Trash TMDLs provide estimates of costs to be borne by "permittees"; there is no indication that these costs will be borne by *Plaintiffs* in particular. (*See* Montevideo Decl., Ex. 3, at 37, 40, *cited in* Pls.' Opp. Br. at 18.) Similarly, Plaintiffs provide no evidentiary support for the bald contention in their opposition brief that *Plaintiffs* must begin employing "strategies" now to meet the progressive reductions [**42] in wasteload allocations required by the State Trash TMDLs. (Pls.' Opp. Br. at 19.)

> 18 The author of the State Trash TMDLs appears to be the Los Angeles Regional Board. (*See* Montevideo Decl., Ex. 3.) Since the Los Angeles Regional Board is an entity created by state law and is subordinate to a state agency, the State Board, the text of the State Trash TMDLs is arguably ascribable to the State Board and the state of California as well.
>
> But these statements cannot be attributed to EPA by virtue of its approval of the State Trash TMDLs. Plaintiffs have laid no legal or evidentiary foundation tending to show that EPA's mere approval of the *TMDLs themselves* implies that EPA further agreed with or endorsed as accurate California's estimates of the costs of compliance provided with those TMDLs.

Even if Plaintiffs will be forced to comply with obligations imposed by the State Trash TMDLs and will suffer costs therefrom, the first Compliance Point is not until Year 3 of the implementation period, which runs [**43] from October 1, 2005, to September 30, 2006. (*See* Montevideo Decl., Ex. 3, at 28.) Thus, as a practical matter, Plaintiffs have three years to reach the specified Compliance Point. They have "ample opportunity later to bring [their] legal challenge at a time when harm is more imminent and more certain." *Ohio Forestry Ass'n*, 523 U.S. at 734. Accordingly, Plaintiffs cannot be heard to complain that they will suffer hardship if review is withheld at the present time. [19]

> 19 To the extent that Plaintiffs identify past events that are not alleged to recur in the future,

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such as Plaintiffs' allegedly having to submit comments to two levels of government, for the purpose of demonstrating hardship, those events are irrelevant because Plaintiffs are solely seeking *prospective* relief (aside from attorney's fees and costs of suit).

[*1158] Second, judicial intervention would likely interfere with further administrative action on the part of the state of California. Plaintiffs have not refuted Defendants' [**44] evidence that the Los Angeles Regional Board will be revisiting the State Trash TMDLs at the end of the monitoring period. [20] It is thus possible that the compliance [*1159] dates or compliance points will be altered or abolished altogether. The State Board may submit new TMDLs to EPA for review and potential approval well before the compliance dates in the State Trash TMDLs. And even if the State Trash TMDLs remain mostly intact, it is certainly possible that the State Board will approve additional regulations that alleviate much of the burden on Plaintiffs. Again, Plaintiffs must bear in mind that it is the state of California, not the federal government, that is charged with implementing the State Trash TMDLs.

20 Plaintiffs' Objections challenge the admissibility of, *inter alia*, the portion of Defendants' evidence tending to show that the Los Angeles Regional Board will be revisiting the State Trash TMDLs at the end of the monitoring period, namely relevant statements in paragraphs 6 and 12 of the Dickerson Declaration. (The statements in paragraph 7 of the Dickerson Declaration and Exhibit C thereto also constitute such evidence, (*see* Mot. to Dismiss at 22), although Plaintiffs do not object to those statements.)

Plaintiffs challenge the statements in paragraph 6 of the Dickerson Declaration on five grounds. First, Plaintiffs contend that these statements are irrelevant "to the issue in question." (Pls.' Objections at 3.) The Court is unclear about what Plaintiffs mean by "the issue in question," but at any rate, the Court overrules this objection because these statements are indeed relevant to an important issue relating to ripeness: whether the Los Angeles Regional Board will revisit the State Trash TMDLs at the end of the monitoring period. Second, Plaintiffs assert that the statements are inadmissible hearsay because they seek "to introduce statements from parties other than the declarant, into evidence." (*Id.*) This argument fails because the statements are not offered for the truth of the matter stated by persons or parties other than Mr. Dickerson. That the Los Angeles Regional Board's *discussed (i.e.*, verbally articulated) the possibility of reopening the TMDLs in the future does not implicate hearsay concerns, *see* United States v. Ballis, 28 F.3d 1399, 1405 (5th Cir. 1994); and the board's orders to its staff are more akin to written or verbal acts.

Third, Plaintiffs assail the statements as "incompetent" because "the opinions and views of individual Regional Board members is [*sic*] not relevant or admissible evidence of the actions or positions of the entire Board." (Pls.' Objections at 3 (emphasis omitted).) But nowhere are the "opinions and views" of the individual Regional Board members set out in the statements in paragraph 6. Fourth, Plaintiffs claim that these statements are "not the best evidence of the position of the entire Regional Board, as the views and positions of an entire Board can only be discerned from the meeting minutes and resolutions which confirm the actions of the public body." (*Id.* (emphasis omitted).) But the "views and positions" of the board are not set out therein. Fifth, Plaintiffs argue that the statements should be excluded as "extra-record evidence." This objection is meritless because the statements are relevant to the ripeness of Plaintiffs' challenge to EPA's approval of the State Trash TMDLs, and the Court may appropriately look beyond the pleadings in evaluating a motion to dismiss pursuant to Rule 12(b)(1).

In sum, Plaintiffs appear to have construed the statements in paragraph 6 of the Dickerson Declaration as stating that the Los Angeles Regional Board intends to *revise* the State Trash TMDLs after completion of the monitoring period, and they have evidently made their objections with this understanding in mind. Careful review of these statements reveals, however, that these statements demonstrate only that board staff have been ordered to report on the TMDLs and make recommendations on whether or not to revise the TMDLs based on the result of the monitoring. Thus, the import of the statements in paragraph 6 is that *the board will be in a position to revisit, and potentially reconsider, the TMDLs at the end of the monitoring period,* not that they have actually decided to revise the TMDLs. Accordingly, and for the reasons stated above, the Court OVERRULES the objections under heading II.1 in Plaintiffs' Objections.

Although Plaintiffs have objected to the admissibility of the statements in paragraph 12 of the Dickerson Declaration, the Court does not rely on those statements in evaluating issues of ripeness. The Court finds that the statements in

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paragraphs 6 and 7 of the Dickerson Declaration are sufficient to support a conclusion that the Los Angeles Regional Board will be revisiting--which is not to be confused with an intent to revise--the State Trash TMDLs at the end of the monitoring period. Accordingly, the Court OVERRULES AS MOOT the objections under heading II.5 in Plaintiffs' Objections.

Finally, the Court has reviewed the remaining objections in Plaintiffs' Objections. The Court does not rely on any of the matter to which Plaintiffs have objected other than those under headings II.1 and II.2 in evaluating the Motion to Dismiss. Accordingly, the Court OVERRULES AS MOOT the remaining objections in Plaintiffs' Objections.

[**45] Finally, the Court would benefit from further factual development of the issues presented. For example, Plaintiffs allege that in approving the State Trash TMDLs, EPA failed "to use 'best science' and [failed] to carefully consider suggestions on how to structure the TMDL program to be more effective and flexible to ensure workable solutions, with such failure resulting in an inequitable share of the burden [of pollution reduction] being placed on municipalities, such as Plaintiffs herein, to attain water quality standards." (SAC P47.) Since TMDLs are not self-executing, but require issuance of state regulations for implementation, delaying review will enable the Court to determine more easily and accurately whether the TMDL program could in fact have been structured more flexibly and whether Plaintiffs are bearing an inequitable share of the burden of pollution reduction.

In light of the Court's evaluation of the foregoing three factors, the Court concludes that Plaintiffs' claim is unripe for judicial review. Accordingly, Plaintiffs' claim (5) within the First Claim for Relief, (*id.* P87), is DISMISSED pursuant to Rule 12(b)(1) due to the Court's lack of subject matter jurisdiction. [**46] Since the Court lacks jurisdiction over this claim, it lacks authority to grant Plaintiffs leave to amend the claim; accordingly, the claim is dismissed WITHOUT LEAVE TO AMEND in this action. Finally, because the Court necessarily does not reach the merits of the claim, the dismissal is WITHOUT PREJUDICE.

D. ***Third Claim for Relief***

Plaintiffs' Third Claim for Relief is wholly predicated on their first two claims for relief. Because these two claims for relief are dismissed, the Third Claim for Relief is DISMISSED on the same bases, and to the same extent, as the two claims (and sub-claims thereunder) are dismissed.

E. ***Motion for Partial Summary Judgment***

Plaintiffs' Motion for Partial Summary Judgment seeks summary judgment in Plaintiffs' favor on the issues of (1) whether Defendants had authority and jurisdiction to approve the State Trash TMDLs to the extent that they covered unlisted waters and (2) whether Defendants had authority and jurisdiction to approve the State Trash TMDLs given that they had previously established the EPA Trash TMDLs. For the reasons stated above, the Court grants the Motion to Dismiss. Accordingly, the Motion for Partial Summary Judgment [**47] is DENIED AS MOOT. For the same reason, the Court OVERRULES AS MOOT Intervenors' Evidentiary Objections to Declaration of Richard Montevideo in Support of Plaintiffs' Motion for Summary Adjudication of Issues, and in Opposition to Defendants' Motion to Dismiss [21] and Plaintiffs' Objections to [*1160] Declaration of Anjali I. Jaiswal and Exhibits.

21 Although the Montevideo Declaration relates both to Plaintiffs' opposition to the Motion to Dismiss and to Plaintiffs' Motion for Partial Summary Judgment, Intervenors' objections to the Montevideo Declaration are made in connection with their opposition to the Motion for Partial Summary Judgment. Accordingly, the Court considers their objections solely for that purpose.

IV. CONCLUSION

Plaintiffs have no reason or right to be before this Court, at least at this time. All of their claims are moot, meritless, or unripe. Plaintiffs' challenges to the EPA Trash TMDLs were quite obviously mooted out the minute that EPA approved the State Trash TMDLs. Indeed, given [**48] that Plaintiffs readily withdrew these challenges based solely on Defendants' representations in their moving papers that the EPA Trash TMDLs are void, (Pls.' Opp. Br. at 4 n.6), the Court wonders why Plaintiffs proceeded to file a lawsuit on this basis. Plaintiffs' challenge to EPA's authority to approve the State Trash TMDLs following its establishment of the EPA Trash TMDLs and their challenge to the "*de facto* TMDL procedure" are so patently meritless that the Court fails to understand why Plaintiffs decided to assert these claims in the first place. Finally, Plaintiffs' challenges to the "merits" of the State Trash TMDLs may very well be valid, but in the absence of any indication that they will suffer imminent hardship, these claims are premature.

The Court does not suggest by any means that Plaintiffs have acted in bad faith by continuing to prosecute this action after EPA approved the State Trash TMDLs. But after receiving Defendants' opening brief for their Motion to Dismiss, Plaintiffs should have recognized

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that their claims could not be maintained at present, if at all. The arguments in their opposition brief appear to reflect more of a "win at all costs" approach than [**49] considered judgment. And while the Court does not doubt that Plaintiffs would appreciate a judicial declaration as to the validity of the State Trash TMDLs, the Court lacks jurisdiction to grant such relief where Plaintiffs are not in jeopardy of imminent harm and future events could obviate the controversy.

Accordingly,

IT IS HEREBY ORDERED THAT:

1. The Motion to Dismiss Second Amended Complaint [Docket No. 18] is GRANTED, such that:

a. The First Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED, as follows:

i. The claim that EPA acted without authority and acted arbitrarily and capriciously by establishing the EPA Trash TMDLs prior to receiving for review the State Trash TMDLs, (SAC PP78-79), is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE as moot and, thus, for lack of subject matter jurisdiction;

ii. The claim that EPA acted without authority and arbitrarily and capriciously by reviewing and approving the State Trash TMDLs because EPA had already established the EPA Trash TMDLs, (SAC PP80, 83), is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE for failure to state a claim upon which relief [**50] can be granted;

iii. The claim that EPA acted arbitrarily and capriciously and in excess of its jurisdiction with regard to the manner by which it established the EPA Trash TMDLs, (SAC PP81-82), is DISMISSED WITHOUT LEAVE TO AMEND and [*1161] WITH PREJUDICE as moot and, thus, for lack of subject matter jurisdiction;

iv. The claim that the collective actions of California and EPA relating to issuance of the EPA Trash TMDLs and subsequent approval of the State Trash TMDLs constitute a "*de facto* TMDL procedure" that is arbitrary, capricious, and contrary to law, (SAC PP84-86), is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE for failure to state a claim upon which relief can be granted;

v. The claim that EPA acted arbitrarily and capriciously by approving the State Trash TMDLs because those TMDLs were "patently defective" and established not in accordance with the procedures of the CWA and California law, (SAC P87), is DISMISSED WITHOUT LEAVE TO AMEND in this action and WITHOUT PREJUDICE as unripe and, thus, for lack of subject matter jurisdiction;

b. The Second Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED, as [**51] follows:

i. To the extent the Second Claim for Relief challenges the validity of the EPA Trash TMDLs, the claim is DISMISSED

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WITHOUT LEAVE TO AMEND and WITH PREJUDICE as moot and, thus, for lack of subject matter jurisdiction;

ii. To the extent the Second Claim for Relief challenges the validity of the alleged *de facto* TMDL procedure, the claim is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE for failure to state a claim upon which relief can be granted;

c. The Third Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED on the same bases, and to the same extent, as the First and Second Claims for Relief are dismissed, given that the Third Claim for Relief is derivative of the first two claims.

2. Plaintiffs' Motion for Summary Adjudication of Issues [Docket No. 28] is DENIED AS MOOT.

3. Plaintiffs' Objections to Declarations of David W. Smith and Dennis Dickerson Offered by Defendants in Support of Defendants' Motion to Dismiss Second Amended Complaint [Docket No. 31] are OVERRULED on the merits with respect to the objections under headings II.1 and II.2 therein and OVERRULED AS MOOT with respect [**52] to all remaining objections.

4. Intervenors' Evidentiary Objections to Declaration of Richard Montevideo in Support of Plaintiffs' Motion for Summary Adjudication of Issues, and in Opposition to Defendants' Motion to Dismiss [Docket No. 43] are OVERRULED AS MOOT.

5. Plaintiffs' Objections to Declaration of Anjali I. Jaiswal and Exhibits [Docket No. 47] are OVERRULED AS MOOT.

IT IS FURTHER ORDERED THAT this action is DISMISSED in its entirety. The Clerk shall enter judgment in favor of defendants accordingly. All deadlines and events presently calendared are VACATED. [*1162] The Clerk shall close the file and terminate any pending matters.

IT IS SO ORDERED.

Dated: May 16, 2003

SAUNDRA BROWN ARMSTRONG

United States District Judge

JUDGMENT

In accordance with the Court's Order Granting Defendants' Motion to Dismiss, Denying as Moot Plaintiffs' Motion for Partial Summary Judgment, and Dismissing Action,

IT IS HEREBY ORDERED THAT judgment is entered in favor of defendants and defendants-intervenors, and against plaintiffs, on all of plaintiffs' claims for relief as follows:

1. The First Claim for Relief in the Second Amended Complaint for Injunctive and [**53] Declaratory Relief ("SAC") is DISMISSED, such that:

a. The claim that EPA acted without authority and acted arbitrarily and capriciously by establishing the EPA Trash TMDLs prior to receiving for review the State Trash TMDLs, (SAC PP78-79), is DISMISSED WITH PREJUDICE;

b. The claim that EPA acted without authority and arbitrarily and capriciously by reviewing and approving the State Trash TMDLs because EPA had already established the EPA Trash TMDLs, (SAC PP80, 83), is DISMISSED WITH PREJUDICE;

c. The claim that EPA acted arbitrarily and capri-

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ciously and in excess of its jurisdiction with regard to the manner by which it established the EPA Trash TMDLs, (SAC PP81-82), is DISMISSED WITH PREJUDICE;

d. The claim that the collective actions of California and EPA relating to issuance of the EPA Trash TMDLs and subsequent approval of the State Trash TMDLs constitute a "*de facto* TMDL procedure" that is arbitrary, capricious, and contrary to law, (SAC PP84-86), is DISMISSED WITH PREJUDICE;

e. The claim that EPA acted arbitrarily and capriciously by approving the State Trash TMDLs because those TMDLs were "patently defective" and established not in accordance [**54] with the procedures of the CWA and California law, (SAC P87), is DISMISSED WITHOUT PREJUDICE;

2. The Second Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED WITH PREJUDICE in its entirety; and

3. The Third Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED to the same extent as the First and Second Claims for Relief are dismissed.

IT IS SO ORDERED.

Dated: May 16, 2003

SAUNDRA BROWN ARMSTRONG

United States District Judge

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Caution
As of: Jun 17, 2010

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

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

191 F.3d 1159; 1999 U.S. App. LEXIS 22212; 99 Cal. Daily Op. Service 7618; 99 Daily Journal DAR 9661; 30 ELR 20116

August 11, 1999, Argued and Submitted, San Francisco, California
September 15, 1999, Filed

SUBSEQUENT HISTORY: [**1] As Amended December 7, 1999.

PRIOR HISTORY: Petition to Review a Decision of the Environmental Protection Agency. EPA No. 97-3.

DISPOSITION: PETITION DENIED.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners appealed decision of the Environmental Appeals Board denying reconsideration of the Environmental Protection Agency's decision issuing five municipalities National Pollution Discharge System permits, without requiring numeric limitations to ensure compliance with state water-quality standards.

OVERVIEW: The Environmental Protection Agency (EPA) issued permits to municipalities without requiring limitations on storm-sewer discharges. Petitioners alleged that the Water Quality Act (WQA), 33 U.S.C.S. § 1311(b)(1)(C), required municipalities to strictly comply with state water-quality standards. Court concluded that EPA's decision was not arbitrary or capricious. Court determined that WQA unambiguously expressed Congress' intent that municipal storm-sewer discharges did not have to strictly comply with WQA. Congress expressly put in provision for industrial storm-water discharges requiring compliance with WQA, but there was no similar provision in WQA for municipal storm-sewer discharges. The plain language of WQA thus exempted municipal storm-sewer discharges from strict compliance. Court found other provisions in WQA excluded certain discharges from permit altogether. Based on that fact, court concluded exemption of municipal storm-sewer discharges from strict compliance with WQA was not so unusual that the court should not interpret the statute as written.

OUTCOME: Court denied petition for reconsideration, because Environmental Protection Agency did not act arbitrarily or capriciously in issuing permits. In examining Water Quality Act, court determined that it was Congress' specific intent to exempt municipal storm-sewer discharges from strict compliance with the statute.

CORE TERMS: municipal, water quality, storm, water-quality, industrial, pollutant, administrator, storm-sewer, strict compliance, storm-water, environmental, quotation marks omitted, unambiguously, numeric, storm sewers, practicable, dischargers, effluent, entity, exempt, statutory construction, engineering, capricious, stringent, maximum, runoff, Clean Water Act, decision to issue, permit requirements, ensure compliance

LexisNexis(R) Headnotes

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Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Public Participation
[HN1] 26 U.S.C.S. § 1342(a)(1) authorizes the Environmental Protection Agency to issue National Pollution Discharge Elimination System permits, thereby allowing entities to discharge some pollutants.

Administrative Law > Judicial Review > Reviewability > Standing
Civil Procedure > Justiciability > General Overview
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN2] 33 U.S.C.S. § 1369(b)(1)(F) authorizes any interested person to seek review in court of an Environmental Protection Agency decision issuing or denying any permit under 26 U.S.C.S. § 1342(a)(1). Any interested person means any person that satisfies the injury-in-fact requirement for U.S. Const. art. III standing.

Environmental Law > Litigation & Administrative Proceedings > Nuisances, Trespasses & Strict Liability
[HN3]A plaintiff claiming injury from environmental damage must use the area affected by the challenged activity.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion
Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN4]The Administrative Procedures Act, 5 U.S.C.S. § 701, et seq., provides the standard of review for the Environmental Protection Agency's decision to issue a permit. Under the Administrative Procedures Act, the court generally reviews such a decision to determine whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Validity
Administrative Law > Judicial Review > Standards of Review > General Overview
Governments > Legislation > Interpretation
[HN5]The court has established a two-step process for reviewing an agency's construction of a statute it administers. Under the first step, the court employs traditional tools of statutory construction to determine whether Congress has expressed its intent unambiguously on the question before the court. 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, the court proceeds to step two. At step two, the court must uphold the administrative regulation unless it is arbitrary, capricious, or manifestly contrary to the statute.

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Discharges
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
[HN6]The Clean Water Act, 33 U.S.C.S. § 1251, et seq., generally prohibits the discharge of any pollutant from a point source into the navigable waters of the United States. An entity can, however, obtain a National Pollution Discharge Elimination System permit that allows for the discharge of some pollutants.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN7]A National Pollution Discharge Elimination System permit imposes effluent limitations on discharges. First, a permit-holder shall achieve effluent limitations which shall require the application of the best practicable control technology currently available. Second, a permit-holder shall achieve 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.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN8]See 33 U.S.C.S. § 1342(p)(3).

Governments > Legislation > Interpretation
[HN9]Questions of congressional intent that can be answered with traditional tools of statutory construction are still firmly within the province of the courts. Using traditional tools of statutory construction, when interpreting a statute, the court looks first to the words that Congress used. Rather than focusing just on the word or phrase at issue, the court looks to the entire statute to determine congressional intent.

Governments > Legislation > Interpretation

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[HN10]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.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges Governments > Legislation > Interpretation
[HN11]The court generally refuses to interpret a statute in a way that renders a provision superfluous.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges Governments > Local Governments > Licenses
[HN12]The Water Quality Act contains other provisions that undeniably exempt certain discharges from the permit requirement altogether, and therefore from 33 U.S.C.S. § 1311. For example, the Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture. 33 U.S.C.S. § 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.S. § 1342(l)(2).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN13]Congress gave the administrator discretion to determine what controls are necessary. Under that discretionary provision, the Environmental Protection Agency (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.

COUNSEL: 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; and Harlan C. Agnew, Deputy County Attorney, Tucson, Arizona, for the intervenors-respondents.

David Burchmore, Squire, Sanders & Dempsey, Cleveland, Ohio, for the amici curiae.

JUDGES: Before: John T. Noonan, David R. Thompson, and Susan P. Graber, Circuit Judges. Opinion by Judge Graber.

OPINION BY: SUSAN P. GRABER

OPINION

[*1161] AMENDED OPINION

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 [**2] 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 [HN1] 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 [**3] 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

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> [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 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 [**4] 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.

[**5] JURISDICTION

[HN2]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 "members 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, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) [HN3]("[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 [**6] 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*

[HN4]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).

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, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). [**7] *See* NRDC II, 966 F.2d at 1297 (so holding). In Chevron, 467 U.S. at 842-44, 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.

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1996) ("The [HN5]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. "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 (footnote omitted). If, instead, Congress has left a gap for the administrative agency to fill, we proceed to step two. *See id.* at 843. At step two, we must uphold the administrative regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

[**8] [*1163] B. *Background*

[HN6]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).

[HN7]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 . . . achieve . . . 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 . . . achieve . . . 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 [**9] (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, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (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 [**10] the permit requirements of § 402 [33 U.S.C. § 1342]." *Natural Resources Defense Council, Inc. v. Costle*, 186 U.S. App. D.C. 147, 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, [1] most entities discharging storm water did not need to obtain a permit. *See* 33 U.S.C. § 1342(p).

1 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.

[**11] 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

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> Permits for discharges from municipal [**12] 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.*

[HN8] 33 U.S.C. § 1342(p)(3) (emphasis added).

C. *Application of Chevron*

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 [**13] manifestly contrary to the statute.") (citation and internal quotation marks omitted), *petition for cert. filed*, No. 99-243 (Aug. 10, 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 (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 [**14] 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.

"Questions [HN9]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, 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* [**15] *provisions of* this section and *section 1311* of this title.") (emphasis added). By incorporation, then, industrial [*1165] storm-water discharges "*shall . . . achieve . . . 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 [**16] 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).

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, "where [HN10]Congress includes particular language in one section of a statute

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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, 78 L. Ed. 2d 17, 104 S. Ct. 296 (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*, No. 98-323 (Aug. 23, 1999). Applying that familiar [**17] 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. § 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). [**18] 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 [HN11]court generally refuses to interpret a statute in a way that renders a provision superfluous."), *as amended*, 1999 U.S. App. LEXIS 18691, 1999 WL 604218 (9th Cir. Aug. 12, 1999). Section 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. [HN12]The Water Quality Act contains other provisions that undeniably exempt certain discharges from the permit requirement altogether (and therefore from [**19] § 1311). For example, "the 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* [**20] *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)*

We are left with Intervenors' contention that the EPA may not, under the CWA, require strict compliance with state water-quality [**21] 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 "permits for discharges from municipal storm sewers . . . shall require . . . *such other provisions as the Administrator . . . determines appropriate for the control of such pollu-*

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tants." (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate. As this court stated in *NRDC II*, "Congress [HN13]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 [**22] 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.

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TAB "4"

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LexisNexis

Caution
As of: Jun 02, 2011

NATURAL RESOURCES DEFENSE COUNCIL, INC. Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent, BATTERY COUNCIL INTERNATIONAL, et al., Respondents-Intervenors.

Nos. 90-70671, 91-70200

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

966 F.2d 1292; 1992 U.S. App. LEXIS 12517; 34 ERC (BNA) 2017; 92 Cal. Daily Op. Service 4703; 92 Daily Journal DAR 7542; 22 ELR 20950

October 9, 1991, Argued and Submitted, San Francisco, California
June 4, 1992, Filed

PRIOR HISTORY: [**1] Petition for Review of a Rule Promulgated by the Environmental Protection Agency.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner environmental action group challenged regulations implemented by respondent Environmental Protection Agency under § 402(1), (p) of the Clean Water Act (CWA), 33 *U.S.C.S. § 1342(l), (p)*. Petitioner argued that those regulations, to be codified at *40 C.F.R. §§ 122.26, 122.26(e),* established deadlines for a storm water discharge rule that exceeded the scope of the CWA's coverage and were otherwise unlawful.

OVERVIEW: Under amendments to the Clean Water Act (CWA), 33 *U.S.C.S. § 1251 et seq.*, respondent Environmental Protection Agency promulgated rules to establish a national pollutant discharge elimination system under § 402 of the CWA, 33 *U.S.C.S. § 1342*. Petitioner environmental action group challenged the implementation of those rules. The court granted declaratory relief because of the importance of the interests and principles at stake, but it denied injunctive relief. The court denied petitioner's request to place all municipalities, no matter what their size, on the same permitting schedule, but it found that respondent's failure to include deadlines for permit approval or denial was arbitrary and capricious. The court upheld certain definitions and disapproved others, including the portion of the regulation regulating light industry. The use of incorporation as a factor was not arbitrary or capricious and was consistent with the CWA. The rule as to oil and gas operations and storm water control was upheld. Respondent's approval of a group application for an industrial discharger was not a rule requiring notice and comment from the public.

OUTCOME: The court granted partial relief to petitioner environmental action group in a challenge to regulations under the Clean Water Act. Declaratory relief was granted, but injunctive relief was denied. All municipalities were not placed one schedule, the lack of deadlines for permit approval was erroneous, the gas operation rules were upheld, and group application approvals did not require notice and comment.

LexisNexis(R) Headnotes

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Point Sources
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > General Overview
[HM] One major focus of the Clean Water Act (CWA), *33 U.S.C.S. § 1251 et seq.*, is the control of point source

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pollution. A point source is any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel from which pollutants are or may be discharged. *33 U.S.C.S. § 1362(14).* The CWA also established a national pollutant discharge elimination system (NPDES), requiring permits for any discharge of pollutants from a point source pursuant to § 402 of the CWA, 33 *U.S. C. S. § 1342.* The CWA empowers the Environmental Protection Agency (EPA) or an authorized state to conduct an NPDES permitting program. *33 U.S.C.S. § 1342(a), (b).* Under the program, as long as the permit issued contains conditions that implement the requirements of the CWA, the EPA may issue a permit for discharge of any pollutant. *33 U.S. C.S. § 1342(a)(1).*

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN2] Congress passed the Water Quality Act, codified in scattered sections of 33 U.S.C.S., portions of which set up a new scheme for regulation of storm water runoff. Section 402(p) of the Water Quality Act establishes deadlines by which certain storm water dischargers must apply for permits. The environmental protection agency or states must act on permits and dischargers must implement their permits. The Water Quality Act also set up a moratorium on permitting requirements for most storm water discharges which ends on October 1, 1992.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN3] See *33 U.S.C.S. § 1342(p)(2).*

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN4] Section 402(p) of the Water Quality Act, codified in scattered sections of 33 U.S.C.S., outlines an incremental or phase-in approach to issuance of storm water discharge permits.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Public Participation
[HN5] Section 509(b)(1) of the Clean Water Act (CWA), 33 *U.S.C.S. § 1369(b)(1),* describes six types of actions by the environmental protection agency administrator that are subject to review in the court of appeals. Section § 509(b)(1)(F) of the CWA, *33 U.S.C.S. § 1369(b)(1)(F),* allows the court to review the issuance or denial of a permit under § 402 of the CWA, *33 U.S. C.S. § 1342.* The court also has the power to review rules that regulate the underlying permit procedures.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
Administrative Law > Judicial Review > Reviewability > Standing
Environmental Law > Water Quality > General Overview
[HN6] Any interested person may seek review of designated actions of the environmental protection agency administrator under 33 *U.S. C.S. § 1369(b)(1).* The injury-in-fact rule for standing covers the interested person language.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion
Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review
[11N7] 5 U.S.C.S. § 706(2)(A) authorizes the court to set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Under this standard a court must find a rational connection between the facts found and the choice made. The court must decide whether the agency considered the relevant factors and whether there has been a clear error of judgment.

Administrative Law > Separation of Powers > Legislative Controls > Implicit Delegation of Authority
Governments > Federal Government > U.S. Congress
Governments > Legislation > Interpretation
[IIN8] On questions of statutory construction, courts must carry out the unambiguously expressed intent of Congress. If a 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 of the statute. Congress may leave an explicit gap, thus delegating legislative authority to an agency subject to the arbitrary and capricious standard. If legislative delegation is implicit, courts must defer to an agency's statutory interpretation as long as it is reasonable. This is because an agency has technical expertise as well as the authority to reconcile conflicting policies. Nevertheless, questions of congressional intent that can be answered with traditional tools of statutory construction are still firmly within the province of the courts.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
Governments > Local Governments > Licenses

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[HN9] The Clean Water Act (CWA), *33 U.S.C.S. § 1251 et seq.*, calls for the Environmental Protection Agency (EPA) to consider permit applications from the most serious sources of pollutants first: industrial dischargers and large municipal separate storm sewer systems (large systems). The CWA requires the EPA to establish regulations for permit application requirements for these two groups by February 4, 1989; to receive applications for permits one year later, February 4, 1990; and to approve or deny the permits by February 4, 1991. Permittees may be given up to three years to comply with their permits. 33 *U.S. C.S. § 1342(p)(4)(A).* Medium sized municipal separate storm sewer systems, those serving a population of 100,000 or more but less than 250,000, are on a similar schedule, except that the deadlines are two years later. *33 U.S.C.S. § 1342(4)(B).*

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

[HIN10] The temporary exemption under the Clean Water Act (CWA), *33 U.S.C.S. § 1251 et seq.*, for all storm water sources expires on October 1, 1992. *33 U.S.C.S. § 1342(p)(1).*

Administrative Law > Judicial Review > Reviewability > Ripeness

Civil Procedure > Declaratory Judgment Actions > State Judgments > Appellate Review

[IIN11] A request for declaratory relief in a challenge to an agency action is ripe for review if the action at issue is final and the questions involved are legal ones.

Civil Procedure > Declaratory Judgment Actions > State Judgments > Discretion

[HN12] The granting of declaratory relief rests in the sound discretion of the court exercised in the public interest. The guiding principles are whether a judgment will clarify and settle the legal relations at issue and whether it will afford relief from the uncertainty and controversy giving rise to the proceedings. A court declaration delineates important rights and responsibilities and can be a message not only to the parties but also to the public and has significant educational and lasting importance.

Environmental Law > Water Quality > Clean Water Act > Enforcement > Injunctive Relief

[HN13] The Environmental Protection Agency does not have the authority to ignore unambiguous deadlines set by Congress in the Clean Water Act, *33 U.S.C.S. § 1251 et seq.* The deadlines are not aspirational. Congress set them and expected compliance. The court must uphold adherence to the law, and cannot condone the failure of an executive agency to conform to express statutory requirements.

Civil Procedure > Remedies > Injunctions > Elements > General Overview

[HN14] Injunctions are an extraordinary remedy issued at a court's discretion when there is a compelling need.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges Governments > Local Governments > Licenses

[IIN15] Section 402(p)(4)(A) of the Clean Water Act (CWA), *33 U.S.C.S. § 1251 et seq.*, calls for the Environmental Protection Agency to issue or deny permits for industrial and large municipalities by February 4, 1991, which is one year after the applications are submitted, and states that any such permit shall provide for compliance as expeditiously as practicable, but in no event later than three years after the date of the issuance of such permit. *33 U.S.C.S. § 1342(p)(4)(A).* The CWA sets out a similar schedule for medium municipalities, except that the deadlines are two years later. *33 U.S.C.S. § 1342(p)(4)(B).*

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges Governments > Public Improvements > General Overview

[HN16] The temporary exemption under the Clean Water Act (CWA), 33 *U.S. C.S. § 1251 et seq.*, for all storm water sources expires on October 1, 1992. The CWA requires the Environmental Protection Agency to establish a comprehensive program to regulate point sources subject to the moratorium, such as small municipalities, by that date. 33 *U.S. C.S. § 1342(p)(1), (6).* Section 402(p)(1) of the CWA forbids requiring a permit for entities not listed as exceptions, such as small municipalities, before October 1, 1992. Yet the deadline for part one of the application for medium systems is currently May 18, 1992.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

[HN17] Section 402(p) of the Clean Water Act, 33 *U.S. C.S. § 1251 et seq.*, refers to municipal separate storm sewer systems serving a population of a specified size. *33 U.S.C.S. § 1342.*

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > General Overview

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Governments > Native Americans > Authority & Jurisdiction

[HN18] The 1987 amendments to the Clean Water Act (CWA), 33 *U.S.C.S. § 1251 et seq.,* do not contain definitions of municipal or separate storm sewer system, but the CWA amendments enacted in 1972 defined municipality. Except as otherwise specifically provided, the term municipality means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to state law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under § *1288* of the CWA, *33 U.S.C.S. § 1288. 33 U.S.C.S. § 1362.*

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review

[HN19] An agency rule would be arbitrary and capricious 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.

Administrative Law > Judicial Review > Standards of Review > General Overview
Environmental Law > Water Quality > General Overview

[HN20] The court's role is not to determine whether the environmental protection agency, under the authority of the Clean Water Act, *33 U.S.C.S. § 1254 et seq.,* has chosen the best among all possible methods. The court can only determine if its choices are rational.

Environmental Law > Water Quality > General Overview

[HN21] Under § 402(p)(2)(B) of the Clean Water Act, 33 *U.S.C.S. § 1254 et seq.,* a discharge associated with industrial activity is an exception to the permit moratorium.

Environmental Law > Water Quality > General Overview
Governments > Legislation > Interpretation

[HN22] The de minimis exemption inherent in statutory schemes to make categorical exemptions when the result is de minimis is only available where a regulation would yield a gain of trivial or no value. The de minimis concept is based on the principle that the law does not concern itself with trifling matters. Its applicability is questionable in a situation where the gains from application of the statute are being weighed against administrative burdens to the regulated community.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

[HN23] The 1987 amendments to the Clean Water Act (CWA), *33 U.S. C.S. § 1251 et seq.,* created an exemption from the permit requirement for uncontaminated runoff from mining, oil and gas facilities. 33 *U.S.C.S. § 1342(1)(2).* Section 402(1)(2) of the CWA states that a permit is not required for discharges of storm water runoff from mining, oil or gas operations composed entirely of flows from conveyance systems used for collecting 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.

Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Cost Recovery Actions > Potentially Responsible Parties > Owners & Operators
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

[HN24] Under the Clean Water Act (CWA), 33 *U.S. C.S. § 1251 et seq.,* reportable quantities (RQs) are not effluent guidelines setting up permissible limits for pollutants. Rather, they are quantities the discharge of which may be harmful to the public health or welfare of the United States. *33 U.S.C.S. § 1321(b)(4).* The environmental protection agency has established RQs for a large number of substances, pursuant to both § 311 of the CWA, *33 U.S.C.S. § 1321,* and § 102 of the Comprehensive Environmental Response, Compensation and Liability Act, *42 U.S.C.S. § 9602.* 40 C.F.R. §§ 110, 117, 302. The operator of any vessel or facility which releases the RQ of any substance must immediately notify the national response center.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

[HN25] Under the Clean Water Act, 33 *U.S. C.S. § 1251 et seq.,* the environmental protection agency administrator has discretion to determine whether or not storm water runoff at an oil, gas, or mining operation is contaminated with materials. They are overburden, raw material, product, or process wastes and oil, grease or hazardous substances. The report sets out factors for the adminis-

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trator to consider in determining contamination for the latter group of pollutants.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN26] Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water under the Clean Water Act (CWA), *33 U.S. C.S. § 1251 et seq.* In the 1987 amendments, Congress retained the existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge. *33 U.S.C.S. § 1342(p)(3)(A), (B).*

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN27] See *33 U.S.C.S. § 1342(p)(3)(B).*

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview
[HN28] See *5 U.S.C.S. § 551(4).*

Environmental Law > Water Quality > General Overview
[HN29] See 33 *U.S. C.S. § 1342.*

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JUDGES: Before: Harry Pregerson, Warren J. Ferguson, and Diarmuid F. O'Scannlain, Circuit Judges.Opinion by Judge Ferguson; Partial Concurrence, Partial Dissent by Judge O'Scannlain.

OPINION BY: FERGUSON

OPINION

[*1295] OPINION

FERGUSON, Circuit Judge:

The Natural Resources Defense Council ("NRDC") challenges aspects of the Environmental Protection Agency's ("EPA") recent Clean Water Act storm water discharge rule. [1] NRDC argues that the deadlines contained in the rule and the scope of its coverage are unlawful under section 402(1), (p) of the Clean Water Act, [**3] 33 *U.S.C. § 1342(l), (p).* We grant partial relief.

1 National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, *55 Fed. Reg. 47,990 (1990)* (to be codified at *40 C.F.R. § 122.26);* National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadline for Group Applications, *56 Fed. Reg. 12,098 (1991)* (to be codified at *40 C.F.R. § 122.26(e)).*

I. BACKGROUND

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In 1972 Congress enacted significant amendments to the Clean Water Act ("CWA"), [2] *33 U.S.C. §§ 1251-1387 (1988),* "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 *U.S.C. § 1251(a).* [HN1] One major focus of the CWA is the control of "point source" pollution. A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel from which pollutants are or may be discharged." *33 U.S.C. § 1362(14).* The CWA also established [**4] the National Pollutant Discharge Elimination System ("NPDES"), requiring permits for any discharge of pollutants from a point source pursuant to section 402 of the CWA, *33 U.S.C. § 1342.* The CWA empowers EPA or an authorized state to conduct an NPDES permitting program. *33 U.S.C. § 1342(a)-(b).* Under the program, as long as the permit issued contains conditions that implement the requirements of the CWA, the EPA may issue a permit for discharge of any pollutant. *33 U.S.C. § 1342(a)(1).*

2 The Act is popularly known as the Clean Water Act or the Federal Water Pollution Control Act. 33 *U.S.C. § 1251.* For more background on the CWA, see *EPA v. State Water Resources Control Bd., 426 U.S. 200, 202-209, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976); Sierra Club v. Union Oil of California, 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);* and *Natural Resources Defense Council v. Train, 166 App. D.C. 312, 510 F.2d 692, 695-97 (D.C. Cir. 1975).*

This case involves runoff [**5] from diffuse sources that eventually passes through storm sewer systems and is thus subject to the NPDES permit program. *See* National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadlines, *56 Fed. Reg. 56,548 (1991).* One recent study concluded that pollution from such sources, including runoff from urban areas, construction sites, and agricultural land, is now a leading cause of water quality impairment. *55 Fed. Reg. at 47,991.* [3]

3 The Nationwide Urban Runoff Program (NURP) conducted from 1978 through 1983 found that urban runoff from residential, commercial and industrial areas produces a quantity of suspended solids and chemical oxygen demand that is equal to or greater than that from secondary treatment sewage plants. *55 Fed. Reg. at 47,991.* A significant number of samples tested exceeded water quality criteria for one or more pollutants. *Id. at 47,992.* Urban runoff is adversely affecting 39% to 59% of the harvest-limited shellfish beds in the waters off the East Coast, West Coast and in the Gulf of Mexico. *56 Fed. Reg. at 56,548.*

[**6] *A. Efforts to Regulate Storm Water Discharge.*

Following the enactment of the CWA amendments in 1972, EPA promulgated NPDES permit regulations exempting a number of classes of point sources, including uncontaminated storm water discharge, on the basis of "administrative infeasibility," i.e., the extraordinary administrative burden imposed on EPA should it have to issue permits for possibly millions of point sources of runoff. *Natural Resources Defense Council v. Costle, 186 App. D.C. 147, 568 F.2d 1369, 1372 &* n.5, 1377 (D.C. Cir. 1977). NRDC [*1296] challenged the exemptions. Relying on the language of the statute, its legislative history and precedent, the D.C. Circuit held that the EPA Administrator did not have the authority to create categorical exemptions from regulation. *Id. at 1379.* However, the court acknowledged the agency's discretion to shape permits in ways "not inconsistent with the clear terms of the Act." *Id. at 1382.*

Following this litigation, EPA promulgated regulations covering storm water discharges in 1979, 1980 and 1984. *56 Fed. Reg. 56,548.* NRDC challenged various aspects of these rules both at the administrative [**7] level as well as in the courts.

Recognizing both the environmental threat posed by storm water runoff and EPA's problems in implementing regulations, [5] [HN2] Congress passed the Water Quality Act of 1987 [6] containing amendments to the CWA ("the 1987 amendments"), portions of which set up a new scheme for regulation of storm water runoff. Section 402(p), as amended, established deadlines by which certain storm water dischargers must apply for permits, the EPA or states must act on permits and dischargers must implement their permits. *See* Appendix A. The Act also set up a moratorium on permitting requirements for most storm water discharges, which ends on October 1, 1992. There are five exceptions that are required to obtain permits before that date:

4 *See* 132 Cong. Rec. 32,381 (1986).

5 Senator Stafford, speaking in favor of the conference report for the Water Quality Act, noted that "EPA should have developed this program long ago. Unfortunately, it did not. The conference substitute provides a short grace period during which EPA and the States generally may not require permits for municipal separate storm sewers." 132 Cong. Rec. 32,381 (1986). Senator Chafee stated "the Agency has been unable to move forward with a [storm water discharge control] program, because the current law did not give enough guidance to the Agency. This provision

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provides such guidance, and I expect EPA to move rapidly to implement this control program." 133 Cong. Rec. 1,264 (1987).

[**8]

6 Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of 33 U.S.C.).

[HN3] (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, . . . determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the United States.

CWA § 402(p)(2); *33 U.S.C. § 1342(p)(2).*

[H1\14] Section 402(p) also outlines an incremental or "phase-in" approach to issuance of storm water discharge permits. The purpose of this approach was to allow EPA and the states to focus their attention on the most serious problems first. 133 Cong. Rec. 991 (1987). Section 402(p) requires EPA to promulgate rules regulating permit application [**9] procedures in a staggered fashion.

Responding to the 1987 amendments requiring the EPA to issue permit application requirements for storm water discharges associated with industrial activities and large municipalities, the EPA issued final rules on November 16, 1990, almost two years after its deadline ("the November 1990 rule"). *55 Fed. Reg. at 47,990c.* EPA issued amended rules on March 21, 1991 ("the March 1991 rule"). *56 Fed. Reg. at 12,098.* It is to portions of these rules that NRDC objects.

B. Jurisdiction.

We have jurisdiction pursuant to CWA § 509(b)(1), *33 U.S.C. § 1369(b)(1).* [FINS] Section 509(b)(1) describes six types of actions by the EPA administrator that are subject to review in the court of appeals. Although the parties do not specify the section upon which they rely, § 509(b)(1)(F), *33 U.S.C. § 1369(b)(1)(F)* allows the court to review [*1297] the issuance or denial of a permit under CWA § 402, 33 *U.S.C. § 1342.* The court also has the power to review rules that regulate the underlying permit procedures. *NRDC v. EPA, 211 App. D. C. 179, 656 F.2d 768, 775 (D.C. Cir. 1981); cf. E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 136, 51 L. Ed. 2d 204, 97 S. Ct. 965 (1976).* [**10] NRDC filed timely petitions for review of the final rules at issue here pursuant to CWA § 509(b)(1), 33 *U.S.C. 1369(b)(1).*

C. Standing.

[HN6] Any "interested person" may seek review of designated actions of the EPA Administrator. *33 U.S.C. § 1369(b)(1).* This court has held that the injury-in-fact rule for standing of *Sierra Club v. Morton, 405 U.S. 727, 733, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972)* covers the "interested person" language. *Trustees for Alaska v. EPA, 749 F.2d 549, 554 (9th Cir. 1984)* (adopting the analysis in *Montgomery Environmental Coalition v. Costle, 207 App. D.C. 233, 646 F.2d 568, 578 (D.C. Cir. 1980)).* A petitioner under *Sierra Club* must suffer adverse affects to her economic interests or "aesthetic and environmental well-being." *Sierra Club, 405 U.S. at 734.* Intervenors are various industry and trade groups subject to regulation under the rules at issue. NRDC claims, inter alia, that EPA has delayed unlawfully promulgation of storm water regulations and that its regulations, as published, inadequately control storm water contaminants. NRDC's allegations and the potential economic impact of the rules on the intervenors satisfy the [**11] broad standing requirement applicable here.

H. DISCUSSION

A. Standard of Review.

[HN7] 5 U.S.C. § 706(2)(A) (1988) authorizes the court to "set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Under this standard a court must find a "rational connection between the facts found and the choice made." *Sierra Pacific Indus., 866 F.2d 1099, 1105 (9th Cir. 1989)* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)).* The court must decide whether the agency considered the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971).*

[HN8] On questions of statutory construction, courts must carry out the unambiguously expressed intent of Congress. If a 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 of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, 843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).* [**12] Congress may leave an explicit gap, thus delegating legislative authority to an agency subject to the arbitrary and capricious standard. *Id. at 843-44.* If legislative delegation is implicit, courts must defer to an agency's statutory interpretation as long as it is

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reasonable. *Id. at 844.* This is because an agency has technical expertise as well as the authority to reconcile conflicting policies. *See id.* Nevertheless, questions of congressional intent that can be answered with "traditional tools of statutory construction" are still firmly within the province of the courts. *INS v. Cardoza-Fonseca, 480 U.S. 421, 447-48, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987).*

B. EPA's Extension of Statutory Deadlines.

1. Background.

NRDC challenges EPA's extension of certain statutory deadlines in the November 1990 and March 1991 rules. [HN9] The statutory scheme calls for EPA to consider permit applications from the most serious sources of pollutants first: industrial dischargers and large municipal separate storm sewer systems ("large systems"). [7] The statute required EPA to establish regulations [* 1298] for permit application requirements for these two groups by February [**13] 4, 1989; to receive applications for permits one year later, February 4, 1990; and to approve or deny the permits by February 4, 1991. Permittees may be given up to three years to comply with their permits. CWA § 402(p)(4)(A), 33 *U.S.C. § 1342(p)(4)(A).* Medium sized municipal separate storm sewer systems ("medium systems") (those serving a population of 100,000 or more but less than 250,000) are on a similar schedule, except that the deadlines are two years later. CWA § 402(p)(4)(B), *33 U.S.C. § 1342(4)(B).* [HN10] The temporary statutory exemption for all storm water sources expires on October 1, 1992. CWA § 402(p)(1), 33 *U.S.C. § 1342(p)(1).* EPA states that discharges from municipal separate storm sewer systems serving a population of under 100,000 are to be regulated after that date.

7 Large municipal systems are those serving a population of 250,000 or more. § 402(p)(2)(C).

The EPA rules at issue changed the statutory deadlines as follows:

Deadlines pursuant to CWA § 402(p) [8]			**EPA Deadlines** [9]
Discharge type	Deadline to issue rules	Deadline for application and approval of permits	Application deadlines
Industrial	2/4/89	2/4/90 - applications due	see below
		2/4/91 - approval due	
Large municipal systems	08/04/89	2/4/90 - applications due	Part 1 - 11/18/91
		2/4/91 - approval	Part 2 - 11/16/92
Medium municipal systems	08/04/91	2/4/92 - applications due	Part 1 - 5/18/92
		2/4/93 - approval due	Part 2 - 5/17/93

EPA Application Deeadlines for "Industrial Activity" Dischargers	
Individual	Group
due 11/18/91	Part 1 9 9/30/91; Part 2 - 10/1/92

8 Since NRDC filed this action, Congress has passed certain legislation affecting some of the deadlines at issue. Congress ratified the date of September 30, 1991 for part 1 of group applications for industrial dischargers. *See* Dire Emergency Supplemental Appropriations Act of 1991, Pub. L. No. 102-27, § 307, 105 Stat. 130, 152 (1991).

Section 1068 of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA") clarifies the deadlines for storm water discharges associated with industrial activity from facilities owned or operated by a municipality. Pub. L. No. 102-240, § 1068, 105 Stat. 1914, 2007 (1991). ISTEA deadlines are being reviewed in a separate case. Nothing in this opinion should be viewed as requiring EPA to comply with deadlines that have been altered or superseded by the ISTEA.

9 *See 55 Fed. Reg. at 48,071-72* (to be codified at *40 C.F.R. § 122.26(e)); 56 Fed. Reg. at 12,100* (to be codified at *40 C.F.R. § 122.26(e)(2)(iii)).* EPA changed certain of these deadlines after this case was submitted. These changes are the subject of a separate case.

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> The EPA rules at issue set no date for final approval or denial of applications from municipal or industrial dischargers, nor for compliance by these regulated entities. *See 55 Fed. Reg. at 48,072.*

[**14] As the chart illustrates, EPA made other elaborations on the statutory scheme in addition to extending the deadlines. Medium and large municipal systems and industrial dischargers are now subject to a two-part application process. *55 Fed. Reg. at 48,072.* The November 1990 rules allow industrial dischargers to apply for either individual or group permits. *Id. at 48,066-67.* [*1299] The March 1991 rules further extended the deadline for part 1 of the group industrial discharger permits to September 30, 1991. [10] *56 Fed. Reg. at 12,098.* A final rule published on April 2, 1992 extended the deadline for the part 2 group application for industrial dischargers from May 18, 1992 to October 1, 1992. *57 Fed. Reg. at 11,394.* The EPA rules at issue contain neither deadlines for final EPA or state approval of permits nor deadlines for compliance with the permit terms.

> 10 NRDC initially claimed that this extension was unlawful because it was granted without proper notice and comment. However, Congress approved this extended deadline in a supplemental appropriations bill. Dire Emergency Supplemental Appropriations Act of 1991, Pub.L. No. 102-27 § 307, 105 Stat. 130, 152 (1991). This Act moots the procedural and substantive challenge to this extended deadline.

[**15] Seeking to compel the EPA to conform to the statutory scheme, NRDC asks this court:

a) to declare unlawful EPA's failure to issue certain of the storm water permitting regulations by February 4, 1989 and EPA's extension of certain statutory deadlines;

b) to enjoin EPA from granting future extensions of the deadlines;

c) to compel EPA to include deadlines for permit approval or denial and permit compliance consistent with the statute; and

d) to compel EPA to require that medium and small municipal systems meet the same deadlines as large systems.

2. *Discussion.*

a. Request for Declaratory Relief.

NRDC asks the court to (1) declare unlawful EPA's failure to issue storm water permitting regulations by February 4, 1989; and (2) declare unlawful EPA's extension of deadlines for submission of permit applications by large and medium systems and individual industrial dischargers.

[HN I 1] A request for declaratory relief in a challenge to an agency action is ripe for review if the action at issue is final and the questions involved are legal ones. *Public Util. Dist. No. 1 v. Bonneville Power Admin., 947 F.2d 386, 390 n. 1 (9th Cir. 1991)* (citations omitted), *cert. denied,* [**16] U.S. , *112 S. Ct. 1759, 118 L. Ed. 2d 422, 60 U.S.L.W. 3537 (1992).* Here, the agency regulations are final. *See 55 Fed. Reg. at 47,990, 56 Fed. Reg. at 12,096.* The question of whether the EPA is bound by the statutory scheme set by Congress is a legal one. The request for declaratory relief is therefore ripe for consideration by this court.

[HN12] The granting of declaratory relief "rests in the sound discretion of the [] court exercised in the public interest." 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Civil Procedure §* 2759, at 645 (1983). The guiding principles are whether a judgment will clarify and settle the legal relations at issue and whether it will afford relief from the uncertainty and controversy giving rise to the proceedings. *McGraw Edison Co. v. Preformed Line Products Co., 362 F.2d 339, 342* (9th Cir.) (citing Borchard, *Declaratory Judgments* 299 (2d ed. 1941)), *cert. denied, 385 U.S. 919, 87 S. Ct. 229, 17 L. Ed. 2d 143 (1966).* A court declaration delineates important rights and responsibilities and can be "a message not only to the parties but also to the public and has significant educational and lasting importance." [* *17] *Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, 1471 (9th Cir. 1984).* Because of the importance of the interests and the principles at stake, we grant declaratory relief.

[HN13] EPA does not have the authority to ignore unambiguous deadlines set by Congress. *Delaney v. EPA, 898 F.2d 687, 691* (9th Cir.), *cert. denied, 111 S. Ct. 556, 112 L. Ed. 2d 563 (1990).* In arguing against injunctive relief, EPA points to cases recognizing factors indicating that equitable relief may be inappropriate. *See, e.g., In re Barr Laboratories, Inc., 289 App. D.C. 187, 930 F.2d 72, 74* (D.C. Cir.) (agency's choice of priorities is an important factor in considering whether to grant equitable relief), *cert. denied, 116 L. Ed. 2d 241, 112 S. Ct. 297, 112 S. Ct. 298 (1991); Natural Resources Defense Council v. Train, 166 App. D.C. 312, 510 F.2d 692, 712 (D.C. Cir. 1975)* (court may need to give [*1300] agency some leeway due to budgetary commitments or technological problems); *Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 569-70 (D.D. C. 1986)* (EPA's good faith is a factor). None of these factors militates against an award of declaratory relief. They do not grant an executive ["18] agency the authority to bypass explicit congressional deadlines. The deadlines are not aspirational - Congress set them and expected compliance. *See* 132 Cong. Rec.

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32,381-82 (remarks of Senator Stafford, commenting on EPA delay and the establishment of statutory deadlines as "outside dates.") This court must uphold adherence to the law, and cannot condone the failure of an executive agency to conform to express statutory requirements. For these reasons, we grant NRDC's request for declaratory relief. EPA's failure to abide by the statutory deadlines is unlawful.

b. Request for Injunction.

NRDC asks the Court to enjoin the EPA from further extensions for permit applications from municipal and industrial dischargers. [HN14] Injunctions are an extraordinary remedy issued at a court's discretion when there is a compelling need. 11 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure §* 2942, at 365, 368-69 (1973). We decline to enjoin the EPA on discretionary grounds.

Injunctive relief could involve extraordinary supervision by this court. Injunctive relief may be inappropriate where it requires constant supervision. *Id.* at 376. At issue are deadlines for the three major [**19] categories of dischargers, each of which has a two-part application. The permitting process will go on for several years. While recognizing the importance of the interests involved, we nevertheless decline to engage in the active management of such a remedy.

In this situation, we must operate on the assumption that an agency will follow the dictates of Congress and the court. As noted above, the EPA does not have the authority to predicate future rules or deadlines in disagreement with this opinion. *See Allegheny General Hosp. v. NLRB, 608 F.2d 965, 970 (3rd Cir. 1979).* We presume that the EPA will duly perform its statutory duties. *See Upholstered Furniture Action Council v. California Bureau of Home Furnishings, 442 F. Supp. 565, 568 (E.D. Cal. 1977)* (three judge court). Because we decline to take on potentially extensive supervision of the EPA, Congress may need to find other ways to ensure compliance if the agency is recalcitrant.

c. Deadlines for Permit Approval and Compliance.

NRDC requests that the court compel EPA to revise the rules to include deadlines for permit approval or denial and permit compliance consistent with the statute. [HN15] Section [**20] 402(p)(4)(A) calls for the EPA to issue or deny permits for industrial and large municipalities by February 4, 1991, which is one year after the applications are submitted, and states that "any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of the issuance of such permit." CWA § 402(p)(4)(A), *33 U.S.C. § 1342(p)(4)(A).* The statute sets out a similar schedule for medium municipalities, except that the deadlines are two years later. CWA § 402(p)(4)(B), *33 U.S.C. § 1342(p)(4)(B).*

The regulations promulgated by the EPA contain neither final approval deadlines nor compliance deadlines for industrial dischargers or medium and large municipalities. *55 Fed. Reg. at 48,072.* By failing to regulate final approval and compliance, EPA has omitted a key component of the statutory scheme. To ensure adherence to the statutory time frame, especially in the face of deadlines already missed, the regulated community must be informed of these deadlines. EPA's failure to include these important deadlines is an arbitrary and capricious exercise of its responsibility to issue regulations pursuant to the statute.

[**21] We see no need for additional delay while supplemental regulations are issued. Given the extraordinary delays already encountered, EPA must avoid further delay. [*1301] The regulations should inform the regulated community of the statute's outside dates for compliance. " *See* CWA § 402(p)(4)(A)-(B), 33 *U.S.C.* § *1342(p)(4)(A)-(b).*

> 11 In addition, pursuant to the statute, compliance deadlines applicable to each facility shall be contained in its permit.

d. Timeline for Small and Medium Systems.

The parties disagree on when small systems (those serving a population of less than 100,000) should be regulated. As noted above, [HN16] the temporary statutory exemption for all storm water sources expires on October 1, 1992. The statute requires EPA to establish a comprehensive program to regulate point sources subject to the moratorium, such as small municipalities, by that date. CWA § 401(p)(1), (6), *33 U.S.C. § 1342(p)(1), (6).*

Pointing to a perceived statutory gap, NRDC argues that small systems should be subject to the same permitting [**22] schedule applicable to medium systems, to assure that they are regulated when the permitting moratorium ends on October 1, 1992. However, the plain language of the statute prohibits this. Section 402(p)(1) forbids requiring a permit for entities not listed as exceptions (such as small municipalities) before October 1, 1992. Yet the deadline for part 1 of the application for medium systems is currently May 18, 1992. *55 Fed. Reg. at 48,072.*

Even if NRDC is correct that EPA is not proceeding so that regulations will be in place on October 1, 1992, we cannot ignore the plain language of the statute by adopting NRDC's solution. The CWA does not require regulation of such systems prior to expiration of the moratorium. We therefore reject NRDC's proposal that small systems be put on the same schedule as medium ones.

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NRDC asks the court to put the medium systems on the same schedule as the large systems, in order to achieve closer compliance with the timeline set out in § 402(p)(4)(B). However, EPA's current schedule for medium systems, although delayed, is still within the statutory scheme in its relation to the schedule for large systems. That is, Congress placed the medium [**23] systems on a staggered permitting schedule to start two years after the large systems and industrial users. The EPA schedule now has medium municipal system applications due six months after the applications for the large municipal systems. *55 Fed. Reg. at 48,072.* For this reason, the current deadline for medium municipalities does not appear to be unreasonable despite the unlawful delay.

C. Exclusion of Certain Sources from Regulation.

1. Definition of "Municipal Separate Storm Sewer System."

[HN17] Section 402(p) refers to "municipal separate storm sewer systems serving a population" of a specified size. CWA § 402(p)(2)(C), (D), *33 U.S.C. § 1342 §§* 402(p)(2)(C), (D). NRDC contends that EPA's definition of this term violates the plain language of the statute, fails to take into account the statutory definition of the word "municipality" and is arbitrary and capricious because the agency considered improper factors when it defined the term. All of this, according to NRDC, results in an impermissible narrowing of the municipalities covered by the first two rounds of permitting.

[HN18] The 1987 amendments to the CWA did not contain definitions of "municipal" or "separate storm [**24] sewer system," but the CWA amendments enacted in 1972 defined "municipality" as follows:

except as otherwise specifically provided, when used in this chapter. . . . (4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved [*1302] management agency under *section 1288* of this title [33 *U.S.C. § 1288].*

33 U.S.C. § 1362.

In the November 1990 regulations, the EPA defined "municipal separate storm sewer" as: "a conveyance or system of conveyances . . . owned or operated by a State, city, town, borough, county, parish, district, association or other public body. . . ." *55 Fed. Reg. at 48,065* (to be codified at *40 C.F.R. § 122.26(b)(8)).* This definition echoes the language of *33 U.S.C. § 1362(4).* However, when defining large and medium municipal separate storm sewer *systems serving a population* of a specified size, EPA brought in other factors. *55 Fed. Reg. at 48,064* (to be codified [**25] at *40 C.F.R. § 122.26(b)(4), (7)).* EPA defines medium and large separate storm sewer systems using two main categories:

1) separate storm sewer systems located in an incorporated place with the requisite population, and

2) separate storm sewer systems located in unincorporated, urbanized portions of counties containing the requisite population (as listed in Appendices H and I to the rule), excluding those municipal separate sewers located in incorporated places, townships or towns within such counties. [12] *55 Fed. Reg. at 48,064.* NRDC opposes this definition for municipal separate storm sewer systems for the reasons explained below.

12 The rule also permits the Administrator to include certain other systems as part of a medium or large system due to the physical interconnections between the systems, their locations, or certain other factors. *See 40 C.F.R. § 122.26(b)(4)(iii), (iv)* and *(b)(7)(iii), (iv).*

First, NRDC argues that according to the definitional section cited above and principles of [**26]. statutory construction, general definitions apply wherever the defined term appears elsewhere in the law. *See 33 U.S.C. § 1362* ("except as otherwise specifically provided" the definitions apply throughout the act); *Sierra Club v. Clark, 755 F.2d 608, 613 (8th Cir. 1985).* NRDC argues that the scope of the statutory definition of "municipality" in *33 U.S.C. § 1362(4)* and the scope of the phrase "municipal separate storm sewer system serving a population" are the same. NRDC thus proposes that the correct definition is a system of conveyances owned or operated by the full range of entities described at *33 U.S.C. § 1362(4),* (cities, towns, etc.) with populations within the ranges designated at § 402(p)(2), i.e., 250,000 or more for large systems and between 100,000 and 250,000 for medium systems.

However, we do not believe that the entire phrase used in the act, "municipal separate storm sewer system serving a population of [a specified size]" can be equated with the term "municipality" in the manner that NRDC proposes. The act contains no definition of either "system" or "serving a population." The word "system" is particularly ambiguous in the context of storm [**27] sewers. [13] We therefore agree with EPA that there is no single, plain meaning for the disputed words.

13 Storm sewers located within the boundaries of a city might be part of a state highway system, a flood control district, or a system operated by the state or county. *See 55 Fed. Reg. at 48,041.*

Because the term is ambiguous, we must look first to whether Congress addressed the issue in another way. *See*

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Abourezk v. Reagan, 251 App. D.C. 355, 785 F.2d 1043, 1053 (D.C. Cir. 1986) ("if the court finds that Congress had a specific intent . . ., the court stops there and enforces that intent regardless of the agency's interpretation") (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 & n. 9 (1984)), affd by an equally divided court, 484 U.S. 1, 108 S. Ct. 252, 98 L. Ed. 2d 1 (1987).* The legislative history is not illuminating. Although it explains that a purpose of the permitting scheme was to attack the most serious sources of discharge first, [14] [**28] this general goal is not helpful in discerning the specific meaning of "municipal separate storm sewer system serving a population." Without clear guidance from Congress, we turn to the agency's justifications [* 1303] for its choices in the face of NRDC's objections.

14 *See, e.g.,* 133 Cong. Rec. 991 (1987) (statement of Rep. Stangeland).

NRDC claims that EPA's definition is arbitrary and capricious because EPA considered improper factors, including its own work load, the incorporation status of municipalities, and urban density. " [HN19] An agency rule would be arbitrary and capricious 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." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins., 463 U.S. 29, 43, 77 L Ed. 2d 443, 103 S. Ct. 2856 (1983).* [**29]

EPA's final definition took into account many issues and concerns of the regulated community *See 55 Fed. Reg. at 48,039.* EPA considered eight different options for defining large and medium municipal separate storm sewer systems. *55 Fed. Reg. at 48,038-43.* EPA considered focusing on ownership or operation of a system by an incorporated place, but found that this approach did not take into account systems operated by flood control districts, state transportation systems, or concerns relating to watershed management. It instead fashioned a multi-faceted approach. This choice of approach is not unreasonable.

NRDC challenges EPA's consideration of incorporation as a factor. It claims that limiting regulation to incorporated places of the appropriate size excludes portions of 378 counties that contain over 100,000 people. NRDC essentially contends that because counties are a type of municipality, storm water conveyances in all counties with populations over 100,000 should come within the definition of either medium or large municipal separate storm sewer systems. We have already rejected NRDC's claim that the definition of regulated "systems" must include [**30] conveyances in all "municipalities."

EPA's use of incorporation as a factor is not arbitrary and capricious or inconsistent with the statute. The agency proceeded on the reasonable assumption that cities possess the police powers needed effectively to control land use within their borders. *See 55 Fed. Reg. at 48,039, 48,043.* The first major category within the definition of regulated "systems," municipal separate storm sewers located within incorporated places having the requisite population, is reasonable.

NRDC questions EPA's second major category, which covers storm sewers located in unincorporated urbanized areas of counties with the designated population, but excludes conveyances located in incorporated places with populations under 100,000 within those counties. The exclusion, however, has a legitimate statutory basis. The statute prohibits EPA from requiring permits for systems serving under 100,000 persons prior to October 1, 1992. CWA § 402(p)(1), *33 U.S.C. § 1342(p)(l).* EPA reasonably concluded that conveyances within small incorporated places should be considered parts of small systems limited to those incorporated places, rather than parts of larger ["31] systems serving whole counties. EPA's definition attempts to capture population centers of over 100,000 (by including urbanized, unincorporated areas) without violating the congressional stricture against regulation of areas with populations under 100,000 (thus excluding incorporated areas of less than 100,000 within a county).

In arriving at its definition of "municipal separate storm sewer systems serving" a designated population, EPA investigated numerous options and considered comments from a range of viewpoints. We find "a rational connection between the facts found and the choices made." *Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.*

NRDC objects to EPA's use of 1980 census data and EPA's definition of urban density. While it appears that NRDC has solid arguments as to why it would be preferable to use 1990 census figures and adopt its method of determining urban density, [HN20] our role is not to determine whether EPA has chosen the best among all possible [*1304] methods. We can only determine if its choices are rational. EPA chose the 1980 census data because it was the most widely available decennial census data at the time of rule formulation and promulgation. Neither [**32] this choice nor its use of the Census Bureau's definition of urbanized area is arbitrary and capricious.

EPA took agency work load into account in arriving at its definition. *55 Fed. Reg. at 48,039.* NRDC objects on the basis that Congress considered the issue of work load when it developed the "phase-in" approach and allowed

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permit applications on a system- or jurisdiction-wide basis. However, this broad congressional scheme does not prohibit further consideration of EPA's work load as one among many factors in its attempt to fashion a workable program.

In summary, NRDC's argument that the phrase "municipal separate storm sewer system serving a population" has the plain meaning NRDC proposes is not persuasive. Although EPA's definition in the face of the statute's ambiguity is complex, if not convoluted, it is not arbitrary and capricious, and we therefore reject NRDC's request that the definition be declared invalid.

2. *EPA Exemption for Light Industry.*

NRDC challenges the portion of the EPA rule excluding various types of "light industry" from the definition of "discharge associated with industrial activity."

[HN21] Under CWA § 402(p)(2)(B), a "discharge associated with [**33] industrial activity" is an exception to the permit moratorium. In the November rule, EPA modified the statutory scheme by drawing distinctions among light and heavy industry and considering actual exposure to industrial materials. Although the statute does not define "associated with industrial activity," the EPA definition excludes industries it considers more comparable to retail, commercial or service industries. The excluded categories are manufacturers of pharmaceuticals, paints, varnishes, lacquers, enamels, machinery, computers, electrical equipment, transportation equipment, glass products, fabrics, furniture, paper board, food processors, printers, jewelry, toys and tobacco products. *55 Fed. Reg. at 48,008.* These types of facilities need apply for permits only if certain work areas or actual materials are exposed to storm water. *Id.* EPA justifies these exemptions on the assumption that most of the activity at these types of manufacturers takes place indoors, and that emissions from stacks, use of unhoused manufacturing equipment, outside material storage or disposal, and generation of large amounts of dust and particles will all be minimal. *55 Fed. Reg. at 48,008c.* [**34]

Thus, EPA considers actual exposure to certain materials or stormwater for the light industry categories, but does not consider actual exposure for the other industrial categories. After careful review of the statutory language and the record, we conclude that this distinction is impermissible.

We note that the language "discharges associated with industrial activity" is very broad. The operative word is "associated." It is not necessary that storm water be contaminated or come into direct contact with pollutants; only association with any type of industrial activity is necessary.

There is a brief discussion of the issue in the legislative history: "[a] discharge is associated with industrial activity if it is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. Discharges which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings." 133 Cong. Rec. 985 (1987); *see also* 132 Cong. Rec. 31,968 (1986) (same). EPA argues that the words "directly related" indicate Congress's intent to require permits for only those materials that come in contact with industrial materials. [**35] *See 55 Fed. Reg. at 48,007.* However, the examples given - parking lots and administrative buildings - indicate that the intent was to exclude only those facilities or parts of a facility that are completely non-industrial.

EPA's definition follows the language quoted above: "Storm water discharge associated with industrial activity means the [*1305] discharge from any conveyance which is used for collecting and conveying stormwater and which is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." *40 C.F.R. § 122.26(b)(14).* EPA applies this definition differently depending on type of industry. EPA bases its regulation of industrial activity on Standard Industrial Classification ("SIC") categories. For most of the industrial SIC categories (identified at *40 C.F.R. § 122.26(b)(i-x)),* the EPA definition includes all stormwater discharges from plant yards, access roads and rail lines, material handling sites, storage and disposal sites, shipping and receiving areas, and manufacturing buildings. *40 C.F.R. § 122.26(b)(14).* However, for the "light industry" categories identified in *40 C.F.R. § 122.26(b)(14)(xi),* stormwater must [**36] be actually exposed to raw materials, by-products, waste, etc., before permitting is required.

EPA justifies this difference on the ground that for "light industry," industrial activity will take place indoors, and that generation of large amounts of particles and emissions will be minimal. There is nothing in the record submitted to the Court however, which supports this assumption. *See, e.g., 55 Fed. Reg. at 48,008.* Without supportable facts, we are unable to rely on our usual assumption that the EPA has rationally exercised the duties delegated to it by Congress. To exempt these industries from the normal permitting process based on an unsubstantiated assumption about the this group of facilities is arbitrary and capricious.

In addition, by designating these light industries as a group that need only apply for permits if actual exposure occurs, EPA impermissibly alters the statutory scheme. The statute did set up a similar approach for oil, gas, and mining industries. However, no other classes of industrial activities are subject to the more lenient "actual exposure" test. To require actual exposure entirely shifts the burden

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in the permitting scheme. Most industrial [**37] facilities will have to apply for permits and show the EPA or state that they are in compliance. Light industries will be relieved from applying for permits unless actual exposure occurs. The permitting scheme then will work only if these facilities self-report, or the EPA searches out the sources and shows that exposure is occurring. We do not know the likelihood of either self-reporting or EPA inspection and monitoring of light industries, and the regulations appear to contemplate neither for these industries. For this reason, the proposed regulation is also arbitrary and capricious.

In conclusion, we hold that the rule for light industries is arbitrary and capricious, vacate the rule, and remand for further proceedings.

3. *Exclusion of Construction Sites of Less than Five Acres.*

NRDC challenges the exemption for construction sites of less than five acres. EPA concedes that the construction industry should be subject to storm water permitting because at a high level of intensity, construction is equivalent to other regulated industrial activities. *55 Fed. Reg. at 48,033.* Construction sites can pollute with soil sediments, phosphorus, nitrogen, nutrients from [**38] fertilizers, pesticides, petroleum products, construction chemicals and solid wastes. *Id.* EPA states that such substances can be toxic to aquatic organisms, and affect water used for drinking and recreation. *Id.*

Following its characterization of construction sites as suitable for regulation, EPA defined its task as determining "an acreage limit [] appropriate for identifying sites that amount are (sic) to industrial activity." *55 Fed. Reg. at 48,036.* EPA originally proposed regulations that exempted operations that disturb less than one acre of land and are not part of a common plan of development or sale. *55 Fed. Reg. at 48,035-36.* In response to comments by the regulated community about the administrative burden presented by the regulation, EPA increased the exemption to five acres. *55 Fed. Reg. at 48,036.* EPA also noted that larger sites will involve heavier equipment for removing vegetation and bedrock than smaller sites. *Id. at 48,036.* [*1306]

We find that EPA's rationale for increasing the limit from one to five acres inadequate and therefore arbitrary and capricious. EPA cites no information to support its [**39] perception that construction activities on less than five acres are non-industrial in nature.

EPA also claims agency power, inherent in statutory schemes, to make categorical exemptions when the result is *de minimis. Alabama Power Co. v. Costle, 204 App. D.C. 51, 636 F.2d 323, 360 (D.C. Cir. 1979).* However, if construction activity is industrial in nature, and EPA concedes that it is, EPA is not free to create exemptions from permitting requirements for such activity. *See Natural Resources Defense Council, Inc. v. Costle, 568 F.2d at 1369, 1377 (D.C. Cir. 1977)* (once Congress has delineated an area that requires permits, EPA is not free to create exemptions).

Further, we find the *de minimis* principle inapplicable here. [HN22] The *de minimis* exemption is only available where a regulation would "yield a gain of trivial or no value." *Alabama Power Co., supra, at 361.* Because of the lack of data, we cannot know whether exempting sites of less than five acres will indeed have only a *de minimis* effect.

The *de minimis* concept is based on the principle that the law does not concern itself with trifling matters. *Id. at 360.* [**40] We question its applicability in a situation such as this where the gains from application of the statute are being weighed against administrative burdens to the regulated community *See id. at 360-361* (implied authority to make cost-benefit decisions must derive from statute, and not general *de minimis* doctrine).

Further, EPA's claim that the five-acre exemption is *de minimis* is contradicted by the admission that even small construction sites can have a significant impact on local water quality. The EPA acknowledges that "over a short period of time, construction sites can contribute more sediment to streams than was previously deposited over several decades." *55 Fed. Reg. at 48,033.* Without data supporting the expanded exemption, we owe no deference to EPA's line-drawing. We thus hold that EPA's choice of a five-acre limit is arbitrary and capricious, invalidate that portion of the rule exempting construction sites of five acres or less from permitting requirements, and remand for further proceedings.

4. *Exemption for oil and gas activities.*

[HN23] The 1987 amendments created an exemption from the permit requirement for uncontaminated runoff [**41] from mining, oil and gas facilities. *See* Appendix, CWA § 402(1)(2), 33 *U.S.C. §§ 1342(l)(2).* Section 402(1)(2) states that a permit is not required for discharges of storm water runoff from mining, oil or gas operations composed entirely of flows from conveyance systems used for collecting 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". NRDC claims that the November 1990 rule sets up an impermissible standard for determining contamination at oil and gas facilities. The relevant portion of the rule states that at these facilities, an operator is not required to submit a permit application unless the facility has had a discharge of a reportable quantity [15] since November 1987, or contributes to a violation of a water quality standard. *55 Fed.*

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Reg. 48,067 (to be codified at *40 C.F.R. § 122.26(c)(1)(iii)*). A facility which has had a release of oil or a hazardous substance in excess of RQs since [*1307] 1987 must submit a permit application. *Id.; 55 Fed. Reg. at 48,029-30.*

15 "[HN24] Reportable Quantities" (RQs) are not effluent guidelines setting up permissible limits for pollutants. Rather, they are quantities the discharge of which "may be harmful to the public health or welfare of the United States." CWA § 311(b)(4), *33 U.S.C. § 1321(b)(4)*. EPA has established RQs for a large number of substances, pursuant to both CWA section 311, *33 U.S.C. § 1321*, and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") section 102, *42 U.S.C. § 9602*. *See* 40 C.F.R. Parts 110, 117, 302. The operator of any vessel or facility which releases the RQ of any substance must immediately notify the National Response Center. *See, e.g.,* 40 C.F.R. § 110.10.

[**42] NRDC claims that oil and gas operations should be subject to the stricter standards which apply to mining operations. [16] It also objects to EPA's use of RQs as the only test for contamination of runoff from oil and gas storm water dischargers, claiming it is inconsistent with the legislative history. We conclude that the legislative history does not support NRDC's position.

16 Operators of mines must submit permit applications whenever storm water discharges come into contact with overburden, waste products, etc. *40 C.F.R. § 122.26(c)(1)(iv)*.

The conference report states:

> Permits are not required where stormwater runoff is diverted around mining operations or oil and gas operations and does not come in contact with overburden, raw material, product, or process wastes. In addition, where stormwater runoff is not contaminated by contact with such materials, *as determined by the administrator,* permits are also not required. With respect to oil or grease or hazardous substances, the determination of whether stormwater [**43] is "contaminated by contact with such materials, *as established by the Administrator,* shall take into consideration whether these materials are present in such stormwater runoff in excess of reportable quantities under section 311 of the Clean Water Act . . ., or in the case of mining operations, above natural background levels.

H.R. Rep. No. 1004, 99th Cong., 2d Sess., at 151 (emphasis added).

Thus, [HN25] the EPA Administrator has discretion to determine whether or not storm water runoff at an oil, gas or mining operation is contaminated with two types of materials: (1) overburden, raw material, product, or process wastes and (2) oil, grease or hazardous substances. The report sets out factors for the Administrator to consider in determining contamination for the latter group of pollutants.

NRDC first claims that because section 402(1)(2) treats oil, gas and mining together, the EPA rule must do the same. NRDC's second objection is based on its interpretation of the language in the conference report. Because the conference report lists RQs as only one factor to be taken into consideration, NRDC insists EPA cannot make it the only factor to measure contamination for oil and gas [**44] facilities.

Both of these arguments must fail in light of the conference report, which gives the Administrator discretion to determine when contamination has occurred with respect to the substances listed in the statute, i.e., overburden, raw materials, waste products, etc. *See* CWA § 402(1)(2). The conference report states that the Administrator shall take certain factors into account, but the report is clear that the determination of whether storm water is contaminated is within the Administrator's discretion.

NRDC argues that the remarks of certain congressmen during congressional debate show that the mining, oil, and gas exemptions were to apply only if the discharges were entirely free of contaminants. We find these examples less persuasive than the clear language of the conference report. Moreover, in light of the discretion granted the Administrator in the conference report, we cannot say that the rule as promulgated is an arbitrary and capricious exercise of that discretion.

NRDC also contends that Congress intended that EPA consider reportable quantities only in determining if a discharge is contaminated with oil, grease, or hazardous substances. Other pollutants, according [* *45] to NRDC, must be found to contaminate the discharge if they exceed background levels.

EPA did not, in fact, limit itself to reportable quantities in determining which oil or gas facilities must apply for a permit. The rule requires a permit for any facility which "contributes to a violation of a water quality standard." *40 C.F.R. § 122.26(c)(1)(iii)(C)*. This requirement addresses contamination with substances other than oil and hazardous substances. We find no support in the statute or the legislative history for NRDC's claim that, with respect [*1308] to these substances, levels above background must be considered "contamination." The conference report quoted above requires consideration of background levels of any pollutant only with respect to mining operations.

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D. Lack of Controls for Municipal Storm Water Discharge.

NRDC contends that EPA has failed to establish substantive controls for municipal storm water discharges as required by the 1987 amendments. Because Congress gave the administrator discretion to determine what controls are necessary, NRDC's argument fails.

[HN26] Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial [**46] 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. CWA § 402(p)(3)(A), (B), *33 U.S.C. § 1342(p)(3)(A)-(B).* [HN27] The Act states that 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-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.*

Section 402(p)(3)(B), *33 U.S.C. § 1342(p)(3)(B)* (emphasis added).

NRDC charges that the EPA regulations accomplish neither of the goals above, i.e., they do not effectively prohibit non-storm water discharges nor do they require the controls described in Par. (iii), above. NRDC argues that Congress granted the moratorium precisely to give EPA the opportunity to develop [**47] new, substantive standards for storm water control of municipal sources and instead EPA wrote vague regulations containing no minimum criteria or performance standards. However, the language in Par. (iii), above, requires the Administrator or a state to design controls. Congress did not mandate a minimum standards approach or specify that EPA develop minimal performance requirements. NRDC also claims that the testing requirements are inadequate because there is only limited sampling at a limited number of sites. However, we must defer to EPA on matters such as this, where EPA has supplied a reasoned explanation of its choices. *See 55 Fed. Reg. at 48,049.*

> 17 The requirements for permit applications are set forth at *40 C.F.R. § 122.26(d).* Individual NPDES permit writers (EPA or state officials) will decide whether application proposals are adequate. Applicants must submit information on source control methods and estimate the annual pollutant load reduction to be achieved from their proposed management programs, but they are not required to achieve any specified level of reduction of any pollutants. *See 55 Fed. Reg. at 48,070-71.*

[**48] NRDC's argument that the EPA rule is inadequate cannot prevail in the face of the clear statutory language and our standard of review. Congress could have written a statute requiring stricter standards, and it did not. We therefore reject NRDC's argument that EPA's storm water control regulations fail to comply with the statute. "

> 18 We base our holding on NRDC's challenge to the regulations at issue. Whether a specific permit complies with the requirements of section 402(p)(3)(B) would, of course, be another matter not controlled by this decision.

E. Lack of Notice and Comment on the Approval of Part 1 of Industrial Group Storm Water Applications.

NRDC objects to the lack of opportunity for notice and comment before EPA approval of part 1 of group applications for industrial dischargers. Each member of a proposed group must submit part 1 of the application. "If EPA approves part 1, only [*1309] a small subset of the member facilities need submit part 2 of the application. *55 Fed. Reg. at 48,072* (to [**49] be codified at *40 C.F.R. 122.26(e)(2)).* NRDC claims that because approval of part 1 waives the requirement of filing part 2 for most members of a group, EPA's decision on part 1 is equivalent to a "rule" requiring notice and comment from the public. The issue thus presented is whether EPA's decision on a part 1 group permit application is a "rule" as defined in *5 U.S. C. § 551(4) (1988)* [20] requiring public notice and opportunity to comment under *5 U.S.C. § 553 (1988),* or is otherwise subject to the notice and comment requirement.

> 19 Part 1 must include the identity of the group's participants, a description of the participants' industrial activities, a list of significant materials exposed to precipitation and the identity of the subset of the group's members who will submit quantitative data in part 2 of the application. *55 Fed. Reg. at 48,067.*
>
> 20 [HN28] A rule means "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." *5 U.S.C. § 551(4).*

[**50] NRDC argues that approval or disapproval of a part 1 application requires public comment because it has "general applicability" pursuant to *5 U.S. C. § 551(4)* and because it will have a "palpable effect" in that it will

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relieve the majority of entities in the group from submitting data in part 2 of the application. NRDC cites *NRDC v. EPA, 683 F.2d 752 (3rd Cir. 1982)* and *Council of Southern Mountains, Inc. v. Donovan, 209 App. D.C. 318, 653 F.2d 573 (D.C. Cir. 1981)* in support of its argument. Both cases involved the postponement of regulations. *See NRDC, 683 F.2d at 753-54, 764* (indefinite postponement of effective date of final amendments to regulations dealing with the discharge of toxic pollutants requires notice and comment because it has a substantial impact on the public and the industry); *Council of Southern Mountains, Inc., 653 F.2d at 575, 580 n. 28* (deferral of implementation of regulations requiring coal operators to supply life-saving equipment ordinarily would require notice and comment because it has a "palpable effect" upon the industry and the public).

We find these cases to be distinguishable. Both involve [**51] the postponement of rules of general applicability to an entire industry, or to a large class of pollutants. In contrast, although the part 1 application process will relieve some entities from the need to furnish further data, the decision is specific to a particular permit application and approval of a preliminary application will not implement, interpret or prescribe any general law or policy pursuant to *5 U.S.C. § 551(4)*. Rulemaking ordinarily involves "broad judgments, legislative in nature rather than the resolution of a particular dispute of facts." *Washington Utilities & Transportation Corn'n v. Federal Communication Commission, 513 F.2d 1142, 1160 (9th Cir. 1975), cert. denied, 423 U.S. 836, 96 S. Ct. 62, 46 L. Ed. 2d 54 (1975)*. The decision to approve a part 1 permit application, although it may affect a large number of applicants, is nevertheless focused on a specific factual question: whether the application adequately designates a representative smaller group subject to the more extensive data gathering requirements in part 2 of the application *See 55 Fed. Reg. at 48,028*. Because the decision involves a discrete, factual issue, the better view [**52] is that it is neither a rule nor otherwise subject to the notice and comment requirement.

Because approval of a part 1 application is essentially a factual determination, we hold that EPA's group permit application process for industrial dischargers is not invalid by its failure to provide for notice and comment.

HI. CONCLUSION

In summary, we grant and deny relief as follows:

1. "Deadlines" issue. We grant the request for declaratory relief and deny the request for injunctive relief. We deny the request to place small, medium and large municipalities on the same permitting schedule. We hold that EPA's failure to include deadlines for permit approval or denial and compliance consistent with CWA § 402(p) is arbitrary and capricious.

2. Exclusion of Sources from Regulation. We uphold the definition of "municipal [*1310] separate storm sewers serving a population." We hold that the exemption for construction sites of less than five acres is arbitrary and capricious and remand for further proceedings. Based on the record before us, we vacate that portion of the rule regulating "light industry" and remand for further proceedings.

3. Other issues. We uphold the rule as to oil and [**53] gas operations and storm water control. We further hold that EPA approval of part 1 of a group application for an industrial discharger is not a rule requiring notice and comment from the public.

Petition for Review GRANTED IN PART and DENIED IN PART.

APPENDIX A

[HN29] *CWA § 402, 33 USCA § 1342*

(1) Limitation on permit requirement

(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.

(p) Municipal and industrial [**54] *stormwater discharges*

(1) General rule

Prior to October 1, 1992, 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

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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.

[**55] *(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 [*1311] 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 [**56] 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 [**57] 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, 1992, 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.

CONCUR BY: O'SCANNLAIN (In Part)

DISSENT BY: O'SCANNLAIN (In Part)

DISSENT

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O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts [**58] I, H.A, II.C.1, II.C.4, II.E, and much of Part II.B of the majority opinion. I dissent from Part II.B.2.c, directing EPA to issue supplemental regulations. I dissent also from Parts II.C.2 and II.C.3, in which the court invalidates EPA's exclusion of storm water discharges from certain light industrial and small construction sites from the definition of "discharges associated with industrial activity." Finally, I concur in the result, but not the reasoning, of Part II.D, holding that EPA has not acted unlawfully by failing to include specific control requirements in the permit application regulations.

[*1312] I

The majority holds that EPA has violated statutory requirements by failing to set dates for approval of, and compliance with, permits as part of its permit application program. *Ante* at 6206. Despite the holding in Part II.B.2.b that injunctive relief is inappropriate (with which I agree), the majority in Part II.B.2.c orders EPA to issue supplemental regulations setting such deadlines immediately.

I am not convinced that the statute requires EPA to set these deadlines as part of the permit application process. The provision at issue reads, in relevant part:

(4) Permit application [* *59] 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 [**60] as practicable, but in no event later than 3 years after the date of issuance of such permit.

CWA § 402(p)(4); 33 *U.S.C. § 1342(p)(4) (1988).*

While the statute establishes a time line EPA must follow, it does not, in my view, require that EPA include the deadline for permit approval in the permit application regulations. I agree that, given EPA's past delays and the fact that the statutory dates for issuance or denial of permits are now long past, it is appropriate for this court to declare that the statute requires EPA to issue or deny permits within one year of the application deadline. I do not, however, see that any purpose is served by requiring EPA to issue supplemental regulations setting out these deadlines, and I doubt our authority to do so.

With respect to compliance deadlines, the statute contemplates that such deadlines will be set in individual permits as they are issued. *See* CWA § 402(p)(4)(A), (B) ("Any such permit shall provide for compliance. . . ."). Each permit must contain a compliance deadline, which may not exceed three years from the date of issuance. Nothing in the statute requires EPA to establish compliance deadlines now, before any permits have [* *61] been issued. Accordingly, in my view, NRDC's challenge to the lack of compliance deadlines in EPA's current regulations is premature. I therefore dissent from Part II.B.2.c of the majority opinion.

II

I dissent also from Parts II.C.2 and II.C.3. In my view, EPA's definition of "discharge associated with industrial activity" is a reasonable construction of an ambiguous statute, entitled to deference. While my colleagues acknowledge that we may not overturn an agency rule that represents a "permissible construction" of a statute, *ante* at 6200 (quoting *Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984))*, they fail to apply that axiom.

A

EPA's rule excludes from the permitting requirement certain light industry facilities at which "areas where material handling equipment or activities, raw materials, intermediate [* 1313] products, final products, waste materials, byproducts, or industrial machinery" are not exposed to storm water. *See 40 C.F.R. § 122.26(b)(14).* EPA determined that discharges from such facilities do not fall within the definition of "discharges associated with industrial activity." In my view, this determination was reasonable.

The majority concedes [**62] that the statute does not define "discharge associated with industrial activity." *Ante* at 6213. The operative phrase, as my colleagues note, is "associated with." *See id.* For purposes of evaluating the light industry exemption, I concede that manufacturing falls within the generally accepted meaning of "industrial activity," and that many of the facilities exempted by the

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EPA rule are manufacturers. Nonetheless, that concession does not compel the conclusion that discharges from such facilities are "associated with industrial activity."

The majority concludes, without explanation, that the phrase "discharges associated with industrial activity" is "very broad." *Ante* at 6214. Neither the plain meaning of the term "associated" nor the legislative history of the statute support this conclusion. "Associated with" means closely related to or connected with. *See Webster's Ninth New Collegiate Dictionary* 110 (1986). To the extent it casts any light on the subject, the legislative history supports a narrow reading of the phrase "associated with." Four members of the House, in the course of floor debates on the measure both before and after President Reagan's veto, explained [**63] that:

[a] discharge is associated with industrial activity if it is *directly related to manufacturing, processing or raw materials storage areas* at an industrial plant. Discharges which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings.

133 Cong. Rec. 985 (1987) (statement of Rep. Hammerschmidt) (emphasis added). [1] The underscored language suggests that Congress intended to regulate only discharges directly related to certain activities at industrial facilities. EPA's interpretation, that discharges are "directly related" to these activities only if storm water may reasonably be expected to come into contact with them before its discharge, is eminently logical.

> 1 This statement was repeated verbatim by Reps. Stangeland and Snyder. 133 Cong. Rec. at 991-92; 132 Cong. Rec. at 31,959, 31,964 (1986). Rep. Rowland offered a slight variation on the theme:
>
> One of the discharge categories is "a discharge associated with an industrial activity." A discharge is not considered to be associated with industrial activity unless it is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. Such discharges include [sic] those from parking lots and administrative areas and employee buildings.
>
> 132 Cong. Rec. at 31,968. Rep. Rowland apparently misspoke; he probably meant, like the other legislators who addressed the topic, to say "such discharges *do not* include" those from parking lots.

[* *64] The majority opinion interprets the exclusion of parking lots as an expression of congressional intent "to exclude only those facilities or parts of a facility that are completely non-industrial." *Ante* at 6215. My colleagues' reliance on the second sentence of the statement quoted above to establish this intent, however, is misplaced. The sentence relied on cannot assist us in our search for the meaning of "associated with" because it employs that very term. Moreover, it does not pretend to establish an exhaustive list of areas excluded from regulation. Legislators listed discharges from parking lots and administrative and employee buildings as *among those* not directly related to industrial activity; no one suggested that *only* discharges associated with those structures were to be excluded.

EPA's definition is consistent with the plain words of the statute and, to the extent any intent is discernible, the congressional intent. EPA has defined the term "storm water discharge associated with industrial activity" to cover only those discharges reasonably expected to come into contact with industrial activities. A large number of facilities automatically fall within EPA's [**65] definition and are required to [*1314] apply for permits. Because facilities falling within certain specified classifications under the Standard Industrial Classification manual generally conduct their operations entirely indoors, minimizing the likelihood of contact with storm water, EPA has not automatically included them within the regulations. However, these facilities *are* required to apply for permits if "areas where material handling equipment or activities, raw materials, intermediate products, final products, waste materials, byproducts, or industrial machinery at these facilities are exposed to storm water." *40 C.F.R. § 122.26(b)(14)*. If a storm water discharge is in fact directly related to or associated with the industrial activity carried on at a facility falling within the light industry category, the facility must obtain a permit. [2]

> 2 Thus, nothing turns on the assumption, attacked by my colleagues as unsupported by the record, *ante* at 6215, that industrial activities at this category of facilities will take place largely indoors. Where the assumption does not hold true, the permit requirement applies with full force. I also note that NRDC has pointed us to no evidence undermining EPA's assumption.
>
> Unlike my colleagues, I decline to assume that EPA will not carry out its responsibility to identify and to require permits of facilities where industrial activities are in fact exposed to storm water, or that such facilities will ignore their statutory duty to apply for permits. Should that occur, a lawsuit challenging EPA's failure to enforce its regulations might well be in order. An unsubstantiated suspicion that EPA may not vigorously enforce its regulations, however, does not make those regulations arbitrary or capricious.

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[**66] In my view, the statute's treatment of oil and gas facilities supports EPA's reading of the term "associated with industrial activity." Congress specifically exempted from the permit requirement discharges from oil and gas facilities and mining operations which have not come in contact with raw materials, finished products, or waste products. CWA § 402(1)(2). This section indicates a congressional intent to exempt uncontaminated discharges which have not come into contact with "industrial activities" from regulation. For oil, gas, and mining operations, Congress in this section supplied a specific, and quite limited, definition of "industrial activities." For other facilities, that definition was left to the discretion of EPA, which has adopted a much broader definition, encompassing contact with such things as industrial machinery and materials handling equipment. *See 40 C.F.R. § 122.26(b)(14).*

I do not mean to suggest that the majority's construction of the statute is untenable. It may even be preferable to the reading chosen by the agency. Nonetheless, in my view the statute is ambiguous and the legislative history does not demonstrate any clear congressional intent. The question [**67] before this court, therefore, is not whether "the agency construction was the only one it permissibly could have adopted" or even whether it is the "reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron, U.S.A. v. NRDC, 467 U.S. 837, 843, n.9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).* We need only inquire if the agency's construction is a permissible one. *Id. at 843.* EPA's definition falls well within permissible bounds, and should be upheld.

B

Although the issue is closer, I also am not persuaded that EPA's exemption for construction sites under five acres should be struck down. EPA has not conceded that "construction activity is industrial in nature." *Ante* at 6217-18. In the preamble to its final rule, EPA noted that "Construction activity *at a high level of intensity is comparable to other activity that is traditionally viewed as industrial,* such as natural resource extraction." 3 *55 Fed. Reg. 48,033 (1990)* (emphasis added). EPA explained that it was "attempting to focus [regulation] only on those construction activities [*1315] that *resemble* industrial activity." *55 Fed. Reg. at 48,035* [**68] (emphasis added).

> 3 EPA did admit that "even small construction sites may have a significant negative impact on water quality in localized areas," *55 Fed. Reg. at 48,033.* In the absence of any indication of what EPA meant by "small," however, that statement does not undermine EPA's exemption of sites under five acres.

Neither NRDC nor the majority point to anything in the statute or the legislative history that would require the agency to define "industrial activity" as including all construction operations. Accordingly, I believe deference is due EPA's definition, provided it is not arbitrary, capricious, or manifestly contrary to the statute. *Chevron, U.S.A., 467 U.S. at 844.*

In trying to determine when construction should be treated as industrial activity, EPA considered a number of possible approaches. *See 55 Fed. Reg. at 48,035.* Exempting construction that would be completed within a certain designated time frame was deemed inappropriate, because the work [**69] could be both intensive and expansive but nonetheless take place over a short period of time. Basing the limit on quantity of soil removed was also rejected as not relating to the amount of land surface disturbed. EPA finally settled on the surface area disturbed by the construction project as a feasible and appropriate mechanism for "identifying sites that are [sic] amount to industrial activity." *55 Fed. Reg. at 48,036.*

Having determined that not all construction amounts to industrial activity, and that the appropriate basis for differentiation is land area disturbed, EPA then had to determine where to draw the line. Initially, EPA proposed to exempt all construction operations disturbing less than one acre of land, as well as single family residential projects disturbing less than five acres. *53 Fed. Reg. 49,431 (1988).* In the final rule, however, EPA adopted a five-acre minimum for all construction projects. *55 Fed. Reg. 48,066 (1990); 40 C.F.R. § 122.26(b)(14)(x).*

Admittedly, the final rule contains little in the way of justification for treating two-acre sites differently than five-acre ones, but that does not necessarily make [**70] it arbitrary and capricious. Line-drawing is often difficult. NRDC was apparently willing to accept EPA's proposed one-acre/five-acre rule. Although NRDC now challenges the blanket five-acre rule, it offers no evidence that sites excluded from the permitting requirement constitute "industrial activity." In such absence of any evidence in the record undermining EPA's conclusion on an issue squarely within its expertise, I believe the rule must be upheld.

> 4 Because I conclude that the rule falls within the permissible bounds of the statutory definition of "discharges associated with industrial activity," I need not consider the applicability of the *de minimis* exception.

III

Finally, while I concur in the result reached by the majority in Part II.D, rejecting NRDC's claim that EPA has unlawfully failed to require substantive controls on municipal discharges, I disagree with the majority's rea-

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soning. In my view, NRDC's claim is premature, and we should decline to address its merits.

NRDC contends that the 1987 amendments [**71] require EPA to establish substantive controls for municipal storm water discharges. In support of this argument, NRDC relies on CWA § 402(p)(3)(B), 33 *U.S.C.* § *1342(p)(3)(B)*, which provides:

> Permits for discharges from municipal storm sewers -
>
> * * *
>
> (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. . . .

This section refers only to *permits*, and says nothing about permit applications. Because EPA has yet to issue any permits, NRDC's claim on this point is premature. In the absence of any indication to the contrary, we must assume that any permit issued will comply with all applicable statutory requirements. The statute does not require that EPA detail the substantive controls to be imposed when establishing permit application requirements. Accordingly, I would reject NRDC's claim without [*1316] reaching the issue of the Administrator's discretion in selecting those controls.

IV

In sum, I join much of my colleagues' opinion. However, I would not require EPA to issue supplemental regulations detailing the time line for [**72] issuance of and compliance with permits, and I would uphold EPA's definition of "discharge associated with industrial activity." Finally, I would reject NRDC's claim that EPA is required to detail control measures in the permit application regulations on the grounds that the statute requires control measures only in the permits themselves.

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TAB "5"

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LEXSEE

Caution
As of: Jun 17, 2010

PUD NO. 1 OF JEFFERSON COUNTY AND CITY OF TACOMA, PETITIONERS v. WASHINGTON DEPARTMENT OF ECOLOGY, ET AL.

No. 92-1911

SUPREME COURT OF THE UNITED STATES

511 U.S. 700; 114 S. Ct. 1900; 128 L. Ed. 2d 716; 1994 U.S. LEXIS 4271; 62 U.S.L.W. 4408; 38 ERC (BNA) 1593; 94 Cal. Daily Op. Service 3843; 94 Daily Journal DAR 7236; 24 ELR 20945; 8 Fla. L. Weekly Fed. S 172

February 23, 1994, Argued
May 31, 1994, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

DISPOSITION: 121 Wash. 2d 179, 849 P.2d 646, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners, a city and a local utility district, desired to build a hydroelectric project on the Dosewallips River in Washington State. Respondent state environmental agency conditioned a permit for the project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. The Supreme Court of Washington upheld the agency's decision. Petitioners sought certiorari.

OVERVIEW: Because a Federal Energy Regulatory Commission license was required and because the project might result in discharges into the Dosewallips River, petitioners were required to obtain state certification of the project pursuant to § 401 (33 U.S.C.S. § 1341) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (Act), 33 U.S.C.S. § 1251 et seq. The principal dispute was whether the minimum stream flow requirement that the state imposed on the hydroelectric project was a permissible condition of a § 401 certification under the Act. The Court concluded that it was, upholding the state supreme court's judgment. The Court held that a state may include minimum stream flow requirements in a § 401 certification insofar as necessary to enforce a designated use contained in a state water quality standard. In so doing, the Court rejected petitioners' assertion that the Act was only concerned with water quality and did not allow the regulation of water quantity. Indeed, there was recognition in the Act itself that reduced stream flow, or diminishment of water quantity, could constitute water pollution.

OUTCOME: The Court affirmed the judgment of the state supreme court.

CORE TERMS: water quality, certification, stream, license, designated, Clean Water Act, river, antidegradation, effluent, fish, state law, navigable waters, quantity, ensure compliance, environmental, hydroelectric, pollution, wildlife, recreation, deference, organisms, impose conditions, recommendation, interfere, licensing, unrelated, spawning, fishery, habitat, Federal Power Act FPA

LexisNexis(R) Headnotes

Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
Real Property Law > Water Rights > Beneficial Use
Real Property Law > Water Rights > Nonconsumptive Uses > General Overview

[HN1]Pursuant to § 303 (33 U.S.C.S. § 1313) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (Act), 33 U.S.C.S. § 1251 et seq., a state water quality standard shall consist of the desig-

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nated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. 33 U.S.C.S. § 1313(c)(2)(A). In setting standards, the state must comply with the following broad requirements: such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational, and other purposes. Section 303 also contains an "antidegradation policy," a policy requiring that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications
Environmental Law > Water Quality > Clean Water Act > Enforcement > General Overview
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN2]States are responsible for enforcing water quality standards on intrastate waters. 33 U.S.C.S. § 1319(a). In addition to these primary enforcement responsibilities, § 401 of the Federal Water Pollution Control Act, 33 U.S.C.S. § 1341, requires states to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters. Specifically, § 401 requires an applicant for a federal license or permit to conduct any activity which may result in any discharge into the navigable waters to obtain from the state a certification that any such discharge will comply with the applicable provisions of 33 U.S.C.S. §§ 1311, 1312, 1313, 1316, and 1317. 33 U.S.C.S. § 1341(a). Section 401(d) further provides that any certification shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant will comply with any applicable effluent limitations and other limitations, under 33 U.S.C.S. § 1311 or 1312, and with any other appropriate requirement of State law set forth in such certification. 33 U.S.C. § 1341(d). The limitations included in the certification become a condition on any federal license.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications
[HN3]See 33 U.S.C.S. § 1341.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
Environmental Law > Water Quality > Clean Water Act > Wetlands
[HN4]State water quality standards adopted pursuant to § 303 (33 U.S.C.S. § 1313) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (Act), 33 U.S.C.S. § 1251 et seq., are among the "other limitations" with which a state may ensure compliance through the certification process under § 401 (33 U.S.C.S. § 1341) of the Act.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN5]Pursuant to § 401 (33 U.S.C.S. § 1341) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act, 33 U.S.C.S. § 1251 et seq., states may condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other appropriate requirement of state law.

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Navigable Waters
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN6]Pursuant to § 401(d) (33 U.S.C.S. § 1341(d)) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (Act), 33 U.S.C.S. § 1251 et seq., a state may require that a permit applicant comply with both the designated uses and the water quality criteria of the state standards. In granting certification pursuant to § 401(d), the state shall set forth any limitations necessary to assure that the applicant will comply with any limitations under § 303 (33 U.S.C.S. § 1313) of the Act and with any other appropriate requirement of state law. A certification requirement that an applicant operate the project consistently with state water quality standards, consistently with the designated uses of the water body and the water quality criteria, is both a "limitation" to assure compliance with limitations imposed under § 303, and an "appropriate" requirement of state law.

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Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > General Overview
Real Property Law > Water Rights > Nonconsumptive Uses > Fishing
[HN7]Under the Federal Water Pollution Control Act, commonly known as the Clean Water Act (Act), 33 U.S.C.S. § 1251 et seq., reduced stream flow, specifically diminishment of water quantity, can constitute water pollution. In particular, the Act's definition of pollution as the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water encompasses the effects of reduced water quantity. 33 U.S.C.S. § 1362(19).

Energy & Utilities Law > Electric Power Industry > Federal Power Act > General Overview
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications
Real Property Law > Water Rights > Administrative Allocations
[HN8]Sections 101(g) and 510(2) (33 U.S.C.S. §§ 1251(g) and 1370(2)) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act, 33 U.S.C.S. § 1251 et seq., preserve the authority of each state to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications
Environmental Law > Water Quality > Clean Water Act > Enforcement > General Overview
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN9]A state may include minimum stream flow requirements in a certification issued pursuant to § 401 (33 U.S.C.S. § 1341) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act, 33 U.S.C.S. § 1251 et seq., insofar as necessary to enforce a designated use contained in a state water quality standard.

DECISION:

State's minimum stream flow requirement held to be permissible condition of certification under 33 USCS 1341 to build hydroelectric project.

SUMMARY:

The Clean Water Act (33 USCS 1251 et seq.) requires (1) under 303 of the Act (33 USCS 1313), that each state, subject to federal approval, institute comprehensive water quality standards establishing water quality goals for all intrastate waters, (2) under 401 of the Act (33 USCS 1341), that states provide a water quality certification before a federal license or permit is issued for activities that might result in any discharge into intrastate navigable waters, and (3) under 401(d) of the Act (33 USCS 1341(d)), that any certification shall set forth any effluent limitations and other limitations necessary to assure that any applicant will comply with various provisions of the Act and appropriate state law requirements, which limitations will become a condition on any federal license. The state of Washington adopted comprehensive water quality standards intended to regulate all of the state's navigable waters under an administrative scheme that classified certain waters as extraordinary, which waters had characteristic uses including fish migration, rearing, and spawning. A city and a local utility district proposed to build on a river that had been classified as extraordinary a hydroelectric project that would divert water from a 1.2-mile bypass reach of the river, run the water through turbines to generate electricity, and then return the water to the river below the bypass reach. The state ecology department issued a 401 water quality certification imposing on the project conditions that included a minimum stream flow requirement of between 100 and 200 cubic feet per second, depending on the season. The state Pollution Control Hearings Board determined that the flow requirement, by being intended to enhance rather than maintain the fishery in the river, exceeded the ecology department's authority under state law, but the Thurston County Superior Court, holding that the Board had erred, reinstated the department's flow requirement. The Supreme Court of Washington, holding that the antidegradation provisions of the state water quality standards required the imposition of minimum stream flows, and that 401(d) authorized the flow requirement imposed by the ecology department, affirmed the Superior Court judgment (121 Wash 2d 179, 849 P2d 646).

On certiorari, the United States Supreme Court affirmed. In an opinion by O'Connor, J., joined by Rehnquist, Ch. J., and Blackmun, Stevens, Kennedy, Souter, and Ginsburg, JJ., it was held that the minimum flow requirement was a permissible condition of a 401 certification, because (1) pursuant to 401, states may condition certification upon any limitations necessary to insure compliance with state water quality standards or any other appropriate requirement of state law; (2) the minimum flow requirement was such a limitation; and (3) the court was unwilling to read implied limitations into 401 based on a purported conflict with the authority of the Federal Energy Regulatory Commission (FERC), under

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the Federal Power Act (FPA) (16 USCS 791a et seq.), to license hydroelectric projects, since (a) 401's certification requirement applied to statutes and regulatory schemes other than those concerning FERC's authority under the FPA, and (b) any conflict with such authority was hypothetical, where FERC had not yet acted on the license application from the city and the local utility district.

Stevens, J., concurring, expressed the view that the Clean Water Act (1) did not purport to place any constraint on a state's power to regulate the quality of its own waters more stringently than federal law might require, and (2) explicitly recognized states' ability to impose stricter standards.

Thomas, J., joined by Scalia, J., dissenting, expressed the view that (1) the majority opinion fundamentally altered the federal-state balance Congress had carefully crafted in the Federal Power Act (16 USCS 791a et seq.), and (2) such a result was neither mandated nor supported by the text of 401.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

ENERGY §30

ENVIRONMENTAL LAW §32

WATERS §20

hydroelectric power -- federal license -- state minimum flow requirement -- protection of fisheries --

Headnote:[1A][1B][1C][1D]

A minimum stream flow requirement of between 100 and 200 cubic feet per second imposed, in order to protect a river's fisheries, by a state environmental agency under a water quality certification issued, with respect to a proposed hydroelectric project on the river, pursuant to 401 of the Clean Water Act (33 USCS 1341)--which requires states to provide a water quality certification before a federal license or permit can be issued for activities that might result in any discharge into intrastate navigable waters--is a permissible condition of 401 certification, because the United States Supreme Court has determined that (1) pursuant to 401, states may condition certification upon any limitations necessary to insure compliance with state water quality standards or any other appropriate requirement of state law; (2) the minimum flow requirement is such a limitation; and (3) the court is unwilling to read implied limitations into 401 based on a purported conflict with the authority of the Federal Energy Regulatory Commission (FERC), under the Federal Power Act (FPA) (16 USCS 791a et seq.), to license hydroelectric projects, since (a) 401's certification requirement applies to other statutes and regulatory schemes in addition to that concerning FERC's authority under the FPA, and (b) any conflict with such authority is hypothetical, where FERC has not yet acted on the license application for the project in question. (Thomas and Scalia, JJ., dissented from this holding.)

[***LEdHN2]

ENVIRONMENTAL LAW §32

Clean Water Act -- federal license -- state water quality certification --

Headnote:[2A][2B]

Pursuant to 401 of the Clean Water Act (33 USCS 1341), which requires states to provide a water quality certification before a federal license or permit can be issued for activities that might result in any discharge into intrastate navigable waters, states may condition certification upon any limitations necessary to insure compliance with state water quality standards or any other appropriate requirement of state law, rather than on only water quality standards specifically tied to a discharge, because (1) the text of 401(d) of the Act (33 USCS 1341(d)), providing that any certification shall set forth any effluent limitations and other limitations necessary to assure that any applicant will comply with various provisions of the Act and appropriate state law requirements, refers to the compliance of the applicant, not the discharge, (2) the conclusion of the Environmental Protection Agency (EPA)--whose regulations implementing 401 expressly interpret 401 as requiring the state to find that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards--that activities, not merely discharges, must comply with state water quality standards is a reasonable interpretation of 401 and is entitled to deference, (3) consistent with the EPA's view of the Act, state water quality standards adopted pursuant to 303 of the Act (33 USCS 1313), which requires each state, subject to federal approval, to institute comprehensive standards establishing water quality goals for all intrastate waters, are among the "other limitations" with which a state may insure compliance through the 401 certification process, (4) limitations to assure compliance with state water quality standards are permitted by 401(d)'s reference to any other appropriate requirement of state law, and (5) at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to 303 are "appropriate" requirements of state law. (Thomas and Scalia, JJ., dissented from this holding.)

[***LEdHN3]

ENVIRONMENTAL LAW §32

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Clean Water Act -- federal license -- compliance with state standards --

Headnote:[3A][3B]

Although 401(d) of the Clean Water Act (33 USCS 1341(d))--providing that any certification under 401 of the Act (33 USCS 1341), which requires states to provide a water quality certification before a federal license or permit can be issued for activities that might result in any discharge into intrastate navigable waters, shall set forth any effluent limitations and other limitations necessary to assure that any applicant will comply with various provisions, including certain specified statutory provisions, of the Act, and with appropriate state law requirements--authorizes a state to place restrictions on the activity as a whole, that authority is not unbounded; however, insuring compliance with 303 of the Act (33 USCS 1313), which requires each state, subject to federal approval, to institute comprehensive standards establishing water quality goals for all intrastate waters, is a proper function of the 401 certification, because, although 303 is not one of the statutory provisions listed in 401(d), the statute allows states to impose limitations to insure compliance with 301 of the Act (33 USCS 1311), and 301 in turn incorporates 303 by reference.

[***LEdHN4]

ENVIRONMENTAL LAW §32

Clean Water Act -- federal license -- state minimum stream flow requirement -- protection of fish habitat --

Headnote:[4A][4B]

With respect to the determination of the United States Supreme Court that pursuant to 401 of the Clean Water Act (33 USCS 1341), which requires states to provide a water quality certification before a federal license or permit can be issued for activities that might result in any discharge into intrastate navigable waters, states may condition certification upon any limitations necessary to insure compliance with state water quality standards or any other appropriate requirement of state law, a minimum stream flow requirement of between 100 and 200 cubic feet per second imposed by a state environmental agency for certification for a proposed hydroelectric project on a river with a state-designated use as a fish habitat is such a necessary limitation, because (1) the designated use directly reflects the Act's goal (stated in 33 USCS 1251(a)) of maintaining the chemical, physical, and biological integrity of the nation's waters, (2) pursuant to 401(d), the state may require that a permit applicant comply with both the designated uses and the water quality criteria of the state standards, and a certification requirement that an applicant operate the project consistently with the designated uses of the water body and the water quality criteria is both a limitation to assure compliance with limitations imposed under 303 of the Act (33 USCS 1313), which requires each state to institute standards establishing water quality goals for intrastate waters, and an appropriate requirement of state law, (3) Environmental Protection Agency (EPA) regulations implicitly recognize that in some circumstances, criteria alone are insufficient to protect a designated use, (4) the Act permits enforcement of broad, narrative criteria which cannot reasonably be expected to anticipate all the water quality issues arising from every activity which can affect the state's hundreds of individual water bodies, (5) the minimum flow requirement is a proper application of the state and federal antidegradation regulations, as the requirement insures that an existing instream water use will be maintained and protected, (6) there is recognition in the Act itself that reduced stream flow can constitute water pollution, where the Act's definition of water pollution (under 33 USCS 1362(19)) encompasses the effects of reduced water quantity and 304 of the Act (33 USCS 1314(f)) expressly recognizes that water pollution may result from changes in the flow of navigable waters, which concern is also embodied in the EPA regulations, (7) 101(g) and 510(2) of the Act (33 USCS 1251(g), 1370(2)) preserve the authority of each state to allocate water quantity as between users, (8) the certification merely determines the nature of the use to which that proprietary right of the parties seeking to build the hydroelectric project may be put under the Act, and (9) this view is reinforced by the legislative history of the 1977 amendment to the Act adding 101(g), which history indicates that the purpose of the amendment is not to prohibit incidental effects of the requirements of the Act on individual water rights, but to insure that state allocation systems are not subverted and that any effects on individual rights are prompted by legitimate and necessary water quality standards. (Thomas and Scalia, JJ., dissented from this holding.)

SYLLABUS

Section 303 of the Clean Water Act requires each State, subject to federal approval, to institute comprehensive standards establishing water quality goals for all intrastate waters, and requires that such standards "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." Under Environmental Protection Agency (EPA) regulations, the standards must also include an antidegradation policy to ensure that "existing instream water uses and the level of water quality necessary to protect [those] uses [are] maintained and protected." States are required by § 401 of the Act to provide a water quality certification before a federal license or permit can be issued for any activity that may result in a discharge into intrastate navigable waters. As relevant

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here, the certification must "set forth any effluent limitations and other limitations . . . necessary to assure that any applicant" will comply with various provisions of the Act and "any other appropriate" state law requirement. § 401(d). Under Washington's comprehensive water quality standards, characteristic uses of waters classified as Class AA include fish migration, rearing, and spawning. Petitioners, a city and a local utility district, want to build a hydroelectric project on the Dosewallips River, a Class AA water, which would reduce the water flow in the relevant part of the river to a minimal residual flow of between 65 and 155 cubic feet per second (cfs). In order to protect the river's fishery, respondent state environmental agency issued a § 401 certification imposing, among other things, a minimum stream flow requirement of between 100 and 200 cfs. A state administrative appeals board ruled that the certification condition exceeded respondent's authority under state law, but the State Superior Court reversed. The State Supreme Court affirmed, holding that the antidegradation provisions of the State's water quality standards require the imposition of minimum stream flows, and that § 401 authorized the stream flow condition and conferred on States power to consider all state action related to water quality in imposing conditions on § 401 certificates.

Held:

Washington's minimum stream flow requirement is a permissible condition of a § 401 certification. Pp. 710-723.

(a) A State may impose conditions on certifications insofar as necessary to enforce a designated use contained in the State's water quality standard. Petitioners' claim that the State may only impose water quality limitations specifically tied to a "discharge" is contradicted by § 401(d)'s reference to an applicant's compliance, which allows a State to impose "other limitations" on a project. This view is consistent with EPA regulations providing that activities -- not merely discharges -- must comply with state water quality standards, a reasonable interpretation of § 401 which is entitled to deference. State standards adopted pursuant to § 303 are among the "other limitations" with which a State may ensure compliance through the § 401 certification process. Although § 303 is not specifically listed in § 401(d), the statute allows States to impose limitations to ensure compliance with § 301 of the Act, and § 301 in turn incorporates § 303 by reference. EPA's view supports this interpretation. Such limitations are also permitted by § 401(d)'s reference to "any other appropriate" state law requirement. Pp. 710-713.

(b) Washington's requirement is a limitation necessary to enforce the designated use of the river as a fish habitat. Petitioners err in asserting that § 303 requires States to protect such uses solely through implementation of specific numerical "criteria." The section's language makes it plain that water quality standards contain two components and is most naturally read to require that a project be consistent with both: the designated use and the water quality criteria. EPA has not interpreted § 303 to require the States to protect designated uses exclusively through enforcement of numerical criteria. Moreover, the Act permits enforcement of broad, narrative criteria based on, for example, "aesthetics." There is no anomaly in the State's reliance on both use designations and criteria to protect water quality. Rather, it is petitioners' reading that leads to an unreasonable interpretation of the Act, since specified criteria cannot reasonably be expected to anticipate all the water quality issues arising from every activity that can affect a State's hundreds of individual water bodies. Washington's requirement also is a proper application of the state and federal antidegradation regulations, as it ensures that an existing instream water use will be "maintained and protected." Pp. 713-719.

(c) Petitioners' assertion that the Act is only concerned with water quality, not quantity, makes an artificial distinction, since a sufficient lowering of quantity could destroy all of a river's designated uses, and since the Act recognizes that reduced stream flow can constitute water pollution. Moreover, §§ 101(g) and 510(2) of the Act do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation. Those provisions preserve each State's authority to allocate water quantity as between users, but the § 401 certification does not purport to determine petitioners' proprietary right to the river's water. In addition, the Court is unwilling to read implied limitations into § 401 based on petitioners' claim that a conflict exists between the condition's imposition and the Federal Energy Regulatory Commission's authority to license hydroelectric projects under the Federal Power Act, since FERC has not yet acted on petitioners' license application and since § 401's certification requirement also applies to other statutes and regulatory schemes. Pp. 719-723.

COUNSEL: Howard E. Shapiro argued the cause for petitioners. With him on the briefs were Michael A. Swiger, Gary D. Bachman, Albert R. Malanca, and Kenneth G. Kieffer.

Christine O. Gregoire, Attorney General of Washington, argued the cause for respondents. With her on the briefs were Jay J. Manning, Senior Assistant Attorney General, and William C. Frymire, Assistant Attorney General.

Deputy Solicitor General Wallace argued the cause for the United States as amicus curiae urging affirmance.

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With him on the brief were Solicitor General Days, Acting Assistant Attorney General Schiffer, James A. Feldman, and Anne S. Almy. *

* Briefs of amici curiae urging reversal were filed for the American Forest & Paper Association et al. by John R. Molm, Winifred D. Simpson, and James A. Lamberth; for Niagara Mohawk Power Corp. by Edward Berlin, Kenneth G. Jaffe, Paul J. Kaleta, Brian K. Billinson, and Timothy P. Sheehan; for the Northwest Hydroelectric Association by Richard M. Glick and Lory J. Kraut; for Pacific Northwest Utilities by Sherilyn Peterson and R. Gerard Lutz; and for the Western Urban Water Coalition by Benjamin S. Sharp and Guy R. Martin.

Briefs of amici curiae urging affirmance were filed for the State of Vermont et al. by Jeffrey L. Amestoy, Attorney General of Vermont, and Ronald A. Shems, Assistant Attorney General, Robert Abrams, Attorney General of New York, and Kathleen Liston Morrison, Assistant Attorney General, Grant Woods, Attorney General of Arizona, Winston Bryant, Attorney General of Arkansas, Daniel E. Lungren, Attorney General of California, Richard Blumenthal, Attorney General of Connecticut, Charles M. Oberly III, Attorney General of Delaware, Robert A. Butterworth, Attorney General of Florida, Michael J. Bowers, Attorney General of Georgia, Robert A. Marks, Attorney General of Hawaii, Larry EchoHawk, Attorney General of Idaho, Roland A. Burris, Attorney General of Illinois, Pamela Fanning Carter, Attorney General of Indiana, Bonnie J. Campbell, Attorney General of Iowa, Robert T. Stephan, Attorney General of Kansas, Chris Gorman, Attorney General of Kentucky, Michael E. Carpenter, Attorney General of Maine, J. Joseph Curran, Jr., Attorney General of Maryland, Scott Harshbarger, Attorney General of Massachusetts, Frank J. Kelley, Attorney General of Michigan, Hubert H. Humphrey III, Attorney General of Minnesota, Mike Moore, Attorney General of Mississippi, Jeremiah W. Nixon, Attorney General of Missouri, Joseph P. Mazurek, Attorney General of Montana, Don Stenberg, Attorney General of Nebraska, Frankie Sue Del Papa, Attorney General of Nevada, Jeffrey R. Howard, Attorney General of New Hampshire, Fred DeVesa, Acting Attorney General of New Jersey, Tom Udall, Attorney General of New Mexico, Michael F. Easley, Attorney General of North Carolina, Heidi Heitkamp, Attorney General of North Dakota, Lee Fisher, Attorney General of Ohio, Susan B. Loving, Attorney General of Oklahoma, Theodore R. Kulongoski, Attorney General of Oregon, Ernest D. Preate, Jr., Attorney General of Pennsylvania, Jefferey B. Pine, Attorney General of Rhode Island, T. Travis Medlock, Attorney General of South Carolina, Charles W. Burson, Attorney General of Tennessee, Dan Morales, Attorney General of Texas, Jan Graham, Attorney General of Utah, Stephen D. Rosenthal, Attorney General of Virginia, Darrell V. McGraw, Jr., Attorney General of West Virginia, James E. Doyle, Attorney General of Wisconsin, Joseph B. Meyer, Attorney General of Wyoming, and John Payton, Corporation Counsel of the District of Columbia; and for American Rivers et al. by Paul M. Smith.

JUDGES: O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. STEVENS, J., filed a concurring opinion, post, p. 723. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, post, p. 724.

OPINION BY: O'CONNOR

OPINION

[*703] [***723] [**1905] JUSTICE O'CONNOR delivered the opinion of the Court.

[***LEdHR1A] [1A]Petitioners, a city and a local utility district, want to build a hydroelectric project on the Dosewallips River in Washington State. We must decide whether respondent state environmental agency (hereinafter respondent) properly conditioned a permit for the project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs.

[*704] I

This case involves the complex statutory and regulatory scheme that governs our Nation's waters, a scheme that implicates both federal and state administrative responsibilities. The Federal Water Pollution Control Act, commonly known as the Clean Water Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 *et seq.*, is a comprehensive water quality statute designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 1251(a). The Act also seeks to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." § 1251(a)(2).

To achieve these ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State Governments. Under the Act, the Administrator of the

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Environmental Protection Agency (EPA) is required, among other things, to establish and enforce technology-based limitations on individual discharges into the country's navigable waters from point sources. See §§ 1311, 1314. Section 303 of the Act also requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters. §§ 1311(b)(1)(C), 1313. These state water quality standards provide "a supplementary basis . . . 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, 48 L. Ed. 2d 578, 96 S. Ct. 2022 (1976).

[HN1]A state water quality standard "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). In setting standards, the State must comply with the following broad requirements:

> "Such standards shall be such as to protect the public health or welfare, enhance the quality of water and [*705] serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational [and other purposes.]" *Ibid.*

See also § 1251(a)(2).

A 1987 amendment to the Clean Water Act makes clear that § 303 also contains an "antidegradation policy" -- that is, a policy requiring [**1906] that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation. Specifically, the Act permits the revision of certain effluent limitations or water quality [***724] standards "only if such revision is subject to and consistent with the antidegradation policy established under this section." § 1313(d)(4)(B). Accordingly, EPA's regulations implementing the Act require that state water quality standards include "a statewide antidegradation policy" to ensure that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 CFR § 131.12 (1993). At a minimum, state water quality standards must satisfy these conditions. The Act also allows States to impose more stringent water quality controls. See 33 U.S.C. §§ 1311(b)(1)(C), 1370. See also 40 CFR § 131.4(a) (1993) ("As recognized by section 510 of the Clean Water Act[, 33 U.S.C. § 1370], States may develop water quality standards more stringent than required by this regulation").

The State of Washington has adopted comprehensive water quality standards intended to regulate all of the State's navigable waters. See Washington Administrative Code (WAC) 173-201-010 to 173-201-120 (1986). The State created an inventory of all the State's waters, and divided the waters into five classes. 173-201-045. Each individual fresh surface water of the State is placed into one of these classes. 173-201-080. The Dosewallips River is classified AA, extraordinary. 173-201-080(32). The water quality [*706] standard for Class AA waters is set forth at 173-201-045(1). The standard identifies the designated uses of Class AA waters as well as the criteria applicable to such waters. [1]

1 WAC 173-201-045(1) (1986) provides in pertinent part:

"(1) Class AA (extraordinary).

"(a) General characteristic. Water quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses.

"(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

"(i) Water supply (domestic, industrial, agricultural).

"(ii) Stock watering.

"(iii) Fish and shellfish:

"Salmonid migration, rearing, spawning, and harvesting.

"Other fish migration, rearing, spawning, and harvesting.

. . .

"(iv) Wildlife habitat.

"(v) Recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment).

"(vi) Commerce and navigation.

"(c) Water quality criteria

"(i) Fecal coliform organisms.

"(A) Freshwater -- fecal coliform organisms shall not exceed a geometric mean value of 50 organisms/100 mL, with not more than 10 percent of samples exceeding 100 organisms/100 mL.

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"(B) Marine water -- fecal coliform organisms shall not exceed a geometric mean value of 14 organisms/100 mL, with not more than 10 percent of samples exceeding 43 organisms/100 mL.

"(ii) Dissolved oxygen [shall exceed specific amounts].

. . .

"(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

"(iv) Temperature shall not exceed [certain levels].

. . .

"(v) pH shall be within [a specified range].

"(vi) Turbidity shall not exceed [specific levels].

"(vii) Toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use.

"(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste."

[*707] In addition to these specific standards applicable to Class AA waters, the State has adopted a statewide [***725] antidegradation policy. That policy provides:

"(a) Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed.

"(b) No degradation will be allowed of waters lying in national parks, national recreation areas, national wildlife refuges, national scenic rivers, and other areas of national ecological importance.

. . .

"(f) In no case, will any degradation of water quality be allowed if this degradation interferes with or becomes injurious to existing water uses and causes long-term [**1907] and irreparable harm to the environment." 173-201-035(8).

As required by the Act, EPA reviewed and approved the State's water quality standards. See 33 U.S.C. § 1313(c)(3); 42 Fed. Reg. 56792 (1977). Upon approval by EPA, the state standard became "the water quality standard for the applicable waters of that State." 33 U.S.C. § 1313(c)(3).

[HN2]States are responsible for enforcing water quality standards on intrastate waters. § 1319(a). In addition to these primary enforcement responsibilities, § 401 of the Act requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters. 33 U.S.C. § 1341. Specifically, § 401 requires an applicant for a federal license or permit to conduct any activity "which may result in any discharge into the navigable waters" to obtain from the State a certification "that any such discharge will comply with the applicable provisions of sections [1311, 1312, 1313, 1316, and 1317 of this title]." 33 U.S.C. § 1341(a). Section 401(d) further provides that "any certification [*708] . . . shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant . . . will comply with any applicable effluent limitations and other limitations, under section [1311 or 1312 of this title] . . . and with any other appropriate requirement of State law set forth in such certification." 33 U.S.C. § 1341(d). The limitations included in the certification become a condition on any federal license. *Ibid.* [2]

2 Section 401, as set forth in [HN3]33 U.S.C. § 1341, provides in relevant part:

"(a) Compliance with applicable requirements; application; procedures; license suspension

"(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

. . .

"(d) Limitations and monitoring requirements of certification

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"Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section."

[***726] II

Petitioners propose to build the Elkhorn Hydroelectric Project on the Dosewallips River. If constructed as presently planned, the facility would be located just outside the Olympic National Park on federally owned land within the Olympic National Forest. The project would divert water from a 1.2-mile reach of the river (the bypass reach), run the [*709] water through turbines to generate electricity and then return the water to the river below the bypass reach. Under the Federal Power Act (FPA), 41 Stat. 1063, as amended, 16 U.S.C. § 791a *et seq.*, the Federal Energy Regulatory Commission (FERC) has authority to license new hydroelectric facilities. As a result, petitioners must get a FERC license to build or operate the Elkhorn Project. Because a federal license is required, and because the project may result in discharges into the Dosewallips River, petitioners are also required to obtain state certification of the project pursuant to § 401 of the Clean Water Act, 33 U.S.C. § 1341.

The water flow in the bypass reach, which is currently undiminished by appropriation, ranges seasonally between 149 and 738 cubic feet per second (cfs). The Dosewallips supports two species of salmon, coho and chinook, as well as steelhead trout. As originally proposed, the project was to include a diversion dam which would completely block [**1908] the river and channel approximately 75% of the river's water into a tunnel alongside the streambed. About 25% of the water would remain in the bypass reach, but would be returned to the original riverbed through sluice gates or a fish ladder. Depending on the season, this would leave a residual minimum flow of between 65 and 155 cfs in the river. Respondent undertook a study to determine the minimum stream flows necessary to protect the salmon and steelhead fishery in the bypass reach. On June 11, 1986, respondent issued a § 401 water quality certification imposing a variety of conditions on the project, including a minimum stream flow requirement of between 100 and 200 cfs depending on the season.

A state administrative appeals board determined that the minimum flow requirement was intended to enhance, not merely maintain, the fishery, and that the certification condition therefore exceeded respondent's authority under state law. App. to Pet. for Cert. 55a-57a. On appeal, the [*710] State Superior Court concluded that respondent could require compliance with the minimum flow conditions. *Id.*, at 29a-45a. The Superior Court also found that respondent had imposed the minimum flow requirement to protect and preserve the fishery, not to improve it, and that this requirement was authorized by state law. *Id.*, at 34a.

The Washington Supreme Court held that the antidegradation provisions of the State's water quality standards require the imposition of minimum stream flows. 121 Wash. 2d 179, 186-187, 849 P.2d 646, 650 (1993). [***727] The court also found that § 401(d), which allows States to impose conditions based upon several enumerated sections of the Clean Water Act and "any other appropriate requirement of State law," 33 U.S.C. § 1341(d), authorized the stream flow condition. Relying on this language and the broad purposes of the Clean Water Act, the court concluded that § 401(d) confers on States power to "consider all state action related to water quality in imposing conditions on section 401 certificates." 121 Wash. 2d at 192, 849 P.2d at 652. We granted certiorari, 510 U.S. 810 (1993), to resolve a conflict among the state courts of last resort. See 121 Wash. 2d 179, 849 P.2d 646 (1993); *Georgia Pacific Corp. v. Dept. of Environmental Conservation*, 159 Vt. 639, 628 A.2d 944 (1992) (table); *Power Authority of New York v. Williams*, 60 N.Y.2d 315, 457 N.E.2d 726, 469 N.Y.S.2d 620 (1983). We now affirm.

III

[***LEdHR1B] [1B]The principal dispute in this case concerns whether the minimum stream flow requirement that the State imposed on the Elkhorn Project is a permissible condition of a § 401 certification under the Clean Water Act. To resolve this dispute we must first determine the scope of the State's authority under § 401. We must then determine whether the limitation at issue here, the requirement that petitioners maintain minimum stream flows, falls within the scope of that authority.

[*711] A

There is no dispute that petitioners were required to obtain a certification from the State pursuant to § 401. Petitioners concede that, at a minimum, the project will result in two possible discharges -- the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity. Brief for Petitioners 27-28. Petitioners contend, however, that the

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minimum stream flow requirement imposed by the State was unrelated to these specific discharges, and that as a consequence, the State lacked the authority under § 401 to condition its certification on maintenance of stream flows sufficient to protect the Dosewallips fishery.

[***LEdHR2A] [2A]If § 401 consisted solely of subsection (a), which refers to a state certification that a "discharge" will comply with certain provisions of the Act, petitioners' assessment of the scope of the State's certification authority would have considerable force. Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a [**1909] project. Section 401(d) provides that any certification shall set forth "any effluent limitations and other limitations . . . necessary to assure that *any applicant*" will comply with various provisions of the Act and appropriate state law requirements. 33 U.S.C. § 1341(d) (emphasis added). The language of this subsection contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a "discharge." The text refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose "other limitations" on the project in general to assure compliance with various provisions of the Clean Water Act and with "any other appropriate [***728] requirement of State law." Although the dissent asserts that this interpretation of § 401(d) renders § 401(a)(1) superfluous, *post*, at 726, we see no such anomaly. Section 401(a)(1) identifies the category of activities [*712] subject to certification -- namely, those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.

Our view of the statute is consistent with EPA's regulations implementing § 401. The regulations expressly interpret § 401 as requiring the State to find that "there is a reasonable assurance that the *activity* will be conducted in a manner which will not violate applicable water quality standards." 40 CFR § 121.2(a)(3) (1993) (emphasis added). See also EPA, Wetlands and 401 Certification 23 (Apr. 1989) ("In 401(d), the Congress has given the States the authority to place any conditions on a water quality certification that are necessary to assure that the applicant will comply with effluent limitations, water quality standards, . . . and with 'any other appropriate requirement of State law'"). EPA's conclusion that *activities* -- not merely discharges -- must comply with state water quality standards is a reasonable interpretation of § 401, and is entitled to deference. See, *e. g.*, *Arkansas v. Oklahoma*, 503 U.S. 91, 110, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (1992); *Chevron* U.S. *A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

[***LEdHR3A] [3A]Although § 401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded. The State can only ensure that the project complies with "any applicable effluent limitations and other limitations, under [33 U.S.C. §§ 1311, 1312]" or certain other provisions of the Act, "and with any other appropriate requirement of State law." 33 U.S.C. § 1341(d). The State asserts that the minimum stream flow requirement was imposed to ensure compliance with the state water quality standards adopted pursuant to § 303 of the Clean Water Act, 33 U.S.C. § 1313.

[***LEdHR2B] [2B] [***LEdHR3B] [3B]We agree with the State that ensuring compliance with § 303 is a proper function of the § 401 certification. Although § 303 is not one of the statutory provisions listed in § 401(d), [*713] the statute allows States to impose limitations to ensure compliance with § 301 of the Act, 33 U.S.C. § 1311. Section 301 in turn incorporates § 303 by reference. See 33 U.S.C. § 1311(b)(1)(C); see also H. R. Conf. Rep. No. 95-830, p. 96 (1977) ("Section 303 is always included by reference where section 301 is listed"). As a consequence, [HN4]state water quality standards adopted pursuant to § 303 are among the "other limitations" with which a State may ensure compliance through the § 401 certification process. This interpretation is consistent with EPA's view of the statute. See 40 CFR § 121.2(a)(3) (1992); EPA, Wetlands and 401 Certification, *supra*. Moreover, limitations to assure compliance with state water quality standards are also permitted by § 401(d)'s reference to "any other appropriate requirement of State law." We do not speculate on what additional state laws, if any, might be incorporated by this language. [3] [***729] [**1910] But at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are "appropriate" requirements of state law. Indeed, petitioners appear to agree that the State's authority under § 401 includes limitations designed to ensure compliance with state water quality standards. Brief for Petitioners 9, 21.

3 The dissent asserts that § 301 is concerned solely with discharges, not broader water quality standards. *Post*, at 730, n. 2. Although § 301 does make certain discharges unlawful, see 33 U.S.C. § 1311(a), it also contains a broad enabling provision which requires States to take certain actions, to wit: "In order to carry out the objective of this chapter [viz. the chemical, physical, and biological integrity of the Nation's water] there shall be achieved . . . not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, . . . established pursuant to any State law or regula-

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tions . . . ." 33 U.S.C. § 1311(b)(1)(C). This provision of § 301 expressly refers to state water quality standards, and is not limited to discharges.

B

[***LEdHR1C] [1C] [***LEdHR4A] [4A]Having concluded that, [HN5]pursuant to § 401, States may condition certification upon any limitations necessary to ensure [*714] compliance with state water quality standards or any other "appropriate requirement of State law," we consider whether the minimum flow condition is such a limitation. Under § 303, state water quality standards must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). In imposing the minimum stream flow requirement, the State determined that construction and operation of the project as planned would be inconsistent with one of the designated uses of Class AA water, namely "salmonid [and other fish] migration, rearing, spawning, and harvesting." App. to Pet. for Cert. 83a-84a. The designated use of the river as a fish habitat directly reflects the Clean Water Act's goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Indeed, the Act defines pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water." § 1362(19). Moreover, the Act expressly requires that, in adopting water quality standards, the State must take into consideration the use of waters for "propagation of fish and wildlife." § 1313(c)(2)(A).

Petitioners assert, however, that § 303 requires the State to protect designated uses solely through implementation of specific "criteria." According to petitioners, the State may not require them to operate their dam in a manner consistent with a designated "use"; instead, say petitioners, under § 303 the State may only require that the project comply with specific numerical "criteria."

[***LEdHR4B] [4B]We disagree with petitioners' interpretation of the language of § 303(c)(2)(A). Under the statute, a water quality standard must "consist of the designated uses of the navigable waters involved *and* the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A) (emphasis added). The text makes it plain that water quality standards contain two components. We think the language [*715] of § 303 is most naturally read to require [***730] that a project be consistent with *both* components, namely, the designated use *and* the water quality criteria. Accordingly, under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.

Consequently, [HN6]pursuant to § 401(d) the State may require that a permit applicant comply with both the designated uses and the water quality criteria of the state standards. In granting certification pursuant to § 401(d), the State "shall set forth any . . . limitations . . . necessary to assure that [the applicant] will comply with any . . . limitations under [§ 303] . . . and with any other appropriate requirement of State law." A certification requirement that an applicant operate the project consistently with state water quality standards -- *i. e.*, consistently with the designated uses of the water body and the water quality criteria -- is both a "limitation" to assure "compl[iance] with . . . [**1911] limitations" imposed under § 303, and an "appropriate" requirement of state law.

EPA has not interpreted § 303 to require the States to protect designated uses exclusively through enforcement of numerical criteria. In its regulations governing state water quality standards, EPA defines criteria as "*elements* of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 CFR § 131.3(b) (1993) (emphasis added). The regulations further provide that "when criteria are met, water quality will *generally* protect the designated use." *Ibid.* (emphasis added). Thus, the EPA regulations implicitly recognize that in some circumstances, criteria alone are insufficient to protect a designated use.

Petitioners also appear to argue that use requirements are too open ended, and that the Act only contemplates enforcement of the more specific and objective "criteria." But this argument is belied by the open-ended nature of the criteria [*716] themselves. As the Solicitor General points out, even "criteria" are often expressed in broad, narrative terms, such as "'there shall be no discharge of toxic pollutants in toxic amounts.'" Brief for United States as *Amicus Curiae* 18. See *American Paper Institute, Inc. v. EPA*, 302 U.S. App. D.C. 80, 996 F.2d 346, 349 (CADC 1993). In fact, under the Clean Water Act, only one class of criteria, those governing "toxic pollutants listed pursuant to section 1317(a)(1)," need be rendered in numerical form. See 33 U.S.C. § 1313(c)(2)(B); 40 CFR § 131.11(b)(2) (1993).

Washington's Class AA water quality standards are typical in that they contain several open-ended criteria which, like the use designation of the river as a fishery, must be translated into specific limitations for individual projects. For example, the standards state that "toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use." WAC 173-201-045(1)(c)(vii) (1986). Similarly, the state standards specify that "aesthetic values shall not be impaired by the presence of materials or

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their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste." 173-201-045(1)(c)(viii). We think petitioners' [***731] attempt to distinguish between uses and criteria loses much of its force in light of the fact that the Act permits enforcement of broad, narrative criteria based on, for example, "aesthetics."

Petitioners further argue that enforcement of water quality standards through use designations renders the water quality criteria component of the standards irrelevant. We see no anomaly, however, in the State's reliance on both use designations and criteria to protect water quality. The specific numerical limitations embodied in the criteria are a convenient enforcement mechanism for identifying minimum water conditions which will generally achieve the requisite water quality. And, in most circumstances, satisfying the criteria will, as EPA recognizes, be sufficient to maintain the [*717] designated use. See 40 CFR § 131.3(b) (1993). Water quality standards, however, apply to an entire class of water, a class which contains numerous individual water bodies. For example, in the State of Washington, the Class AA water quality standard applies to 81 specified fresh surface waters, as well as to all "surface waters lying within the mountainous regions of the state assigned to national parks, national forests, and/or wilderness areas," all "lakes and their feeder streams within the state," and all "unclassified surface waters that are tributaries to Class AA waters." WAC 173-201-070 (1986). While enforcement of criteria will in general protect the uses of these diverse waters, a complementary requirement that activities also comport with designated uses enables the States to ensure that each activity -- even if not foreseen by the criteria -- will be consistent with the specific uses and attributes of a particular body of water.

Under petitioners' interpretation of the statute, however, if a particular criterion, such as turbidity, were missing from the list [**1912] contained in an individual state water quality standard, or even if an existing turbidity criterion were insufficient to protect a particular species of fish in a particular river, the State would nonetheless be forced to allow activities inconsistent with the existing or designated uses. We think petitioners' reading leads to an unreasonable interpretation of the Act. The criteria components of state water quality standards attempt to identify, for all the water bodies in a given class, water quality requirements generally sufficient to protect designated uses. These criteria, however, cannot reasonably be expected to anticipate all the water quality issues arising from every activity that can affect the State's hundreds of individual water bodies. Requiring the States to enforce only the criteria component of their water quality standards would in essence require the States to study to a level of great specificity each individual surface water to ensure that the criteria applicable to that water are sufficiently detailed and individualized to fully protect the [*718] water's designated uses. Given that there is no textual support for imposing this requirement, we are loath to attribute to Congress an intent to impose this heavy regulatory burden on the States.

The State also justified its minimum stream flow as necessary to implement the "antidegradation policy" of § 303, 33 U.S.C. § 1313(d)(4)(B). When the Clean Water Act was enacted in 1972, the water quality standards of [***732] all 50 States had antidegradation provisions. These provisions were required by federal law. See U.S. Dept. of Interior, Federal Water Pollution Control Administration, Compendium of Department of Interior Statements on Non-degradation of Interstate Waters 1-2 (Aug. 1968); see also Hines, A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water, 62 Iowa L. Rev. 643, 658-660 (1977). By providing in 1972 that existing state water quality standards would remain in force until revised, the Clean Water Act ensured that the States would continue their antidegradation programs. See 33 U.S.C. § 1313(a). EPA has consistently required that revised state standards incorporate an antidegradation policy. And, in 1987, Congress explicitly recognized the existence of an "antidegradation policy established under [§ 303]." § 1313(d)(4)(B).

EPA has promulgated regulations implementing § 303's antidegradation policy, a phrase that is not defined elsewhere in the Act. These regulations require States to "develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy." 40 CFR § 131.12 (1993). These "implementation methods shall, at a minimum, be consistent with the . . . existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." *Ibid.* EPA has explained that under its antidegradation regulation, "no activity is allowable . . . which could partially or completely eliminate any existing use." EPA, Questions and [*719] Answers on Antidegradation 3 (Aug. 1985). Thus, States must implement their antidegradation policy in a manner "consistent" with existing uses of the stream. The State of Washington's antidegradation policy in turn provides that "existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed." WAC 173-201-035(8)(a) (1986). The State concluded that the reduced stream flows would have just the effect prohibited by this policy. The Solicitor General, representing EPA, asserts, Brief for United States as *Amicus Curiae* 18-21, and we agree, that the State's minimum stream flow condition is a proper application

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of the state and federal antidegradation regulations, as it ensures that an "existing instream water use" will be "maintained and protected." 40 CFR § 131.12(a)(1) (1993).

Petitioners also assert more generally that the Clean Water Act is only concerned with water "quality," and does not allow the regulation of water "quantity." This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the [**1913] water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery. In any event, [HN7]there is recognition in the Clean Water Act itself that reduced stream flow, *i. e.*, diminishment of water quantity, can constitute water pollution. First, the Act's definition of pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water" encompasses the effects of reduced water quantity. 33 U.S.C. § 1362(19). This broad conception of pollution -- one which [***733] expressly evinces Congress' concern with the physical and biological integrity of water -- refutes petitioners' assertion that the Act draws a sharp distinction between the regulation of water "quantity" and water "quality." Moreover, § 304 of the Act expressly recognizes that water "pollution" may result from "changes [*720] in the movement, flow, or circulation of any navigable waters . . ., including changes caused by the construction of dams." 33 U.S.C. § 1314(f). This concern with the flowage effects of dams and other diversions is also embodied in the EPA regulations, which expressly require existing dams to be operated to attain designated uses. 40 CFR § 131.10(g)(4) (1992).

Petitioners assert that two other provisions of the Clean Water Act, §§ 101(g) and 510(2), 33 U.S.C. §§ 1251(g) and 1370(2), exclude the regulation of water quantity from the coverage of the Act. Section 101(g) provides "that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." 33 U.S.C. § 1251(g). Similarly, § 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." 33 U.S.C. § 1370. In petitioners' view, these provisions exclude "water quantity issues from direct regulation under the federally controlled water quality standards authorized in § 303." Brief for Petitioners 39 (emphasis deleted).

This language gives the States authority to allocate water rights; we therefore find it peculiar that petitioners argue that it prevents the State from regulating stream flow. In any event, we read these provisions more narrowly than petitioners. [HN8]Sections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation. In *California* v. *FERC*, 495 U.S. 490, 498, 109 L. Ed. 2d 474, 110 S. Ct. 2024 (1990), construing an analogous provision of the Federal Power Act, [4] we explained that "minimum stream [*721] flow requirements neither reflect nor establish 'proprietary rights'" to water. Cf. *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152, 176, 90 L. Ed. 1143, 66 S. Ct. 906, and n. 20 (1946). Moreover, the certification itself does not purport to determine petitioners' proprietary right to the water of the Dosewallips. In fact, the certification expressly states that a "State Water Right Permit (Chapters 90.03.250 RCW and 508-12 WAC) must be obtained prior to commencing construction of the project." App. to Pet. for Cert. 83a. The certification merely determines the nature of the use to which that proprietary right may be put under the Clean Water Act, if and when it is obtained from the State. Our view is reinforced by the legislative history of the 1977 [***734] amendment to the Clean Water Act adding § 101(g). See 3 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 532 (1978) ("The requirements [of the Act] may incidentally affect individual water rights. . . . [**1914] It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations").

4 The relevant text of the Federal Power Act provides: "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat. 1077, 16 U.S.C. § 821.

IV

Petitioners contend that we should limit the State's authority to impose minimum flow requirements because FERC has comprehensive authority to license hydroelectric projects pursuant to the FPA, 16 U.S.C. § 791a *et seq.* In petitioners' view, the minimum flow requirement imposed here interferes with FERC's authority under the FPA.

[*722] The FPA empowers FERC to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power

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across, along, from, or in any of the streams . . . over which Congress has jurisdiction." § 797(e). The FPA also requires FERC to consider a project's effect on fish and wildlife. §§ 797(e), 803(a)(1). In *California v. FERC, supra*, we held that the California Water Resources Control Board, acting pursuant to state law, could not impose a minimum stream flow which conflicted with minimum stream flows contained in a FERC license. We concluded that the FPA did not "save" to the States this authority. *Id.*, 495 U.S. at 498.

[***LEdHR1D] [1D]No such conflict with any FERC licensing activity is presented here. FERC has not yet acted on petitioners' license application, and it is possible that FERC will eventually deny petitioners' application altogether. Alternatively, it is quite possible, given that FERC is required to give equal consideration to the protection of fish habitat when deciding whether to issue a license, that any FERC license would contain the same conditions as the state § 401 certification. Indeed, at oral argument the Deputy Solicitor General stated that both EPA and FERC were represented in this proceeding, and that the Government has no objection to the stream flow condition contained in the § 401 certification. Tr. of Oral Arg. 43-44.

Finally, the requirement for a state certification applies not only to applications for licenses from FERC, but to all federal licenses and permits for activities which may result in a discharge into the Nation's navigable waters. For example, a permit from the Army Corps of Engineers is required for the installation of any structure in the navigable waters which may interfere with navigation, including piers, docks, and ramps. Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1151, § 10, 33 U.S.C. § 403. Similarly, a permit must be obtained from the Army Corps of Engineers [*723] for the discharge of dredged or fill material, and from the Secretary of the Interior or Agriculture for the construction of reservoirs, canals, and other water storage systems on federal land. See 33 U.S.C. §§ 1344(a), (e); 43 U.S.C. § 1761 (1988 ed. and Supp. IV). [***735] We assume that a § 401 certification would also be required for some licenses obtained pursuant to these statutes. Because § 401's certification requirement applies to other statutes and regulatory schemes, and because any conflict with FERC's authority under the FPA is hypothetical, we are unwilling to read implied limitations into § 401. If FERC issues a license containing a stream flow condition with which petitioners disagree, they may pursue judicial remedies at that time. Cf. *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 778, n. 20, 80 L. Ed. 2d 753, 104 S. Ct. 2105 (1984).

In summary, we hold that [HN9]the State may include minimum stream flow requirements in a certification issued pursuant to § 401 of the Clean Water Act insofar as necessary to enforce a designated use contained in a state water quality standard. The judgment of the Supreme Court of Washington, accordingly, is affirmed.

So ordered.

CONCUR BY: STEVENS

CONCUR

JUSTICE STEVENS, concurring.

While I agree fully with the thorough analysis in the Court's opinion, I add this comment [**1915] for emphasis. For judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case. Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards. See, *e. g.*, § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

DISSENT BY: THOMAS

DISSENT

[*724] JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court today holds that a State, pursuant to § 401 of the Clean Water Act, may condition the certification necessary to obtain a federal license for a proposed hydroelectric project upon the maintenance of a minimum flow rate in the river to be utilized by the project. In my view, the Court makes three fundamental errors. First, it adopts an interpretation that fails adequately to harmonize the subsections of § 401. Second, it places no meaningful limitation on a State's authority under § 401 to impose conditions on certification. Third, it gives little or no consideration to the fact that its interpretation of § 401 will significantly disrupt the carefully crafted federal-state balance embodied in the Federal Power Act. Accordingly, I dissent.

I

A

Section 401(a)(1) of the Federal Water Pollution Control Act, otherwise known as the Clean Water Act (CWA or Act), 33 U.S.C. § 1251 *et seq.*, provides that "any applicant for a Federal license or permit to conduct any activity . . ., which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the

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discharge originates . . . that any such [***736] discharge will comply with . . . applicable provisions of [the CWA]." 33 U.S.C. § 1341(a)(1). The terms of § 401(a)(1) make clear that the purpose of the certification process is to ensure that discharges from a project will meet the requirements of the CWA. Indeed, a State's authority under § 401(a)(1) is limited to certifying that "any discharge" that "may result" from "any activity," such as petitioners' proposed hydroelectric project, will "comply" with the enumerated provisions of the CWA; if the discharge will fail to comply, the State may "deny" the certification. *Ibid.* In addition, under § 401(d), a State may place conditions on a [*725] § 401 certification, including "effluent limitations and other limitations, and monitoring requirements," that may be necessary to ensure compliance with various provisions of the CWA and with "any other appropriate requirement of State law." § 1341(d).

The minimum stream flow condition imposed by respondents in this case has no relation to any possible "discharge" that might "result" from petitioners' proposed project. The term "discharge" is not defined in the CWA, but its plain and ordinary meaning suggests "a flowing or issuing out," or "something that is emitted." Webster's Ninth New Collegiate Dictionary 360 (1991). Cf. 33 U.S.C. § 1362(16) ("The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants"). A minimum stream flow requirement, by contrast, is a limitation on the amount of water the project can take in or divert from the river. See *ante*, at 709. That is, a minimum stream flow requirement is a limitation on intake -- the opposite of discharge. Imposition of such a requirement would thus appear to be beyond a State's authority as it is defined by § 401(a)(1).

The Court remarks that this reading of § 401(a)(1) would have "considerable force," *ante*, at 711, were it not for what the Court understands to be the expansive terms of § 401(d). That subsection, as set forth in 33 U.S.C. § 1341(d), provides:

> "Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that *any applicant* for a Federal license or permit [**1916] will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal [*726] license or permit subject to the provisions of this section." (Emphasis added.)

According to the Court, the fact that § 401(d) refers to an "applicant," rather than a "discharge," complying with various provisions of the Act "contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a 'discharge.'" *Ante*, at 711. In the Court's view, § 401(d)'s reference to an applicant's compliance "expands" a State's authority beyond the limits set out in § 401(a)(1), *ibid.*, [***737] thereby permitting the State in its certification process to scrutinize the applicant's proposed "activity as a whole," not just the discharges that may result from the activity, *ante*, at 712. The Court concludes that this broader authority allows a State to impose conditions on a § 401 certification that are unrelated to discharges. *Ante*, at 711-712.

While the Court's interpretation seems plausible at first glance, it ultimately must fail. If, as the Court asserts, § 401(d) permits States to impose conditions unrelated to discharges in § 401 certifications, Congress' careful focus on discharges in § 401(a)(1) -- the provision that describes the scope and function of the certification process -- was wasted effort. The power to set conditions that are unrelated to discharges is, of course, nothing but a conditional power to deny certification for reasons unrelated to discharges. Permitting States to impose conditions unrelated to discharges, then, effectively eliminates the constraints of § 401(a)(1).

Subsections 401(a)(1) and (d) can easily be reconciled to avoid this problem. To ascertain the nature of the conditions permissible under § 401(d), § 401 must be read as a whole. See *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 98 L. Ed. 2d 740, 108 S. Ct. 626 (1988) (statutory interpretation is a "holistic endeavor"). As noted above, § 401(a)(1) limits a State's authority in the certification process to addressing concerns related to discharges and to ensuring that any discharge resulting from a project will comply with specified provisions of the Act. It is reasonable [*727] to infer that the conditions a State is permitted to impose on certification must relate to the very purpose the certification process is designed to serve. Thus, while § 401(d) permits a State to place conditions on a certification to ensure compliance of the "applicant," those conditions must still be related to discharges. In my view, this interpretation best harmonizes the subsections of § 401. Indeed, any broader interpretation of § 401(d) would permit that subsection to swallow § 401(a)(1).

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The text of § 401(d) similarly suggests that the conditions it authorizes must be related to discharges. The Court attaches critical weight to the fact that § 401(d) speaks of the compliance of an "applicant," but that reference, in and of itself, says little about the nature of the conditions that may be imposed under § 401(d). Rather, because § 401(d) conditions can be imposed only to ensure compliance with specified provisions of law -- that is, with "applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard[s] of performance under section 1316 of this title, . . . prohibition[s], effluent standard[s], or pretreatment standard[s] under section 1317 of this title, [or] . . . any other appropriate requirement[s] of State law" -- one should logically turn to those provisions for guidance in determining the nature, scope, and purpose of § 401(d) conditions. Each of the four identified CWA provisions describes discharge-related limitations. See § 1311 (making it unlawful to discharge any pollutant except in compliance with enumerated provisions of the Act); § 1312 (establishing effluent limitations on point source discharges); [***738] § 1316 (setting national standards of performance [**1917] for the control of discharges); and § 1317 (setting pretreatment effluent standards and prohibiting the discharge of certain effluents except in compliance with standards).

The final term on the list -- "appropriate requirement[s] of State law" -- appears to be more general in scope. Because [*728] this reference follows a list of more limited provisions that specifically address discharges, however, the principle *ejusdem generis* would suggest that the general reference to "appropriate" requirements of state law is most reasonably construed to extend only to provisions that, like the other provisions in the list, impose discharge-related restrictions. Cf. *Cleveland v. United States*, 329 U.S. 14, 18, 91 L. Ed. 12, 67 S. Ct. 13 (1946) ("Under the *ejusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it"); *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 84, 112 L. Ed. 2d 374, 111 S. Ct. 415 (1990). In sum, the text and structure of § 401 indicate that a State may impose under § 401(d) only those conditions that are related to discharges.

B

The Court adopts its expansive reading of § 401(d) based at least in part upon deference to the "conclusion" of the Environmental Protection Agency (EPA) that § 401(d) is not limited to requirements relating to discharges. *Ante*, at 712. The agency regulation to which the Court defers is 40 CFR § 121.2(a)(3) (1993), which provides that the certification shall contain "[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." *Ante*, at 712. According to the Court, "EPA's conclusion that *activities* -- not merely discharges -- must comply with state water quality standards . . . is entitled to deference" under *Chevron* U.S. *A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). *Ante*, at 712.

As a preliminary matter, the Court appears to resort to deference under *Chevron* without establishing through an initial examination of the statute that the text of the section is ambiguous. See *Chevron, supra*, 467 U.S. at 842-843. More importantly, the Court invokes *Chevron* deference to support its interpretation even though the Government does not seek [*729] deference for the EPA's regulation in this case. [1] That the Government itself has not contended that an agency interpretation exists reconciling the scope of the conditioning authority under § 401(d) with the terms of § 401(a)(1) should suggest to the Court that there is no "agency construction" directly addressing the question. *Chevron, supra*, at 842.

1 The Government, appearing as *amicus curiae* "supporting affirmance," instead approaches the question presented by assuming, *arguendo*, that petitioners' construction of § 401 is correct: "Even if a condition imposed under Section 401(d) were valid only if it assured that a 'discharge' will comply with the State's water quality standards, the [minimum flow condition set by respondents] satisfies that test." Brief for United States as *Amicus Curiae* 11.

In fact, the regulation to which the [***739] Court defers is hardly a definitive construction of the scope of § 401(d). On the contrary, the EPA's position on the question whether conditions under § 401(d) must be related to discharges is far from clear. Indeed, the only EPA regulation that specifically addresses the "conditions" that may appear in § 401 certifications speaks exclusively in terms of limiting discharges. According to the EPA, a § 401 certification shall contain "[a] statement *of any conditions* which the certifying agency deems necessary or desirable *with respect to the discharge of the activity*." 40 CFR § 121.2(a)(4) (1993) (emphases added). In my view, § 121.2(a)(4) should, at the very least, give the Court pause before it resorts to *Chevron* deference in this case.

II

The Washington Supreme Court held that the State's water quality standards, promulgated [**1918] pursuant to § 303 of the Act, 33 U.S.C. § 1313, were "appropriate" requirements of state law under § 401(d), and sustained the stream flow condition imposed by respondents as necessary to ensure compliance with a "use" of

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the river as specified in those standards. As an alternative to their argument that § 401(d) conditions must be discharge related, petitioners assert that [*730] the state court erred when it sustained the stream flow condition under the "use" component of the State's water quality standards without reference to the corresponding "water quality criteria" contained in those standards. As explained above, petitioners' argument with regard to the scope of a State's authority to impose conditions under § 401(d) is correct. I also find petitioners' alternative argument persuasive. Not only does the Court err in rejecting that § 303 argument, in the process of doing so it essentially removes all limitations on a State's conditioning authority under § 401.

The Court states that, "at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are 'appropriate' requirements of state law" under § 401(d). *Ante*, at 713. [2] A water quality standard promulgated pursuant to § 303 must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). The Court asserts that this language "is most naturally read to require that a project be consistent with *both* components, namely, the designated use *and* the water quality criteria." *Ante*, at 715. In the Court's view, then, the "use" of a body of water is independently enforceable through § 401(d) without reference to the corresponding criteria. *Ibid.*

> 2 In the Court's view, § 303 water quality standards come into play under § 401(d) either as "appropriate" requirements of state law or through § 301 of the Act, which, according to the Court, "incorporates § 303 by reference." *Ante*, at 713 (citations omitted). The Court notes that through § 303, "the statute allows States to impose limitations to ensure compliance with § 301 of the Act." *Ibid.* Yet § 301 makes unlawful only "the [unauthorized] *discharge* of any pollutant by any person." 33 U.S.C. § 1311(a) (emphasis added); cf. *supra*, 511 U.S. at 727. Thus, the Court's reliance on § 301 as a source of authority to impose conditions unrelated to discharges is misplaced.

[***740] The Court's reading strikes me as contrary to common sense. It is difficult to see how compliance with a "use" of a body of water could be enforced without reference to the [*731] corresponding criteria. In this case, for example, the applicable "use" is contained in the following regulation: "Characteristic uses shall include, but not be limited to, . . . salmonid migration, rearing, spawning, and harvesting." Wash. Admin. Code (WAC) 173-201-045(1)(b)(iii) (1986). The corresponding criteria, by contrast, include measurable factors such as quantities of fecal coliform organisms and dissolved gases in the water. 173-201-045(1)(c)(i) and (ii). [3] Although the Act does not further address (at least not expressly) the link between "uses" and "criteria," the regulations promulgated under § 303 make clear that a "use" is an aspirational goal to be attained through compliance with corresponding "criteria." Those regulations suggest that "uses" are to be "achieved and protected," and that "water quality criteria" are to be adopted to "protect the designated use[s]." 40 CFR §§ 131.10(a), 131.11(a)(1) (1993).

> 3 Respondents concede that petitioners' project "will likely not violate any of Washington's water quality criteria." Brief for Respondents 24.

The problematic consequences of decoupling "uses" and "criteria" become clear once the Court's interpretation of § 303 is read in the context of § 401. In the Court's view, a State may condition the § 401 certification "upon *any limitations* necessary to ensure compliance" with the "uses of the water body." *Ante*, at 713-714, 715 (emphasis added). Under the Court's interpretation, then, state environmental agencies may pursue, through § 401, their water goals in any way they choose; the conditions imposed on certifications need not relate to discharges, nor to water quality criteria, nor to any objective or quantifiable standard, so long as they tend to [**1919] make the water more suitable for the uses the State has chosen. In short, once a State is allowed to impose conditions on § 401 certifications to protect "uses" in the abstract, § 401(d) is limitless.

To illustrate, while respondents in this case focused only on the "use" of the Dosewallips River as a fish habitat, this particular river has a number of other "characteristic uses," [*732] including "recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment)." WAC 173-201-045(1)(b)(v) (1986). Under the Court's interpretation, respondents could have imposed any number of conditions related to recreation, including conditions that have little relation to water quality. In *Town of Summersville*, 60 F.E.R.C. P61,291, p. 61,990 (1992), for instance, the state agency required the applicant to "construct . . . access roads and paths, low water stepping stone bridges, . . . a boat launching facility . . ., and a residence and storage building." These conditions presumably would be sustained under the approach the Court adopts today. [4] In the end, it is difficult to conceive of a condition that would fall outside a [***741] State's § 401(d) authority under the Court's approach.

> 4 Indeed, as the § 401 certification stated in this case, the flow levels imposed by respondents

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are "in excess of those required to maintain water quality in the bypass region," App. to Pet. for Cert. 83a, and therefore conditions not related to water quality must, in the Court's view, be permitted.

III

The Court's interpretation of § 401 significantly disrupts the careful balance between state and federal interests that Congress struck in the Federal Power Act (FPA), 16 U.S.C. § 791 *et seq.* Section 4(e) of the FPA authorizes the Federal Energy Regulatory Commission (FERC) to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction." 16 U.S.C. § 797(e). In the licensing process, FERC must balance a number of considerations: "In addition to the power and development purposes for which licenses are issued, [FERC] shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational [*733] opportunities, and the preservation of other aspects of environmental quality." *Ibid.* Section 10(a) empowers FERC to impose on a license such conditions, including minimum stream flow requirements, as it deems best suited for power development and other public uses of the waters. See 16 U.S.C. § 803(a); *California* v. *FERC*, 495 U.S. 490, 494-495, 506, 109 L. Ed. 2d 474, 110 S. Ct. 2024 (1990).

In *California* v. *FERC*, the Court emphasized FERC's exclusive authority to set the stream flow levels to be maintained by federally licensed hydroelectric projects. California, in order "to protect [a] stream's fish," had imposed flow rates on a federally licensed project that were significantly higher than the flow rates established by FERC. *Id.*, at 493. In concluding that California lacked authority to impose such flow rates, we stated:

> "As Congress directed in FPA § 10(a), FERC set the conditions of the [project] license, including the minimum stream flow, after considering which requirements would best protect wildlife and ensure that the project would be economically feasible, and thus further power development. Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination. FERC has indicated that the California requirements interfere with its comprehensive planning authority, and we agree that allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would constitute a veto of the project that was approved and licensed by [**1920] FERC." *Id.*, 495 U.S. at 506-507 (citations and internal quotation marks omitted).

California v. *FERC* reaffirmed our decision in *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152, 164, 90 L. Ed. 1143, 66 S. Ct. 906 (1946), in which we warned against "vesting in [state authorities] [*734] a veto power" over federal hydroelectric projects. Such authority, we concluded, could "destroy the effectiveness" of the FPA and "subordinate to the control of the State the 'comprehensive' [***742] planning" with which the administering federal agency (at that time the Federal Power Commission) was charged. *Ibid.*

Today, the Court gives the States precisely the veto power over hydroelectric projects that we determined in *California* v. *FERC* and *First Iowa* they did not possess. As the language of § 401(d) expressly states, any condition placed in a § 401 certification, including, in the Court's view, a stream flow requirement, "*shall* become a condition on any Federal license or permit." 33 U.S.C. § 1341(d) (emphasis added). Any condition imposed by a State under § 401(d) thus becomes a "term . . . of the license as a matter of law," *Department of Interior* v. *FERC*, 293 U.S. App. D.C. 182, 952 F.2d 538, 548 (CADC 1992) (citation and internal quotation marks omitted), regardless of whether FERC favors the limitation. Because of § 401(d)'s mandatory language, federal courts have uniformly held that FERC has no power to alter or review § 401 conditions, and that the proper forum for review of those conditions is state court. [5] Section 401(d) conditions imposed by States are [*735] therefore binding on FERC. Under the Court's interpretation, then, it appears that the mistake of the State in *California* v. *FERC* was not that it had trespassed into territory exclusively reserved to FERC; rather, it simply had not hit upon the proper device -- that is, the § 401 certification -- through which to achieve its objectives.

> 5 See, *e. g.*, *Keating* v. *FERC*, 288 U.S. App. D.C. 344, 927 F.2d 616, 622 (CADC 1991) (federal review inappropriate because a decision to grant or deny § 401 certification "presumably turns on questions of substantive state environmental law -- an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence");

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> *Department of Interior* v. *FERC*, 952 F.2d at 548; *United States* v. *Marathon Development Corp.*, 867 F.2d 96, 102 (CA1 1989); *Proffitt* v. *Rohm & Haas*, 850 F.2d 1007, 1009 (CA3 1988). FERC has taken a similar position. See *Town of Summersville*, 60 F.E.R.C. P61,291, p. 61,990 (1992) ("Since pursuant to Section 401(d) . . . all of the conditions in the water quality certification must become conditions in the license, review of the appropriateness of the conditions is within the purview of state courts and not the Commission. The only alternatives available to the Commission are either to issue a license with the conditions included or to deny" the application altogether); accord, *Central Maine Power Co.*, 52 F.E.R.C. P61,033, pp. 61,172-61,173 (1990).

Although the Court notes in passing that "the limitations included in the certification become a condition on any federal license," *ante*, at 708, it does not acknowledge or discuss the shift of power from FERC to the States that is accomplished by its decision. Indeed, the Court merely notes that "any conflict with FERC's authority under the FPA" in this case is "hypothetical" at this stage, *ante*, at 723, because "FERC has not yet acted on petitioners' license application," *ante*, at 722. We are assured that "it is quite possible . . . that any FERC license would contain the same conditions as the state § 401 certification." *Ibid.*

The Court's observations simply miss the point. Even if FERC might have no objection to the stream flow condition established by respondents *in this case*, such a happy coincidence will likely prove to be the exception, rather than the rule. In issuing licenses, FERC must balance the *Nation's* power needs together with the need for energy conservation, [***743] irrigation, flood control, fish and wildlife protection, and recreation. 16 U.S.C. § 797(e). State environmental agencies, by contrast, need only consider parochial environmental interests. Cf., *e. g.*, Wash. Rev. Code § 90.54.010(2) (1992) (goal of State's water policy is to "insure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington"). As a result, it is likely that conflicts will arise between a [**1921] FERC-established stream flow level and a state-imposed level.

Moreover, the Court ignores the fact that its decision nullifies the congressionally mandated process for resolving such state-federal disputes when they develop. Section 10(j)(1) of the FPA, 16 U.S.C. § 803(j)(1), which was added as part [*736] of the Electric Consumers Protection Act of 1986 (ECPA), 100 Stat. 1244, provides that every FERC license must include conditions to "protect, mitigate damage to, and enhance" fish and wildlife, including "related spawning grounds and habitat," and that such conditions "shall be based on recommendations" received from various agencies, including state fish and wildlife agencies. If FERC believes that a recommendation from a state agency is inconsistent with the FPA -- that is, inconsistent with what FERC views as the proper balance between the Nation's power needs and environmental concerns -- it must "attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities" of the state agency. § 803(j)(2). If, after such an attempt, FERC "does not adopt in whole or in part a recommendation of any [state] agency," it must publish its reasons for rejecting that recommendation. *Ibid.* After today's decision, these procedures are a dead letter with regard to stream flow levels, because a State's "recommendation" concerning stream flow "shall" be included in the license when it is imposed as a condition under § 401(d).

More fundamentally, the 1986 amendments to the FPA simply make no sense in the stream flow context if, in fact, the States already possessed the authority to establish minimum stream flow levels under § 401(d) of the CWA, which was enacted years before those amendments. Through the ECPA, Congress strengthened the role of the States in establishing FERC conditions, but it did not make that authority paramount. Indeed, although Congress could have vested in the States the final authority to set stream flow conditions, it instead left that authority with FERC. See *California* v. *FERC*, 495 U.S. at 499. As the Ninth Circuit observed in the course of rejecting California's effort to give *California* v. *FERC* a narrow reading, "there would be no point in Congress requiring [FERC] to consider the state agency recommendations on environmental matters and [*737] make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves." *Sayles Hydro Associates* v. *Maughan*, 985 F.2d 451, 456 (1993).

Given the connection between § 401 and federal hydroelectric licensing, it is remarkable that the Court does not at least attempt to fit its interpretation of § 401 into the larger statutory framework governing the licensing process. At the very least, the significant impact the [***744] Court's ruling is likely to have on that process should compel the Court to undertake a closer examination of § 401 to ensure that the result it reaches was mandated by Congress.

IV

Because the Court today fundamentally alters the federal-state balance Congress carefully crafted in the FPA, and because such a result is neither mandated nor supported by the text of § 401, I respectfully dissent.

REFERENCES

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61A Am Jur 2d, Pollution Control 133, 142, 144, 151, 158; 78 Am Jur 2d, Waters 292

11 Federal Procedure, L Ed, Environmental Protection 32:262; 24 Federal Procedure, L Ed, Natural and Marine Resources 56:313, 56:315

9 Federal Procedural Forms, L Ed, Environmental Protection 29:91

20 Am Jur Pl & Pr Forms (Rev), Pollution Control, Form 81

33 USCS 1341

L Ed Digest, Energy 30; Environmental Law 32, 40; Waters 20

L Ed Index, Hydroelectric Power; Water Pollution

ALR Index, Federal Water Pollution Control Act; Hydroelectric Power; Water Pollution

Annotation References:

Supreme Court's views as to construction and application of Federal Water Pollution Control (Clean Water) Act (33 USCS 1251-1376). 84 L Ed 2d 895.

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LEXSEE

Caution
As of: Jun 17, 2010

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.

D042385

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

124 Cal. App. 4th 866; 22 Cal. Rptr. 3d 128; 2004 Cal. App. LEXIS 2073; 2004 Cal. Daily Op. Service 10694; 2004 Daily Journal DAR 14492; 34 ELR 20149

December 7, 2004, Filed

NOTICE:

As modified Jan. 4, 2005. [***1] CERTIFIED FOR PARTIAL PUBLICATION [1]

1 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.

SUBSEQUENT HISTORY: Modified by, Rehearing denied by Building Industry Assn. v. State Water Resources Control Bd., 2005 Cal. App. LEXIS 7 (Cal. App. 4th Dist., Jan. 4, 2005)
Time for Granting or Denying Review Extended Building Industry Assn. of San Diego v. Calif Regional Water Qlty Bd., 2005 Cal. LEXIS 2502 (Cal., Feb. 24, 2005)
Review denied by, Request denied by Building Industry Association of San Diego County v. California Regional Water Quality Control Board, 2005 Cal. LEXIS 3489 (Cal., Mar. 30, 2005)

PRIOR HISTORY: Superior Court of San Diego County, No. GIC 780263, Wayne L. Peterson, Judge.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff building industry association filed an administrative appeal with defendant California Water Resources Control Board (State Water Board) regarding the Board's issuance of a comprehensive municipal storm sewer permit. The Board denied the appeal. The association then petitioned for a writ of mandate, asserting numerous claims. The Superior Court of San Diego County, California, found the association failed to prove its claims.

OVERVIEW: The association argued that the permit violated federal law because it allowed the State Water Board and a regional water board to impose municipal storm sewer control measures more stringent than a federal standard known as "maximum extent practicable" set forth in 33 U.S.C.S. § 1342(p)(3)(B)(iii). The instant court held the language of § 1342(p)(3)(B)(iii) communicates the basic principle that the Environmental Protection Agency, and/or a state approved to issue a National Pollution Discharge Elimination System (NPDES) permit, retains the discretion to impose "appropriate" water pollution controls in addition to those that come within the definition of "maximum extent practicable." The NPDES permit did not violate federal law. The water boards had the authority to include a permit provision requiring compliance with the more stringent state water quality standards.

OUTCOME: The judgment was affirmed.

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CORE TERMS: water quality, water board, storm sewer, Clean Water Act, 'practicable', pollution, maximum, pollutant, municipality, municipal, regional, federal law, environmental, effluent, stringent, challenging, runoff, storm, state laws, regulatory agency, "point sources", iterative, stormwater, entity, Conservation Laws, statutory language, waste discharge, permit requirements, strict compliance, industrial

LexisNexis(R) Headnotes

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
[HN1]The Clean Water Act employs the basic strategy of prohibiting pollutant emissions from "point sources" unless the party discharging the pollutants obtains a National Pollution Discharge Elimination System (NPDES) permit. It is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. 33 U.S.C.S. § 1311(a). An NPDES permit is issued by the Environmental Protection Agency or by a state that has a federally-approved water quality program. 33 U.S.C.S. § 1342(a), (b). Before an NPDES is issued, the federal or state regulatory agency must follow an extensive administrative hearing procedure. 40 C.F.R. §§ 124.3, 124.6, 124.8, 124.10. NPDES permits are valid for five years. 33 U.S.C.S. § 1342(b)(1)(B).

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Point Sources
[HN2]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. 33 U.S.C.S. § 1362(14).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
Real Property Law > Water Rights > Beneficial Use
[HN3]Under the Clean Water Act, the proper scope of the controls in a National Pollution Discharge Elimination System (NPDES) permit depends on the applicable state water quality standards for the affected water bodies. Each state is required to develop water quality standards that establish the desired condition of a waterway. 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. As enacted in 1972, the 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. 33 U.S.C.S. §§ 1311, 1362(11).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
Governments > Local Governments > Licenses
[HN4]In 1987, Congress amended the Clean Water Act to add provisions that specifically concerned National Pollution Discharge Elimination System (NPDES) permit requirements for storm sewer discharges. 33 U.S.C.S. § 1342(p). 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 municipal storm water discharges, Congress clarified that the Environmental Protection Agency 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. 33 U.S.C.S. § 1342(p)(3)(B)(iii).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN5]See 33 U.S.C.S. § 1342(p)(3)(B)(iii).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
[HN6]See Cal. Water Code § 13377.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Real Property Law > Water Rights > Beneficial Use
[HN7]See Cal. Water Code § 13374.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Public Participation
Governments > Local Governments > Licenses
[HN8]The waste discharge requirements issued by the regional water boards ordinarily also serve as National Pollution Discharge Elimination System permits under federal law. Cal. Water Code § 13374.

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Administrative Law > Judicial Review > Reviewability > Standing
Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus
Environmental Law > Water Quality > General Overview
[HN9]See Cal. Water Code § 13330(b).

Administrative Law > Judicial Review > Reviewability > Standing
Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus
Evidence > Inferences & Presumptions > Presumption of Regularity
[HN10]Where a party has been aggrieved by a final decision of a regional water board for which the California Water Resources Control Board denies review, Cal. Code Civ. Proc. § 1094.5 governs the writ of mandate proceedings, and the superior court must exercise its independent judgment in examining the evidence and resolving factual disputes. Cal. Water Code § 13330(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.

Administrative Law > Judicial Review > Administrative Record > General Overview
Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN11]In reviewing the trial court's factual determinations on the administrative record, an appellate court applies a substantial evidence standard. However, in reviewing the trial court's legal determinations, an appellate court conducts a de novo review. Thus, the appellate court is not bound by the legal determinations made by the state or regional agencies or by the trial court, but it must give appropriate consideration to an administrative agency's expertise underlying its interpretation of an applicable statute.

Environmental Law > Water Quality > General Overview
[HN12]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, 33 U.S.C.S. § 1370, and California law specifically allows the imposition of controls more stringent than federal law, Cal. Water Code § 13377.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN13]The language of 33 U.S.C.S. § 1342(p)(3)(B)(iii) does communicate the basic principle that the Environmental Protection Agency (and/or a state approved to issue a National Pollution Discharge Elimination System permit) retains the discretion to impose "appropriate" water pollution controls in addition to those that come within the definition of "maximum extent practicable."

Governments > Legislation > Interpretation
[HN14]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. 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.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
Governments > Public Improvements > General Overview
[HN15]With respect to National Pollution Discharge Elimination System (NPDES) permits, the legislative purpose underlying the Water Quality Act of 1987, and 33 U.S.C.S. § 1342(p) in particular, supports that Congress intended to provide the Environmental Protection Agency (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 that compliance will be achieved primarily through an iterative process.

Administrative Law > Judicial Review > Standards of Review > Statutory Interpretation
Governments > Legislation > Interpretation
[HN16]A court is required to give substantial deference to an administrative interpretation of a statute.

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Civil Procedure > Appeals > Standards of Review > Reversible Errors
Evidence > Inferences & Presumptions > General Overview
[HN17]All judgments and orders are presumed correct, and persons challenging them must affirmatively show reversible error.

Civil Procedure > Appeals > Briefs
[HN18]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.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN19]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.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN20]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.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A building industry association filed an administrative appeal with the State Water Resources Control Board regarding the board's issuance of a comprehensive municipal storm sewer permit. The board denied the appeal. The association then petitioned for a writ of mandate, asserting numerous claims. Three environmental groups intervened as defendants. The trial court found the association failed to prove its claims. The association argued that the permit violated federal law because it allowed the state water board and a regional water board to impose municipal storm sewer control measures more stringent than a federal standard known as "maximum extent practicable" under 33 U.S.C. § 1342(p)(3)(B)(iii). (Superior Court of San Diego County, No. GIC 780263, Wayne L. Peterson, Judge.)

The Court of Appeal affirmed. The court held the language of § 1342(p)(3)(B)(iii) communicates the basic principle that the Environmental Protection Agency, and or a state approved to issue a National Pollution Discharge Elimination System (NPDES) permit, retains the discretion to impose "appropriate" water pollution controls in addition to those that come within the definition of "maximum extent practicable." The NPDES permit did not violate federal law. The water boards had the authority to include a permit provision requiring compliance with the more stringent state water quality standards. (Opinion by Haller, J., with Benke, Acting P. J., and Aaron, J., concurring.) [*867]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--Regulatory Permit--Municipal Storm Sewer Control Measures.--A regulatory permit issued by the State Water Resources Control Board allowing it and a regional water board to impose municipal storm sewer control measures more stringent than a federal standard known as "maximum extent practicable," set forth in 33 U.S.C. § 1342(p)(3)(B)(iii), did not violate federal law.

[4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 69.]

(2) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--NPDES Permits.--The Clean Water Act (33 U.S.C. 1251 et seq.) employs the basic strategy of prohibiting pollutant emissions from "point sources" unless the party discharging the pollutants obtains a National Pollution Discharge Elimination System (NPDES) permit. Pursuant to 33 U.S.C. § 1311(a), it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. Pursuant to 33 U.S.C. § 1342(a) and (b) an NPDES permit is issued by the Environmental Protection Agency or by a state that has a federally-approved water quality program. Pursuant to 40 C.F.R. §§ 124.3, 124.6, 124.8, 124.10, before an NPDES is issued, the federal or state regulatory agency must follow an extensive administrative hearing procedure. Pursuant to 33 U.S.C. § 1342(b)(1)(B), NPDES permits are valid for five years.

(3) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--NPDES Permits.--Under the Clean Water Act (33 U.S.C. § 1251 et seq.), the proper scope of the controls in a National Pollution Discharge Elimination System (NPDES) permit depends on the applicable state water quality standards for the affected

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water bodies. Each state is required to develop water quality standards that establish the desired condition of a waterway. 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. As enacted in 1972, 33 U.S.C. §§ 1311, 1362(11) of the 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. [*868]

(4) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--NPDES Permits.--In 1987, Congress amended the Clean Water Act (33 U.S.C. 1251 et seq.), to add provisions, specifically, 33 U.S.C. § 1342(p), that specifically concerned National Pollution Discharge Elimination System (NPDES) permit requirements for storm sewer discharges. In these amendments, enacted as part of the Water Quality Act of 1987 (33 U.S.C. § 251 et seq.), Congress distinguished between industrial and municipal storm water discharges. With respect to municipal storm water discharges, Congress clarified in 33 U.S.C. § 1342(p)(3)(B)(iii) that the Environmental Protection Agency 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.

(5) Pollution and Conservation Laws § 5--Water Pollution--Waste Discharge Requirements.--Pursuant to Wat. Code, § 13374, the waste discharge requirements issued by the regional water boards ordinarily also serve as National Pollution Discharge Elimination System permits under federal law.

(6) Pollution and Conservation Laws § 5--Water Pollution--Writ of Mandate--Exercise of Independent Judgment.--Where a party has been aggrieved by a final decision of a regional water board for which the State Water Resources Control Board denies review, Code Civ. Proc., § 1094.5, governs the writ of mandate proceedings, and the superior court must, pursuant to Wat. Code, § 13330, subd. (d), exercise its independent judgment in examining the evidence and resolving factual disputes. 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.

(7) Appellate Review § 144--Scope of Review--Questions of Law and Fact--Factual Determinations--Substantial Evidence Standard--De Novo Review.--In reviewing the trial court's factual determinations on the administrative record, an appellate court applies a substantial evidence standard. However, in reviewing the trial court's legal determinations, an appellate court conducts a de novo review. Thus, the appellate court is not bound by the legal determinations made by the state or regional agencies or by the trial court, but it must give appropriate consideration to an administrative agency's expertise underlying its interpretation of an applicable statute. [*869]

(8) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--More Stringent State Controls.--It is well settled that the Clean Water Act (33 U.S.C. § 1251 et seq.) authorizes states to impose water quality controls that are more stringent than are required under federal law, 33 U.S.C. § 1370, and California law specifically allows the imposition of controls more stringent than federal law, Wat. Code, § 13377.

(9) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--NPDES Permits.--The language of 33 U.S.C. § 1342(p)(3)(B)(iii) does communicate the basic principle that the Environmental Protection Agency (and/or a state approved to issue a National Pollution Discharge Elimination System permit) retains the discretion to impose "appropriate" water pollution controls in addition to those that come within the definition of "maximum extent practicable."

(10) Statutes § 21--Construction--Legislative Intent.--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. 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.

(11) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--NPDES Permits.--With respect to National Pollution Discharge Elimination System (NPDES) permits, the legislative purpose underlying the Water Quality Act of 1987 (33 U.S.C. § 251 et seq.), and 33 U.S.C. § 1342(p) in particular, supports that Congress intended to provide the Environmental Protection Agency (or the regulatory agency of an approved state) the discretion to require compliance with water quality standards in a municipal storm sewer NPDES

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permit, particularly where that compliance will be achieved primarily through an iterative process.

(12) Statutes § 44--Construction--Administrative--Judicial Deference.--A court is required to give substantial deference to an administrative interpretation of a statute.

(13) Appellate Review § 135--Scope of Review--Presumptions.--All judgments and orders are presumed correct, and persons challenging them must affirmatively show reversible error. [*870]

(14) Appellate Review § 108--Briefs--Requisites--Reference to Record--Party Challenging Sufficiency of Evidence--Summarization of All Material Evidence Required.--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.

(15) Administrative Law § 116--Judicial Review and Relief--Scope of Review--Abuse of Discretion--Administrative Permit.--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.

(16) Pollution and Conservation Laws § 5--Water Pollution--Industrial Storm Water Dischargers--Best Available Technology Economically Achievable.--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.

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Bill Lockyer, Attorney General, Mary Hackenbracht, Assistant Attorney General, Carol A. Squire, David Robinson and Deborah Fletcher, Deputy Attorneys General, for Defendants and Respondents.

David S. Beckman, Heather L. Hoecherl, Anjali I. Jaiswal and Dan L. Gildor for Interveners and Respondents.

Marco Gonzalez for Intervener and Respondent San Diego BayKeeper.

Law Offices of Rory Wicks and Rory R. Wicks for Surfrider Foundation, Waterkeeper Alliance, The Ocean Conservancy, Heal the Bay, Environmental Defense Center, Santa Monica BayKeeper, Orange County CoastKeeper, Ventura CoastKeeper, Environmental Health Coalition, CalBeach Advocates, San Diego Audubon Society, Endangered Habitats League and Sierra Club as Amici Curiae on behalf [***2] of Defendants and Respondents and Interveners and Respondents.

JUDGES: Haller, J., with Benke, Acting P. J., and Aaron, J., concurring.

OPINION BY: HALLER [*871]

OPINION

[**130] **HALLER, J.**--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 [***3] 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.

(1) 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." (33 U.S.C. § 1342(p)(3)(B)(iii).) [2] [**131] In the published

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portion of this opinion, we reject this contention, and conclude the Water Boards had the authority to include [***4] 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.

2 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. [3]

3 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.

[***5] 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 [69 L. Ed. 2d 435, 101 S. Ct. 2615]; *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 [48 L. Ed. 2d 578, 96 S. Ct. 2022].) 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.) [***6] 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).)

[HN1](2) The Clean Water Act employs the basic strategy of prohibiting pollutant emissions from "point sources" [4] unless the party discharging the pollutants obtains a permit, known as an NPDES [5] permit. (See *EPA v. State Water Resources Control Board, supra*, 426 U.S. at p. 205.) It is "unlawful [*873] for any person to discharge a pollutant without obtaining a permit and complying with its terms." (*Ibid.*; see § 1311(a); *Costle, supra*, 568 [**132] 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.) 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* [***7] *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).)

4 [HN2]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).)

5 NPDES stands for National Pollution Discharge Elimination System.

[HN3](3) 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 [***8] 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

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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 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.) [***9] 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*).)

(4) Eventually,[HN4] in 1987, Congress amended the [***10] Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. (§ 1342(p); see *Defenders of Wildlife, supra,* [**133] 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 [***11] storm sewers is at the center of this appeal, we quote the relevant portion of the statute in full:

"[HN5](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*

Three years before the 1972 Clean Water Act, the California Legislature enacted [***12] 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

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"[HN6]shall, as required or authorized [***13] 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 "[HN7][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]."

(5) 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, [HN8]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 [***14] by San Diego County, the San Diego Unified Port District, and 18 San Diego-area cities (collectively, Municipalities). [6] 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.

6 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.

[***15] 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 discharging those pollutants "which have not been reduced to the *maximum extent practicable* ... ." [7] (Italics added). Second, the Municipalities [**135] are 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.

7 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."

[***16] [*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

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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, [***17] 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 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 [***18] 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 [*878] Board modified the Permit to make clear that the iterative enforcement process applied to the Water Quality Standards provisions in the Permit. But the State Water Board did not delete the Permit's [**136] provision stating 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. [8] Building Industry asserted numerous legal claims, including that the Water Boards: (1) violated the Clean Water Act by imposing a standard greater [***19] 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.

8 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), [***20] 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 the regulatory [*879] controls

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before issuing the Permit. Rejecting Building Industry's legal arguments, the court also stated that [***21] 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*

[HN9](6) 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).) [HN10]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. [***22] (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].)

[HN11](7) 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.) 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. [9] (*Ibid.*)

> 9 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 [81 L. Ed. 2d 694, 104 S. Ct. 2778] (*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.)

[***23]

[*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. [10] 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.

> 10 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).

[***24] 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*

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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 [***25] 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 [***26] not waive its rights to challenge the Permit under federal law.

(8) Although[HN12] 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 [128 L. Ed. 2d 716, 114 S. Ct. 1900]; *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. [***27]

B. *The Water Quality Standards Requirement Does Not Violate Federal Law*

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 [***28] 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 [***29] 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 dis-

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tinct 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.

(9) 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" [***30] 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, [HN13]the language of section 1342(p)(3)(B)(iii) does communicate the [**140] basic 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)*

(10) Further, "[HN14][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 [***31] 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].)

[HN15](11) 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; *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology, supra*, 511 U.S. at p. 715; [***32] *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; see also *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101 [117 L. Ed. 2d 239, 112 S. Ct. 1046].)

There [***33] 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. & 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

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and escalating problems [***34] 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. " (132 Cong. Rec. 32400 (Oct. 16, 1986); 133 Cong. Rec. S752 (daily [***35] 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. [12]

> 11 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.

[***36]

> 12 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 [***37] 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*

(12) 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 [***38] maximum extent practicable, *and where necessary water quality-based controls* ... ." (55 Fed.Reg. 47990, 47994 (Nov. 16, 1990), italics added.) [HN16]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.)

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

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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 [***39] demonstrates that Congress did not require [**143] 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 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* [***40] *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. [13]

13 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 extent practicable standard in issuing NPDES permits for municipal storm sewers.

[***41] 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 [***42] 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 [***43] 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.

(13) 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

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support this contention, and Building Industry does not present a proper appellate challenge to this finding sufficient to warrant our reexamining the evidence. [HN17]All judgments and orders are presumed correct, and persons challenging them must affirmatively show reversible error. **(14)** *(Walling v. Kimball* (1941) 17 Cal.2d 364, 373 [110 P.2d 58].) [HN18]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 [***44] 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 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. [14]

> 14 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.

[***45] **(15)** 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. [HN19]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; *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 [***46] 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."

(16) This argument is unpersuasive. 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. 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.) [HN20]BAT is an acronym [***47] 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' "]; *Primavera Familienstiftung v. Askin* (S.D.N.Y. 1998) 178 F.R.D. [*890] 405, 409 [noting that "impracticability does not mean impossibility, but rather difficulty [***48] or inconvenience"].)

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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 [***49] 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. [15] As noted, the applicable [***50] 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).) [***51]

15 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.* [NOT CERTIFIED FOR PUBLICATION]

* See footnote, *ante*, page 866.

DISPOSITION

Judgment affirmed. Appellants to pay respondents' costs on appeal.

Benke, Acting P. J., and Aaron, J., concurred.

A petition for a rehearing was denied January 4, 2005, and the opinion was modified to read as printed above. Appellants' petition for review by the Supreme Court was denied March 30, 2005. Baxter, J., and Brown, J., were of the opinion that the petition should be granted. [***52]

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TAB "7"

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LEXSEE

Caution
As of: Jun 17, 2010

CITY OF ARCADIA et al., Plaintiffs and Appellants, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants.

D043877

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

135 Cal. App. 4th 1392; 38 Cal. Rptr. 3d 373; 2006 Cal. App. LEXIS 92; 2006 Cal. Daily Op. Service 797; 2006 Daily Journal DAR 1145; 36 ELR 20025

January 26, 2006, Filed

SUBSEQUENT HISTORY: Rehearing denied by City of Arcadia v. State Water Resources Control Board, 2006 Cal. App. LEXIS 221 (Cal. App. 4th Dist., Feb. 17, 2006)
Review denied by City of Arcadia v. State Water Res. Control Bd., 2006 Cal. LEXIS 4781 (Cal., Apr. 19, 2006)

PRIOR HISTORY: [***1] Superior Court of San Diego County, No. GIC803631, Wayne L. Peterson and Linda B. Quinn, Judges.
City of Arcadia v. United States EPA, 265 F. Supp. 2d 1142, 2003 U.S. Dist. LEXIS 9044 (N.D. Cal., 2003)

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff cities alleged that defendants, regional and state water quality boards, violated the Clean Water Act, 33 U.S.C. § 1251 et seq., or the Porter-Cologne Act, Wat. Code, § 13000 et seq., by enacting a basin plan with the levels of permissible pollution, or total maximum daily loads (TMDLs), set at zero. The Superior Court of San Diego County (California) partially granted the cities' petition for writ of mandate. Both parties appealed.

OVERVIEW: The cities agreed that litter discharged from storm drains into a river had to be remedied but opposed the target of zero as unattainable and inordinately expensive. The court found that the regional board's environmental checklist was deficient and that there was sufficient evidence of a fair argument that the project might have a significant effect on the environment, thus necessitating an environmental impact report or its functional equivalent under the California Environmental Quality Act (CEQA). The trial court erred by granting declaratory relief on the cities' claim that the Trash TMDL did not apply to "nonwaters" and by substituting its own judgment for that of the 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 channel. The Trash TMDL sufficiently notified affected parties of its inclusion in the state's 1998 303(d) list as an impaired water body. The court rejected the cities' claim that the trial court should have invalidated the Trash TMDL on the additional ground that the boards failed to provide for deemed compliance with the target of zero trash through certain methods.

OUTCOME: The judgment was affirmed as to the Trash TMDL's violation of CEQA and as to the cities' appeal. The judgment was reversed insofar as it was based on the Trash TMDL's lack of an assimilative capacity study, inclusion on the impaired water body list, and a cost/benefit analysis or the consideration of economic factors, and also insofar as it granted declaratory relief regarding the purported inclusion of non-navigable waters in the Trash TMDL.

CORE TERMS: trash, environmental, pollution, water board', regional boards, epa, water quality, load, nonpoint, river, Clean Water Act, pollutant, basin, zero,

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maximum, monitoring, target, impaired, checklist, watershed, storm, state board, point sources, significant effect, beneficial uses, negative declarations, mitigation measures, regulatory programs, assimilative, numeric

LexisNexis(R) Headnotes

Environmental Law > Water Quality > Clean Water Act > Water Quality Standards

[HN1]The Clean Water Act places primary reliance for developing water quality standards on the states. It requires each state to develop such standards and review them at least once every three years for required modifications, pursuant to 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 anti-degradation policy, pursuant to 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. 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. 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, as provided in 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.

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Point Sources
Environmental Law > Water Quality > Clean Water Act > Nonpoint Source Pollution

[HN2]Congress has 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-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, pursuant to 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.

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Discharges
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards

[HN3]When the National Pollution Discharge Elimination System (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 (TMDLs) under 33 U.S.C. § 1313(d)(1)(A) and 40 C.F.R. § 130.7(b) (2003). This list of substandard waters is known as the 303(d) list (§ 303 of the Clean Water Act having been codified as 33 U.S.C. § 1313). 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. A TMDL must be established at a level necessary to implement the applicable water quality standards. 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. Once a TMDL is developed, effluent limitations in NPDES permits must be consistent with the waste load allocations in the TMDL. Under 33 U.S.C. § 1313(d)(1)(C), a TMDL requires a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

Environmental Law > Federal & State Interrelationships > General Overview
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > General Overview

[HN4]The Environmental Protection Agency may allow states to adopt and administer National Pollution Discharge Elimination System permit programs, and it has authorized California to administer such a program.

Environmental Law > Water Quality > Clean Water Act > Water Quality Standards

[HN5]California implements the Clean Water Act through the Porter-Cologne Act, Wat. Code, § 13000 et seq. Under the Porter-Cologne Act, nine regional water quality control boards regulate the quality of waters within their regions under the purview of the State Water Resources Control Board, pursuant to Wat. Code, §§ 13000, 13100, 13200, 13241, 13242. In accordance with Wat. Code, §§ 13050, subd. (j), 13240, regional boards must formulate and adopt water quality control plans, commonly called basin plans, which designate the bene-

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ficial uses to be protected, water quality objectives and a program to meet the objectives. "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, as provided in Wat. Code, § 13050, subd. (h). The Environmental Protection Agency (EPA) must approve or disapprove a state's total maximum daily load (TMDL) within 30 days of its submission, pursuant to 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.

Administrative Law > Judicial Review > Remedies > Mandamus

[HN6]Code Civ. Proc., § 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, pursuant to § 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. Rather, review of a quasi-legislative action is limited to traditional mandamus.

Civil Procedure > Appeals > Standards of Review > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review
Civil Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview
Evidence > Procedural Considerations > Burdens of Proof > General Overview

[HN7]Under Code Civ. Proc., § 1085, 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. An 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.

Environmental Law > Litigation & Administrative Proceedings > Judicial Review

[HN8]As to California Environmental Quality Act issues, an abuse of discretion standard applies. Abuse of discretion is established if an agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence, pursuant to Pub. Resources Code, § 21168.5. A reviewing court's task on appeal is the same as the trial court's. Thus, the court conducts its review independent of the trial court's findings.

Administrative Law > Judicial Review > Standards of Review > Statutory Interpretation

[HN9]Generally, considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.

Environmental Law > Water Quality > Clean Water Act > Water Quality Standards

[HN10]A regional water quality control board is authorized to investigate the quality of waters in its region, pursuant to 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 reports and the benefits to be obtained from the reports, pursuant to § 13267, subd. (b)(1).

Governments > Legislation > Interpretation

[HN11]A reviewing court's primary aim in construing any law is to determine the legislative intent. In doing so the court looks first to the words of the statute, giving them their usual and ordinary meaning.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > General Overview

[HN12]A total maximum daily load (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 National Pollution Discharge Elimination System permits or establishing nonpoint source controls. A TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and water bodies.

Environmental Law > Water Quality > Clean Water Act > Water Quality Standards

[HN13]Wat. Code, § 13241, provides that each regional water quality control 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

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consider several factors, including economic considerations, pursuant to § 13241, subd. (d). Section 13241, subd. (d), does not define "economic considerations" or specify a particular manner of compliance. Thus, the matter is within a regional board's discretion.

Environmental Law > Water Quality > Clean Water Act > Water Quality Standards

[HN14]The Clean Water Act provides that 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 under 33 U.S.C. § 1313(d)(1)(A). Further, it provides in § 1313(d)(1)(C) that each state shall establish for the waters identified in § 1313(d)(1)(A), and in accordance with the priority ranking, the total maximum daily load (TMDL). These provisions do not prohibit a regional water quality control 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, § 1313(d)(2) provides that each state shall submit to the Environmental Protection Agency (EPA) Administrator from time to time, for his or her approval the waters identified and the loads established under § 1313(d)(1)(A) and (1)(C). The EPA Administrator shall either approve or disapprove such identification and load not later than 30 days after the date of submission. This clarifies that a regional board may simultaneously identify an impaired water body and establish a TMDL for it.

Environmental Law > Federal & State Interrelationships > General Overview

Environmental Law > Water Quality > Clean Water Act > Water Quality Standards

[HN15]States remain at the front line in combating pollution, and so long as the State 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.

Environmental Law > National Environmental Policy Act > Environmental Assessments

[HN16]The California Environmental Quality Act (CEQA) compels the government first to identify the environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives. CEQA mandates that public agencies refrain from approving projects with significant environmental effects if there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects.

Environmental Law > National Environmental Policy Act > Environmental Impact Statements

[HN17]The California Environmental Quality Act (CEQA) is implemented through initial studies, negative declarations, and environmental impact reports (EIR). 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. 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 EIR is required. 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. 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.

Environmental Law > National Environmental Policy Act > Environmental Impact Statements

[HN18]"Significant effect on the environment," for purposes of the California Environmental Quality Act requirement for preparation of an environmental impact report, 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, pursuant to Cal. Code Regs., tit. 14, § 15382.

Environmental Law > National Environmental Policy Act > General Overview

[HN19]State regulatory programs that meet certain environmental standards and are certified by the Secretary of the California Resources Agency are exempt from the California Environmental Quality Act's (CEQA) requirements for preparation of environmental impact reports, negative declarations, and initial studies. Environmental review documents prepared by certified pro-

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grams may be used instead of environmental documents that CEQA would otherwise require. Certified regulatory programs remain subject, however, to other CEQA requirements, pursuant to Pub. Resources Code. § 21080.5. Documents prepared by certified programs are considered the functional equivalent of documents CEQA would otherwise require. 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 decisionmaking process. The agency must also implement guidelines for evaluating the proposed activity consistently with the environmental protection purposes of the regulatory program. 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, and be made available for review by other public agencies and the public.

Environmental Law > National Environmental Policy Act > General Overview

[HN20]The guidelines for implementation of the California Environmental Quality Act (CEQA), Cal. Code Regs., tit. 14, § 15000 et seq., 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. In a certified program, an environmental document used as a substitute for an environmental impact report must include alternatives 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 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, pursuant to Cal. Code Regs., tit. 14, § 15252, subd. (a).

Environmental Law > National Environmental Policy Act > Environmental Impact Statements

[HN21]A regional water quality control board's submission of a plan for State Water Resources Control 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, pursuant to Cal. Code Regs., tit. 23, § 3777, subd. (a).

Environmental Law > National Environmental Policy Act > Environmental Impact Statements

[HN22]"Tiering" refers to the coverage of general matters in broader environmental impact reports (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 from a general plan, policy, or program EIR to a site-specific EIR. Courts have allowed first tier EIR's to defer detailed analysis to subsequent project EIR's.

Environmental Law > National Environmental Policy Act > Environmental Assessments

[HN23]Pub. Resources Code, § 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; and (3) an analysis of reasonably foreseeable alternative means of compliance with the rule or regulation, pursuant to § 21159, subd. (a).

Civil Procedure > Appeals > Reviewability > Preservation for Review

[HN24]Issues not presented to the trial court are ordinarily waived on appeal.

Environmental Law > National Environmental Policy Act > Environmental Impact Statements

[HN25]Because a negative declaration ends environmental review, the fair argument test provides a low threshold for requiring an environmental impact report.

Environmental Law > National Environmental Policy Act > Environmental Assessments

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[HN26]Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative or evidence which is clearly inaccurate or erroneous under 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 supports a fair argument that the project may have a significant environmental impact.

Civil Procedure > Justiciability > Case or Controversy Requirements > Actual Disputes
Civil Procedure > Declaratory Judgment Actions > General Overview
[HN27]The fundamental basis of declaratory relief is the existence of an actual, present controversy.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN28]33 U.S.C. § 1342(p)(3)(B)(iii), provides that a National Pollution Discharge Elimination System (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 Environmental Protection Act Administrator or the State determines appropriate for the control of such pollutants. Best management practices are generally pollution control measures set forth in NPDES permits.

Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN29]The statute applicable to establishing a total maximum daily load (TMDL), 33 U.S.C. § 1313(d)(1)(C), does not suggest that practicality is a consideration. To the contrary, a regional water quality control 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, pursuant to § 1313(d)(1)(C).

Civil Procedure > Appeals > Briefs
[HN30]Parties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows an appellate court to treat an appellant's issue as waived.

Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN31]33 U.S.C. § 1342(p)(3)(B)(iii) does not divest a regional water quality control board's discretion to impose a National Pollution Discharge Elimination System permit condition requiring compliance with state water quality standards more stringent than the maximum extent practicable standard.

Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN32]When the Environmental Protection Agency makes a total maximum daily load 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.

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Point Sources
Environmental Law > Water Quality > Clean Water Act > Nonpoint Source Pollution
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN33]Although the Clean Water Act focuses on both point and nonpoint sources of pollution, 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.

Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN34]Section 303(d)(1)(A) of the Clean Water Act, 33 U.S.C. § 1313(d)(1)(A), 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. Wat. Code, § 13241, subd. (a), requires regional water quality control boards to establish water quality objectives in water quality control plans by considering a variety of factors, including past, present, and probable future beneficial uses of water.

Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN35]See 33 U.S.C. § 1313(d)(1)(C).

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Administrative Law > Agency Rulemaking > General Overview
Administrative Law > Agency Rulemaking > Notice Requirements
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards

[HN36]The California Administrative Procedures Act (APA), Gov. Code, §§ 11340 et seq. and 11370, establishes the procedures by which state agencies may adopt regulations. The agency must give the public notice of its proposed regulatory action; issue a complete text of the proposed regulation with a statement of the reasons for it; give interested parties an opportunity to comment on the proposed regulation; respond in writing to public comments; and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law, which reviews the regulation for consistency with the law, clarity, and necessity. One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation, as well as notice of the law's requirements so that they can conform their conduct accordingly. 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, pursuant to Gov. Code, § 11353, subds. (a), (b)(1).

SUMMARY:

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Regional and state water quality boards sought to ameliorate the problem of litter discharged from municipal storm drains into a river through the adoption and approval of a planning document. Several cities alleged that the boards violated the Clean Water Act (33 U.S.C. § 1251 et seq.), or the Porter-Cologne Act (Wat. Code, § 13000 et seq.), by setting the levels of permissible pollution, known as total maximum daily loads (TMDL's), at zero. The cities agreed that trash pollution had to be remedied but opposed the target of zero as unattainable and inordinately expensive. The trial court partially granted the cities' petition for writ of mandate. (Superior Court of San Diego County, No. GIC803631, Wayne L. Peterson and Linda B. Quinn, Judges.)

The Court of Appeal affirmed as to the trial court's judgment that the TMDL violated the California Environmental Quality Act (CEQA) and as to the cities' appeal. However, the court reversed the judgment insofar as it was based on the TMDL's lack of an assimilative capacity study, inclusion on the impaired water body list, and consideration of economic factors, and also insofar as it granted declaratory relief regarding the purported inclusion of nonnavigable waters in the TMDL. The court found that the regional board's environmental checklist was deficient and that there was sufficient evidence of a fair argument that the project might have a significant effect on the environment, thus necessitating an environmental impact report or its functional equivalent under CEQA. The trial erred by substituting its own judgment for that of the boards on the issue of whether the adoption of the TMDL should have been preceded by a scientific study of the assimilative capacity of the river. Federal law did not require the regional board to conduct an assimilative capacity study before adopting the TMDL. By its plain terms, Wat. Code, § 13267, is inapplicable at the TMDL stage, and thus the trial court erred by invalidating the TMDL on that ground. The TMDL sufficiently notified affected parties of its inclusion in the state's 1998 "303(d) list" of substandard waters as an impaired water body. The court rejected the cities' claim that the trial court erred by not invalidating the TMDL on the additional ground that the boards [*1393] failed to provide for deemed compliance with the target through certain methods. (Opinion by McConnell, P. J., with McIntyre and Irion, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Pollution and Conservation Laws § 5--Clean Water Act--Effect on States.--The federal Clean Water Act places primary reliance for developing water quality standards on the states. It requires each state to develop such standards and review them at least once every three years for required modifications, pursuant to 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, pursuant to 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. 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. 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, as provided in 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.

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(2) **Pollution and Conservation Laws § 5--Water--National Discharge Elimination System Permits--Total Maximum Daily Loads.**--Congress has 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-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. Nonpoint sources, because of their very nature, are not regulated under the NPDES program. [*1394] Instead, Congress has addressed nonpoint sources of pollution in a separate portion of the Clean Water Act which encourages states to develop areawide waste treatment management plans. 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 (TMDL's). This list of substandard waters is known as the 303(d) list (§ 303 of the Clean Water Act having been codified as 33 U.S.C. § 1313). 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. A TMDL must be established at a level necessary to implement the applicable water quality standards. 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. Once a TMDL is developed, effluent limitations in NPDES permits must be consistent with the waste load allocations in the TMDL. Under 33 U.S.C. § 1313(d)(1)(C), a TMDL requires a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. The Environmental Protection Agency may allow states to adopt and administer NPDES permit programs, and it has authorized California to administer such a program.

(3) **Pollution and Conservation Laws § 5--Water--Porter-Cologne Act--Regional Quality Control Boards and Plans.**--California implements the Clean Water Act through the Porter-Cologne Act (Wat. Code, § 13000 et seq.). Under the Porter-Cologne Act, nine regional water quality control boards regulate the quality of waters within their regions under the purview of the State Water Resources Control Board, pursuant to Wat. Code, §§ 13000, 13100, 13200, 13241, 13242. In accordance with Wat. Code, §§ 13050, subd. (j), 13240, regional boards must formulate and adopt water quality control plans, commonly called basin plans, which [*1395] designate the beneficial uses to be protected, water quality objectives and a program to meet the objectives. "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, as provided in Wat. Code, § 13050, subd. (h). The Environmental Protection Agency (EPA) must approve or disapprove a state's total maximum daily load (TMDL) within 30 days of its submission, pursuant to 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.

(4) **Administrative Law § 95--Judicial Review and Relief--Methods--Mandamus--Quasi-legislative Acts.**--Code Civ. Proc., § 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, pursuant to § 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. Rather, review of a quasi-legislative action is limited to traditional mandamus.

(5) **Mandamus § 74--Rehearing and Appeal--Review; Scope--Petitioner's Burden of Proof.**--Under Code Civ. Proc., § 1085, review of an administrative action 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. An 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. [*1396]

(6) **Administrative Law § 10--Powers and Functions of Agencies--Deference to Construction of Laws.**--Generally, considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.

(7) **Statutes § 21--Construction--Legislative Intent--Examination of Language.**--A court's primary aim in construing any law is to determine the legislative intent. In doing so the court looks first to the words of the statute, giving them their usual and ordinary meaning.

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(8) Pollution and Conservation Laws § 5--Water--Total Maximum Daily Load and Pollutant Discharge Requirements.--A total maximum daily load (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 National Pollution Discharge Elimination System permits or establishing nonpoint source controls. A TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and water bodies.

(9) Pollution and Conservation Laws § 5--Water--Environmental Checklist Requirement--Regional Quality Control Board's Basin Plan to Incorporate Trash in Total Maximum Daily Load.--In an action challenging a regional water quality control board's basin plan, which set the levels of permissible pollution for a flood control channel, the trial court correctly concluded that an environmental impact report or its functional equivalent was necessary because the regional water board's environmental checklist and total maximum daily load were deficient and there was sufficient evidence of a fair argument that the project might have a significant effect on the environment.

[8 Witkin, Cal. Procedure (4th ed. 1997) Extraordinary Writs, § 268; 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, §§ 833, 893, 896; 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 817.]

(10) Pollution and Conservation Laws § 2.1--California Environmental Quality Act--Impact Reports--Necessity of Preparing; Requirements.--The California Environmental Quality Act (CEQA) compels the government first to identify the environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives. CEQA mandates that public agencies refrain from approving projects with significant environmental effects if there are feasible alternatives or [*1397] mitigation measures that can substantially lessen or avoid those effects. CEQA is implemented through initial studies, negative declarations, and environmental impact reports (EIR's). 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. 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 EIR is required. 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. 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. "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, pursuant to Cal. Code Regs., tit. 14, § 15382.

(11) Pollution and Conservation Laws § 2.1--California Environmental Quality Act--Impact Reports--Necessity of Preparing; Exemptions.--State regulatory programs that meet certain environmental standards and are certified by the Secretary of the California Resources Agency are exempt from the California Environmental Quality Act's (CEQA) requirements for preparation of environmental impact reports, negative declarations, and initial studies. Environmental review documents prepared by certified programs may be used instead of environmental documents that CEQA would otherwise require. Certified regulatory programs remain subject, however, to other CEQA requirements. Documents prepared by certified programs are considered the functional equivalent of documents CEQA would otherwise require. An agency seeking [*1398] certification must adopt regulations requiring that final action on the proposed activity include written responses to significant environmental points raised during the decisionmaking process. The agency must also implement guidelines for evaluating the proposed activity consistently with the environmental protection purposes of the regulatory program. 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, and be made available for review by other public agencies and the public.

(12) Pollution and Conservation Laws § 2.1--California Environmental Quality Act--Impact Reports--Necessity of Preparing; Application to Certified Regulatory Program.--The guidelines for implementation of the California Environmental Quality Act (CEQA), Cal. Code Regs., tit. 14, § 15000 et seq., do not directly apply to a certified regulatory program's environmental document. However, when conducting its en-

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vironmental review and preparing its documentation, a certified regulatory program is subject to the broad policy goals and substantive standards of CEQA. In a certified program, an environmental document used as a substitute for an environmental impact report must include alternatives 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 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, pursuant to Cal. Code Regs., tit. 14, § 15252, subd. (a)(2)(A), (B). A regional water quality control board's submission of a plan for State Water Resources Control 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, pursuant to Cal. Code Regs., tit. 23, § 3777, subd. (a).

(13) Pollution and Conservation Laws § 1--California Environmental Quality Act--Expedited Review for Mandated Projects--Analysis of Reasonably Foreseeable Impacts.--Pub. Resources Code, § 21159, which allows expedited environmental review for mandated projects, provides that an agency shall perform, at the time of the adoption of a [*1399] 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; and (3) an analysis of reasonably foreseeable alternative means of compliance with the rule or regulation, pursuant to § 21159, subd. (a). Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, or evidence which is clearly inaccurate or erroneous, as stated in 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 supports a fair argument that the project may have a significant environmental impact.

(14) Declaratory Relief § 7--Actual Controversy; Fundamental Basis of Relief.--The fundamental basis of declaratory relief is the existence of an actual, present controversy.

(15) Pollution and Conservation Laws § 5--Water--National Discharge Elimination System Permit for Municipal Discharge into Storm Drain.--33 U.S.C. § 1342(p)(3)(B)(iii), provides that a National Pollution Discharge Elimination System (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 Environmental Protection Act Administrator or the state determines appropriate for the control of such pollutants. Best management practices are generally pollution control measures set forth in NPDES permits.

(16) Pollution and Conservation Laws § 5--Water--Regional Quality Control Board and Establishment of Total Maximum Daily Load.--The statute applicable to establishing a total maximum daily load (TMDL), 33 U.S.C. § 1313(d)(1)(C), does not suggest that practicality is a consideration. To the contrary the statute requires a regional water quality control board to establish a TMDL at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety. [*1400]

(17) Appellate Review § 109--Briefs--Form and Requisites--Argument and Authority--Waiver.--Parties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows an appellate court to treat an appellant's issue as waived.

(18) Pollution and Conservation Laws § 5--Water--Requirements for Total Maximum Daily Load or Permitting Decisions.--When the Environmental Protection Agency makes a total maximum daily load 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.

(19) Pollution and Conservation Laws § 5--Water--Clean Water Act and Effect on States.--Although the Clean Water Act focuses on both point and nonpoint sources of pollution, the measure does not require states to take regulatory action to limit

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the amount of nonpoint 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.

(20) Administrative Law § 19--Actions--Legislation or Rulemaking--Practice and Procedure.--The California Administrative Procedure Act (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; issue a complete text of the proposed regulation with a statement of the reasons for it; give interested parties an opportunity to comment on the proposed regulation; respond in writing to public comments; and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law, which reviews the regulation for consistency with the law, clarity, and necessity. One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation, as well as notice of the law's requirements so that they can conform their conduct accordingly. 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, pursuant to Gov. Code, § 11353, subds. (a), (b)(1). [*1401]

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Law Office of Michael R. Lozeau, Michael R. Lozeau; and Dana P. Palmer for Santa Monica Baykeeper, Inc., Heal the Bay, Inc., [***2] and Natural Resources Defense Council, Inc., as Amici Curiae on behalf of Defendants and Appellants.

JUDGES: McConnell, P. J., with McIntyre and Irion, JJ., concurring.

OPINION BY: McConnell

OPINION

[**378] **McCONNELL, P. J.**--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) [1] 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.

1 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), [2] who [*1402] agree trash pollution must be remedied but oppose the target of zero trash as unattainable and inordinately expensive. The Water Boards challenge [***3] 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.

2 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 [***4] 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.

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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

[***5] *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.' " (*City of Burbank v. State Water Resources Control Bd.* [*1403] (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.) 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).)

(1) [HN1]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 [***6] 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 v. E.P.A.* (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.)

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 [***7] 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. U.S. Environ. Protec.* (10th Cir. 2005) 415 F.3d 1121, 1124.)[3]

3 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> [as of Jan. 26, 2006].)

[*1404] [HN2](2) "Congress dealt with the problem of point source [***8] 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; see 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*

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(N.D.Cal. 2000) 91 F. Supp. 2d 1337, 1348, citing 33 U.S.C. § 1288; see also 33 U.S.C. § 1329.)

[HN3]"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 [***9] 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; see 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. U.S. Environmental* (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 [***10] 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]; see *Dioxin/Organochlorine Center v. Clarke*, at p. 1520.) [4] 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).)

4 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; see 40 C.F.R. § 130.2(g)-(i) (2005).)

[HN4]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 [***11] such a program. (54 Fed.Reg. 40664 (Oct. 3, 1989).)

B

State Law

[HN5](3) 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.)

[**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. [***12] (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 [***13] 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.

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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. [5] 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." [6] "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."

5 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."

[***14]

6 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 monitoring, 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 [***15] 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. [7] The Regional Board intends to use resulting data to "refine" the default baseline waste load allocations in the Trash TMDL.

7 In *City of Arcadia v. U.S. Environ. Protection Agency* (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 copermittees 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]."

[***16] 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.) [8]

8 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 [***17] 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

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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 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 [***18] 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

(4) 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. [HN6]Code of Civil Procedure section 1094.5, the administrative mandamus [***19] 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.)

[*1409] (5) 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. [HN7]Under Code of Civil Procedure section 1085, " 'review is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking [***20] 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], citations omitted.)

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 *ante*, Water Code section 13330 necessarily applies to an administrative appeal of a quasi-judicial action [***21] 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.

[HN8]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

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Assimilative Capacity Study

The trial court [***22] 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."

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 [***23] 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 [***24] 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."

The administrative record includes numerous photographs of copious amounts of trash deposited in the Los Angeles River watershed through storm water drains. Dennis [***25] 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. [***26] A range of methods can be used ... ." (Boldface 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."

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(6) 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." [***27] [HN9]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 [150 L. Ed. 2d 292, 121 S. Ct. 2164].)

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 [***28] 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.] ... [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 [***29] 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 [***30] 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

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

[HN10]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 [***31] 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

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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 monitoring plan with the proposed monitoring sites and at least two alternative monitoring locations for each site. The plan must [***32] 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 [***33] 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."

(7) [HN11]"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.) (8) [HN12]"A TMDL does not, by itself, [***34] 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

[HN13]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 [***35] 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. ' Water Code section 13241, subdivision (d) does not define "economic considerations" or specify a particular manner of com-

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pliance, and thus, as the Water Boards assert, the matter is within a regional [**389] board's discretion. [***36] 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, 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.)

> 9 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, 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 [***37] 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 [***38] 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 [***39] 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 during 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 [***40] 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&inches; to 1&inches; 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,

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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. [***41] 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. [10]

10 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 *post*. The portion of the regulation covering TMDL's 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.

[***42] IV

Los Angeles River Estuary

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) 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.

[HN14]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).) [***43] 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 [***44] 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, [HN15]"[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.)

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 [***45] 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

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[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 region 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. [***46] 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, [***47] 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 curiae 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

(9) 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 [***48] 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

(10) [HN16]"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].)

[HN17]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.) "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.) [***49] "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 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

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impacts or effects may occur, an EIR is required and a negative declaration cannot be certified." (*Id.* at pp. 1601-1602.)

[HN18]" '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 [***50] 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

[HN19](11) "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; see 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; 2 Kostka & Zischke, Practice Under the Cal. Environmental [***51] 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 decisionmaking 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.)

[HN20](12) 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, [***52] 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 showed that the project 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)(2)(A), (B).)

The basin planning process of the State Board and regional boards is [***53] 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. [HN21]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 [***54] and recreation. The checklist denied the project would have any environmental impact on land, including soil displacement, air, noise, natural resources or traffic, and

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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."

[HN22]" '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 [***55] 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." (*Friends of* [*1424] *Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, 532 [98 Cal. Rptr. 2d 334].)

(13) [HN23]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. [***56] [¶] (3) An analysis of reasonably foreseeable alternative 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.

[HN24]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 " 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. [HN25]"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].)

> 11 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.

[***57] [**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 [***58] catch basin inserts "are not a full capture method, they must be monitored frequently

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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.

The Water Boards contend those comments are merely "unsubstantiated opinion and speculation by biased project opponents." [HN26]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).) [***59] 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 [***60] 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.) 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. [12]

12 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.

[***61] VI

Declaratory Relief

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 [***62] TMDL are invalid because they violate federal and state law. The judgment declared unenforceable 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."

(14) [HN27]"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

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not have included declaratory relief on the nonwaters issue.

CITIES' APPEAL

I

Concepts of "Maximum Extent Practicable" and "Best Management Practices"

(15) 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 [HN28]33 United States Code section 1342(p)(3)(B)(iii), [***63] 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.) [13] "Best management practices" are generally pollution control measures set forth in NPDES permits. (*BIA, supra*, 124 Cal.App.4th at p. 877.)

13 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 [***64] 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 [***65] 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.

(16) We agree with the court's assessment. [HN29]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, 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.

(17) To bolster their position the Cities rely on 33 United States Code section 1329(a)(1)(C)). [***66] [**399] 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, 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. [HN30]"[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 [***67] on *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, for the

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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 [***68] 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 [HN31]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; 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"].) [***69] 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.

(18) Additionally, the Cities' reliance on a November 2002 EPA memorandum on establishing TMDL's and issuing NPDES [**400] permits is misplaced, as it postdates the Regional Board's adoption 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. [HN32]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

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. [***70] 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 [***71] 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.)

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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 [***72] 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" (*American Wildlands v. Browner* (10th Cir. 2001) 260 F.3d 1192, 1194), [**401] 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 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]; see *People v. Sierra* (1995) 37 Cal.App.4th 1690, 1693, fn. 2 [44 Cal. Rptr. 2d 575].)

(19) In any event, [HN33]although the Clean Water Act focuses on both point and nonpoint sources of pollution, it is settled that [***73] the measure "does not require states to take regulator[y] 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. U.S. Environ. Protec., 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 [***74] 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

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." (Boldface and some capitalization 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 [***75] evidence to support the Trash TMDL's finding that swimming is an actual use of the river in any location.

The Cities rely on [HN34]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." (Boldface omitted.)

The Cities, however, make no showing of prejudice. Swimming and bathing by the homeless are only [***76] 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

Scientific Methodology

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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, TMDL's. (*Id.*, § 130.4(b).)

The trial court rejected the Cities' position, finding they failed to establish the Water Boards' [***77] 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 [***78] 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."

[*1434] [**403] 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: [HN35]"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) [***79] (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 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. [***80] (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 TMDL's. 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 desig-

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nating 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 [***81] "establish[] a regulation in violation of the APA's elements of 'clarity,' 'consistency,' and 'necessity,' as defined in [Government] Code section 11349."

[HN36](20) 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 [***82] that they can conform their conduct accordingly [citation]." (*Id.* at pp. 568-569.)

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. [14]

14 We deny the Water Boards' June 16, 2005, request for judicial notice.

[***83]

[*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.

McIntyre, J., and Irion, J., concurred.

A petition for a rehearing was denied January 17, 2006, and the petition of plaintiffs and appellants for review by the Supreme Court was denied April 19, 2006, S141673.

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TAB "8"

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LEXSEE

Positive
As of: Jun 17, 2010

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.

S119248

SUPREME COURT OF CALIFORNIA

35 Cal. 4th 613; 108 P.3d 862; 26 Cal. Rptr. 3d 304; 2005 Cal. LEXIS 3486; 60 ERC (BNA) 1470; 2005 Cal. Daily Op. Service 2861; 2005 Daily Journal DAR 3870; 35 ELR 20071

April 4, 2005, Filed

SUBSEQUENT HISTORY: Time for Granting or Denying Rehearing Extended Burbank, City of v. State Water Resources Control Board, 2005 Cal. LEXIS 4271 (Cal., Apr. 21, 2005)
Rehearing denied by, Request denied by City of Burbank v. State Water Res. Control Bd., 2005 Cal. LEXIS 7185 (Cal., June 29, 2005)

PRIOR HISTORY: Superior Court of Los Angeles County, Nos. BS060960, BS060957, Dzintra I. Janavs, Judge. Court of Appeal, Second Dist., Div. Three, Nos. B150912, B151175 & B152562.
City of Burbank v. State Water Resources Control Bd., 111 Cal. App. 4th 245, 4 Cal. Rptr. 3d 27, 2003 Cal. App. LEXIS 1236 (Cal. App. 2d Dist., 2003)

DISPOSITION: Judgment affirmed in part and remanded in part..

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff cities sought review of a judgment of the Court of Appeal of California, Second Appellate District, Division Three, holding that Cal. Water Code §§ 13241 and 13263 required a regional water control quality board to take into account economic considerations when it adopted water quality standards in a basin plan but not when the board set specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards.

OVERVIEW: The cities owned three treatment plants that discharged wastewater under National Pollutant Discharge Elimination System permits issued by the regional board. The court held that whether the regional board should have complied with Cal. Water Code §§ 13263 and 13241 of California's Porter-Cologne Water Quality Control Act, Cal. Water Code § 13000 et seq., by taking into account "economic considerations," such as the costs the permit holder would incur to comply with the numeric pollutant restrictions set out in the permits depended on whether those restrictions met or exceeded the requirements of the federal Clean Water Act, 33 U.S.C.S. § 1251 et seq. To comport with the principles of federal supremacy, California law could not authorize California's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law. The federal Clean Water Act did not prohibit a state, when imposing effluent limitations that were more stringent than required by federal law, from taking into account the economic effects of doing so.

OUTCOME: The court affirmed the judgment of the court of appeal, reinstating the wastewater discharge permits to the extent that the specified numeric limitations on chemical pollutants were necessary to satisfy federal Clean Water Act requirements for treated waste-

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water. The court remanded for further proceedings to determine whether the pollutant limitations in the permits met or exceeded federal standards.

CORE TERMS: water quality, wastewater, regional boards, pollutant, Clean Water Act, effluent, federal law, basin, plant's, stringent', pollution, discharged, economic factors, narrative, federal standards, clean, Porter-Cologne Act, numeric, beneficial uses, concentration, navigable waters, regional, river, issuing, Conservation Laws, point sources, environmental, authorize, chemical, Control Act

LexisNexis(R) Headnotes

Environmental Law > Water Quality > General Overview
Real Property Law > Water Rights > Beneficial Use
[HN1]Whereas the State Water Resources Control Board establishes statewide policy for water quality control, Cal. Water Code § 13140, the regional boards formulate and adopt water quality control plans for all areas within a region. Cal. Water Code § 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. Cal. Water Code § 13050(j). Basin plans must be consistent with state policy for water quality control. Cal. Water Code § 13240.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Enforcement > General Overview
[HN2]Under the federal Clean Water Act, 33 U.S.C.S. § 1251 et seq., 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.S. § 1370.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN3]The Clean Water Act, 33 U.S.C.S. § 1251 et seq., provides for two sets of water quality measures. Effluent limitations are promulgated by the Environmental Protection Agency and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. 33 U.S.C.S. §§ 1311, 1314. Water quality standards are, in general, promulgated by the states and establish the desired condition of a waterway. 33 U.S.C.S. § 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.

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Point Sources
[HN4]See 33 U.S.C.S. § 1362(14).

Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN5]The Environmental Protection Agency (EPA) provides states with substantial guidance in the drafting of water quality standards. Moreover, the Clean Water Act, 33 U.S.C.S. § 1251 et seq., 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.S. § 1313(c).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Enforcement > General Overview
[HN6]Part of the federal Clean Water Act, 33 U.S.C.S. § 1251 et seq., is the National Pollutant Discharge Elimination System (NPDES), the primary means for enforcing effluent limitations and standards under the Clean Water Act. The NPDES sets out the conditions under which the federal Environmental Protection Agency or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. 33 U.S.C.S. § 1342(a), (b). In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. Cal. Water Code § 13374.

Environmental Law > Water Quality > General Overview
Real Property Law > Water Rights > Beneficial Use
[HN7]See Cal. Water Code § 13263(a).

Environmental Law > Water Quality > General Overview
Real Property Law > Water Rights > Beneficial Use
[HN8]See Cal. Water Code § 13241.

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Governments > Legislation > Interpretation
[HN9]When construing any statute, the reviewing court's task is to determine the legislature's intent when it enacted the statute so that the court may adopt the construction that best effectuates the purpose of the law. In doing this, the court looks to the statutory language, which ordinarily is the most reliable indicator of legislative intent.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
[HN10]Cal. Water Code § 13263 directs regional boards, when issuing wastewater discharge permits, to take into account various factors including those set out in Cal. Water Code § 13241. Listed among the § 13241 factors is economic considerations. Cal. Water Code § 13241(d).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
[HN11]Cal. Water Code § 13377 specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, § 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.S. § 1311(a), and publicly operated wastewater treatment plants must comply with the act's clean water standards, regardless of cost. 33 U.S.C.S. §§ 1311(a), (b)(1)(B), (C), 1342(a)(1), (3).

Constitutional Law > Supremacy Clause > General Overview
Environmental Law > Water Quality > General Overview
[HN12]Because Cal. Water Code § 13263 cannot authorize what federal law forbids, 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. Such a construction of § 13263 would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's declaration in Cal. Water Code § 13377 that all discharged wastewater must satisfy federal standards. Moreover, under the federal Constitution's Supremacy Clause, U.S. Const. art. VI, cl. 2, a state law that conflicts with federal law is without effect. To comport with the principles of federal supremacy, California law cannot authorize the state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Enforcement > General Overview
[HN13]The federal Clean Water Act, 33 U.S.C.S. § 1251 et seq., reserves to the states significant aspects of water quality policy, 33 U.S.C.S. § 1251(b), and it specifically grants the states authority to "enforce any effluent limitation" that is not "less stringent" than the federal standard, 33 U.S.C.S. § 1370. 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.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court ruled that California law required a regional water quality control board to weigh the economic burden on a wastewater treatment facility against the expected environmental benefits of reducing pollutants in the wastewater discharge. The cities owned three treatment plants that discharged wastewater under National Pollutant Discharge Elimination System permits issued by the regional board. (Superior Court of Los Angeles County, Nos. BS060960 and BS060957, Dzintra I. Janavs, Judge.) The Court of Appeal, Second Dist., Div. Three, Nos. B150912, B151175 and B152562, concluded that Wat. Code, §§ 13241 and 13263, required a regional board to take into account "economic considerations" when it adopted water quality standards in a basin plan but not when the regional board set specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards.

The Supreme Court affirmed the judgment of the Court of Appeal, reinstating the wastewater discharge permits in part and remanding for further proceedings. The court held that whether the regional board should have complied with Wat. Code, §§ 13263 and 13241, of California's Porter-Cologne Water Quality Control Act, Wat. Code, § 13000 et seq., by taking into account "economic considerations," such as the costs the permit holder would incur to comply with the numeric pollutant restrictions set out in the permits, depended on whether those restrictions met or exceeded the requirements of

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the federal Clean Water Act, 33 U.S.C. § 1251 et seq. To comport with the principles of federal supremacy, California law could not authorize California's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law. The federal Clean Water Act did not prohibit a state, when imposing effluent limitations that were more stringent than required by [*614] federal law, from taking into account the economic effects of doing so. (Opinion by Kennard, J., with George, C. J., Baxter, Werdegar, Chin, and Moreno, JJ., concurring. Concurring opinion by Brown, J. (see p. 629).)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Pollution and Conservation Laws § 5--Water--"Basin Plans."--Whereas the State Water Resources Control Board establishes statewide policy for water quality control, Wat. Code, § 13140, the regional boards formulate and adopt water quality control plans for all areas within a region, Wat. Code, § 13240. Under Wat. Code, § 13050, subd. (j), 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 under Wat. Code, § 13240.

(2) Pollution and Conservation Laws § 5--Water--Federal and State Standards.--Under 33 U.S.C. § 1370, of the federal Clean Water Act, 33 U.S.C. § 1251 et seq., 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.

(3) Pollution and Conservation Laws § 5--Water--Federal and State Standards.--The Clean Water Act, 33 U.S.C. § 1251 et seq., provides for two sets of water quality measures. Pursuant to 33 U.S.C. §§ 1311 and 1314, effluent limitations are promulgated by the Environmental Protection Agency and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. Water quality standards are, in general, promulgated by the states and establish the desired condition of a waterway under 33 U.S.C. § 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.

(4) Pollution and Conservation Laws § 5--Water--Federal and State Standards.--The Environmental Protection Agency (EPA) provides states with substantial guidance in the drafting of water quality standards. Moreover, the Clean Water Act, 33 U.S.C. § 1251 et seq., requires, inter alia, that state authorities periodically review water quality [*615] 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, 33 U.S.C. § 1313(c), authorizes the EPA to promulgate water quality standards for the state.

(5) Pollution and Conservation Laws § 5--Water--National Pollutant Discharge Elimination System.--Part of the federal Clean Water Act, 33 U.S.C. § 1251 et seq., is the National Pollutant Discharge Elimination System (NPDES), the primary means for enforcing effluent limitations and standards under the Clean Water Act. Title 33 U.S.C. § 1342(a), (b), of the NPDES sets out the conditions under which the federal Environmental Protection Agency or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. Under California law, Wat. Code, § 13374, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law.

(6) Statutes § 21--Construction--Legislative Intent.--When construing any statute, the reviewing court's task is to determine the Legislature's intent when it enacted the statute so that the court may adopt the construction that best effectuates the purpose of the law. In doing this, the court looks to the statutory language, which ordinarily is the most reliable indicator of legislative intent.

(7) Pollution and Conservation Laws § 5--Water--Wastewater Discharge Permits--Economic Considerations.--Wat. Code, § 13263, directs regional boards, when issuing wastewater discharge permits, to take into account various factors, including those set out in Wat. Code, § 13241. Listed among the § 13241 factors is economic considerations, in § 13241, subd. (d).

(8) Pollution and Conservation Laws § 5--Water--Wastewater Discharge Permits--Economic Considerations.--Wat. Code, § 13377, specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, § 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

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Act. That act prohibits the discharge of pollutants into the navigable waters of [*616] the United States unless there is compliance with federal law (33 U.S.C. § 1311(a)), and publicly operated wastewater treatment plants must comply with the act's clean water standards under 33 U.S.C. §§ 1311(a), (b)(1)(B) and (C), 1342(a)(1) and (3), regardless of cost.

(9) Pollution and Conservation Laws § 5--Water--Wastewater Discharge Permits--Economic Considerations.--Because Wat. Code, § 13263, cannot authorize what federal law forbids, 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. Such a construction of § 13263 would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's declaration in Wat. Code, § 13377, that all discharged wastewater must satisfy federal standards. Moreover, under the federal Constitution's supremacy clause, U.S. Const., art. VI, a state law that conflicts with federal law is without effect. To comport with the principles of federal supremacy, California law cannot authorize the state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law.

(10) Pollution and Conservation Laws § 5--Water--Federal and State Standards.--The federal Clean Water Act, 33 U.S.C. § 1251 et seq., reserves to the states significant aspects of water quality policy under 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 under 33 U.S.C. § 1370. 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. Thus, 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 factors, including the wastewater discharger's cost of compliance.

[4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, §§ 68, 69.] [*617]

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Stoel Rives and Lawrence S. Bazel for Western Coalition of Arid States as Amicus Curiae on behalf of Plaintiffs and Appellants.

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[*618] Squire, Sanders & Dempsey, Joseph A. Meckes; David W. Burchmore; and Alexandra Dapolito

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Fulbright & Jaworski, Colin Lennard, Patricia Chen; Archer Norris and Peter W. McGaw for California Association of Sanitation Agencies as Amicus Curiae on behalf of Plaintiffs and Appellants. [***306]

JUDGES: Kennard, J., with George, C. J., Baxter, Werdegar, Chin, and Moreno, JJ., concurring. Concurring opinion by Brown, J.

OPINION BY: KENNARD [**864]

OPINION

KENNARD, J.--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 [128 L. Ed. 2d 716, 114 S. Ct. 1900].) 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.) [1] 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). [2]

1 Further undesignated statutory references are to the Water Code.

2 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).)

(1) [HN1]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

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plans must be consistent with "state policy for water quality control." (§ 13240.)

B. Federal Law

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, 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).)

(2) [HN2]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] (3) Roughly a dozen years ago, the United States Supreme Court, in *Arkansas v. Oklahoma* (1992) 503 U.S. 91 [117 L. Ed. 2d 239, 112 S. Ct. 1046], 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, [HN3][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.[3] 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 [48 L. Ed. 2d 578, 96 S. Ct. 2022, 2025, n. 12] (1976).

3 A "[HN4]point source" is "any discernible, confined and discrete conveyance" and includes "any pipe, ditch, channel ... from which pollutants ... may be discharged." (33 U.S.C. § 1362 (14).)

[*621] (4) "[HN5]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.)

(5) [HN6]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.) 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

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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 Bur [***309] bank, 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. [4] 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. [5]

4 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.

5 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. [6]

6 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)

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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 *ante*, at p. 619.) Section 13263 provides in relevant part: "[HN7]*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: "[HN8]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 express 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.

[*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

(6) [HN9]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]; see *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.)

(7) 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. [HN10]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

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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. (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043 [12 [***312] 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.

(8) [HN11]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)). [HN12](9) Because section 13263 cannot authorize what federal law forbids, 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. [7] 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. [8] 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 [120 L. Ed. 2d 407, 112 S. Ct. 2608]; see *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 that would exceed the mandates of federal law.

7 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*, at p. 629, 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.)

8 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.

[***313] 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

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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.

(10) 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. [HN13]The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to "enforce any effluent limitation" that is not "*less stringent*" than the federal standard (33 U.S.C. § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit [*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 [148 L. Ed. 2d 576, 121 S. Ct. 675] ["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 Cal. Rules of Court, rule [***314] 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.

George, C. J., Baxter, J., Werdegar, J., Chin, J., and Moreno, J., concurred.

CONCUR BY: BROWN

CONCUR

BROWN, J., Concurring.--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 is-

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suing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require." (Maj. opn., *ante*, at p. 618.) 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 system, 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 reduction 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, 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) 302 U.S. App. D.C. 80 [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

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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 directs [**874] 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*, at pp. 625-627.) The majority then bifurcates the issue when it orders the Court of Appeal "to remand this mat-

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ter 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 pp. 628-629.)

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. [1] 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. [2] 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.

1 (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.)

2 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," [3] I write separately to set forth my concerns and concur in the judgment–*dubitante.* [4]

3 Marvin Gaye (1971) "Inner City Blues."

4 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 [2005 WL 466202] (conc. opn. of Berzon, J.).)

The petitions of all appellants and respondent for a rehearing were denied June 29, 2005. Brown, J., did not participate therein.

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TAB "9"

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LEXSEE

Positive
As of: Jun 25, 2010

CITY OF MERCED, Plaintiff and Appellant, v. THE STATE OF CALIFORNIA et al., Defendants and Respondents

Civ. No. 7590

Court of Appeal of California, Fifth Appellate District

153 Cal. App. 3d 777; 200 Cal. Rptr. 642; 1984 Cal. App. LEXIS 1824

March 27, 1984

SUBSEQUENT HISTORY: [***1] Appellant's petition for a hearing by the Supreme Court was denied May 24, 1984.

PRIOR HISTORY: Superior Court of Merced County, No. 69797, George G. Murry, Judge.

DISPOSITION: The judgment is affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant, the city of Merced, sought review of an order of the Superior Court of Merced County (California), that denied a petition for a writ of mandamus to compel payment of the costs of business goodwill incurred in an eminent domain proceeding.

OVERVIEW: Appellant, the City of Merced, was ordered to pay $ 72,350 to land owners in a condemnation action. Appellant applied to respondent, State of California, for reimbursement of that amount, and filed a petition for writ of mandamus to compel reimbursement when respondent refused to pay. The lower court denied the petition. The court affirmed the denial of the writ of mandamus and held that whether a city or county decided to exercise eminent domain was, essentially, an option of the city or county, rather than a mandate of the state. The court found that the fundamental concept was that the city or county was not required to exercise eminent domain, but if the power of eminent domain was exercised, then the city would be required to pay for loss of goodwill and the payment for loss of goodwill was not a state-mandated cost.

OUTCOME: The court affirmed the order of the lower court that denied a petition for a writ of mandamus to compel respondent. State of California, to reimburse appellant, city of Merced, for the costs of business goodwill incurred in an eminent domain proceeding because the costs were not state mandated.

CORE TERMS: state-mandated, business goodwill, reimbursement, eminent domain, mandated, optional, goodwill, eminent domain laws, loss of goodwill, local agency, legal theory, eminent domain proceeding, writ of mandamus, line item, reasonable alternatives, discretionary, accorded, revised, incur, system of law, state agency, business conducted, statutes enacted, condemnation, acquisition, recodified, acquire, italics, executive order, question of law

LexisNexis(R) Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview
[HN1]The appellate court is not limited by the interpretation of statutes by the trial court.

Governments > Legislation > Interpretation
[HN2]The meaning of a statute must, in the first instance, be sought in the language in which it is framed, and if that is plain the sole judicial function is to enforce

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it according to its terms; where the language is clear there is no room for interpretation. And courts will not determine the wisdom, desirability, or propriety of statutes enacted by the legislature.

Governments > Legislation > Interpretation
[HN3]Every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
Governments > Legislation > Interpretation
[HN4]Administrative interpretations of statutes should be accorded great respect and followed if not clearly erroneous. The court also relies on extrinsic aids such as the history of relevant statutes, committee reports, and the legislative debates.

Governments > State & Territorial Governments > Finance
[HN5]See Cal. Rev. & Tax. Code § 2231(a).

Governments > State & Territorial Governments > Finance
[HN6]See Cal. Rev. & Tax. Code § 2207.

Civil Procedure > Eminent Domain Proceedings > General Overview
[HN7]See Cal. Civ. Proc. Code § 1263.510.

Governments > State & Territorial Governments > Finance
[HN8]See Cal. Rev. & Tax. Code § 2207(h).

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court entered judgment denying a city's petition for a writ of mandamus to compel payment of its claim against the State of California for costs of business goodwill it incurred in an eminent domain proceeding as a result of the enactment of Stats. 1975, ch. 1275, which revised and recodified the state's eminent domain laws. The revisions included a new requirement that, upon proof of satisfaction of certain stated conditions, the owner of a business conducted on the condemned property is entitled to compensation for loss of goodwill (Code Civ. Proc., § 1263.510). In entering judgment denying the writ, the court concluded that the state was liable to the city for payment of business goodwill, but that the court could not order subvention from state funds. (Superior Court of Merced County, No. 69797, George G. Murry, Judge.)

The Court of Appeal affirmed. The court held that the city's payment for business goodwill in a condemnation proceeding it elected to pursue did not constitute the payment of a state-mandated cost pursuant to Rev. & Tax. Code, § 2231, subd. (a), and Rev. & Tax. Code, § 2207. In so ruling, the court held that the Legislature made clear the discretionary nature of the acquisition of property by eminent domain by the passage of Code Civ. Proc., § 1230.030 (also included within Stats. 1975, ch. 1275). Thus, the court held that the Legislature intended for payment of business goodwill to be discretionary as well, and that such an increased cost so incurred as a result of the enactment of the revised eminent domain laws was not a cost which the city was required or mandated to incur. (Opinion by Hamlin, J., with Franson, Acting P. J., and Zenovich, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

(1) Appellate Review § 55 -- Presenting and Preserving Questions in Trial Court -- Adherence to Theory of Case -- Assertion of New Legal Theory on Appeal. --On appeal from the denial of a city's petition for a writ to compel the state to pay the city for the costs of business goodwill incurred in an eminent domain proceeding, it was permissible for defendants to assert a new legal theory. Although defendants argued for the first time on appeal that in governmental-entity-initiated eminent domain proceedings, payment for business goodwill pursuant to the requirements of Stats. 1975, ch. 1275 (which revised and recodified the state's eminent domain laws), is not a state-mandated cost subject to reimbursement by the state, which argument was a change in defendants' position from its answer to the petition and its stipulation at the hearing on the petition, such issue was purely a question of law. Thus, since the appellate court is not limited by the interpretation of statutes by the trial court, on appeal defendants could correct a position mistakenly taken in the trial court that allegedly was inconsistent with the clear manifestation of the intent of the Legislature.

(2a) (2b) (2c) Eminent Domain § 22 -- Compensable Property and Rights -- Business Goodwill -- Payment by City -- Reimbursement From State --

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State-mandated Cost. --A city's payment for business goodwill in a condemnation proceeding it elected to pursue did not constitute the payment of a state-mandated cost under Rev. & Tax. Code, § 2231, subd. (a), and Rev. & Tax. Code, § 2207. Although Stats. 1975, ch. 1275, which revised and recodified the state's eminent domain laws, included the requirement that upon proof of satisfaction of certain stated conditions the owner of a business conducted on the condemned property is entitled to compensation for a loss of goodwill (Code Civ. Proc., § 1263.510), the Legislature made clear the discretionary nature of acquisition of property by eminent domain by the passage of Code Civ. Proc., § 1230.030 (also included within Stats. 1975, ch. 1275). Thus, the Legislature intended for payment of goodwill to be discretionary, and such an increased cost so incurred as a result of the enactment of the revised eminent domain laws was not a cost which the county was required or mandated to incur.

(3) Statutes § 28 -- Construction -- Language -- Harmony With Whole System of Law. --The meaning of a statute must, in the first instance, be sought in the language in which it is framed, and if that is plain the sole judicial function is to enforce it according to its terms. Where the language is clear there is no room for interpretation. Moreover, courts will not determine the wisdom, desirability, or propriety of statutes enacted by the Legislature. Additionally, every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. Furthermore, administrative interpretations of statutes should be accorded great respect and followed if not clearly erroneous.

(4) Appellate Review § 135 -- Review -- Presumptions -- Finding by State Agency. --A finding by a state agency is accorded great weight unless it is shown to be clearly erroneous.

COUNSEL: Steven F. Nord, City Attorney, for Plaintiff and Appellant.

John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, and Geoffrey L. Graybill, Deputy Attorney General, for Defendants and Respondents.

JUDGES: Opinion by Hamlin, J., with Franson, Acting P. J., and Zenovich, J., concurring.

OPINION BY: HAMLIN

OPINION

[*779] [**643] The Case

By its petition for writ of mandamus and its complaint for declaratory judgment plaintiff sought to compel payment of its claim against the State of California (the State) for costs of business goodwill it incurred in an eminent domain proceeding as a result of the enactment of chapter 1275, Statutes of 1975. Specifically, plaintiff asked the court to order the State Controller to pay plaintiff $ 71,350, plus interest, from a "State budget line item he deems appropriate" or, alternatively, to direct the State Controller to pay the amount from a line item the court deems appropriate. The trial court concluded that the [***2] State was liable to plaintiff for payment of business goodwill, but that the court could not order subvention from state funds. It therefore entered judgment denying the peremptory writ of mandamus. Plaintiff filed a timely notice of appeal.

[*780] On appeal, defendants argue for the first time, as we believe they may, that plaintiff's payment for business goodwill in a condemnation proceeding it elected to pursue does not constitute a state-mandated cost. We agree and find it unnecessary to discuss the other contentions of the parties.

The Facts

We include only a brief statement of the undisputed facts which are essential to resolution of the pivotal legal issue involved, i.e., whether plaintiff's payment for business goodwill in the proceeding it initiated to condemn property for its use is a state-mandated cost.

On April 8, 1980, the Merced County Superior Court entered a final order of condemnation in the case entitled City of Merced v. Rodney Barbour and Thomas L. Barbour. This order required plaintiff to pay, along with other sums, $ 71,350 allocated to loss of goodwill pursuant to the provisions of Code of Civil Procedure section 1263.510 [***3] . Plaintiff applied to the State for reimbursement of that amount under the provisions of Revenue and Taxation Code section 2201 et seq. Plaintiff's application for reimbursement was directed to the State Board of Control. That board approved plaintiff's claim. It was included, along with other similar claims, as a line item in chapter 1090, Statutes of 1981. [**644] The Legislature deleted from chapter 1090 all claims seeking reimbursement for business goodwill under chapter 1275, Statutes of 1975 (1275 claims). Additionally, the Legislature included in chapter 1090, as amended, a direction that the Board of Control not accept, or submit to the Legislature, any more 1275 claims.

After plaintiff received notice of the above-mentioned action of the Legislature, it initiated this case.

Discussion

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I. *The State may assert a new legal theory on appeal.*

(1) Defendants admitted in their answer to the petition for writ of mandamus that chapter 1275, Statutes of 1975, mandated a new program or increased level of service under provisions of the Revenue and Taxation Code. At the hearing on the petition, defendants stipulated to the same effect [***4] and added that plaintiff had not requested that mandate. For the first time on appeal, defendants argue that in governmental-entity-initiated eminent domain proceedings payment for business goodwill pursuant to the requirements of chapter 1275, Statutes of 1975, is not a state-mandated cost subject to reimbursement by the State. Defendants admit this represents a change [*781] in their position but that they mistakenly took a position in the trial court inconsistent with the clear manifestation of the intent of the Legislature.

To support their position that defendants may argue on appeal at variance with their answer and admission in the trial court, defendants rely on *Barton v. Owen* (1977) 71 Cal.App.3d 484 [139 Cal.Rptr. 494]. There the plaintiff sought medical treatment from defendant for acute sinusitis. After a series of unsuccessful treatments, plaintiff developed a brain abscess which resulted in a prefrontal lobotomy. The plaintiff tried the case on the theory that the physician was negligent in not taking a culture and sensitivity test as part of his diagnosis. He did not prevail. On appeal, plaintiff argued the trial court erred in instructing [***5] the jury on contributory negligence. Additionally, plaintiff stated a new theory that failure to take the culture and sensitivity test was negligence as a matter of law. The court allowed the new legal theory on appeal.

Plaintiff points to 3 Witkin, California Procedure (2d ed. 1971) Pleadings, sections 342-344, pages 2009-2011, for the general rule that an admission of fact may not be argued differently on appeal. We agree, but that is not what defendants seek to do. Here, the question of whether a cost is state-mandated is purely a question of law. [HN1]This court is not limited by the interpretation of statutes by the trial court. (See *In re Davis* (1978) 87 Cal.App.3d 919, 921 [151 Cal.Rptr. 29]; *Barton v. Owen, supra*, 71 Cal.App.3d at p. 491.) Thus defendants may argue their new legal theory on appeal.

II. *Payment of goodwill is not a state-mandated cost.*

(2a) By this appeal, plaintiff seeks to compel reimbursement of its payment for business goodwill in a proceeding to acquire property under its power of eminent domain. Plaintiff can succeed only if the payment for which it seeks reimbursement was a state-mandated cost. [***6] Our decision on this issue turns upon the meaning of various statutory provisions. (3) In examining the relevant statutes we apply the basic rules of statutory construction stated by the court in *Marin Hospital Dist. v. Rothman* (1983) 139 Cal.App.3d 495, 498-499 [188 Cal.Rptr. 828]. "[HN2]The meaning of a statute must, in the first instance, be sought in the language in which it is framed, and if that is plain the sole judicial function is to enforce it according to its terms [citation]; where the language is clear there is no room for interpretation [citation]. And courts will not determine the *wisdom*, desirability, or propriety of statutes enacted by the Legislature. [Citation.]

"'Moreover, "[HN3]every statute should be construed with reference to the whole system of law of which it is a part so [**645] that all may be harmonized and [*782] have effect."' (*Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645 . . . .) We inquire further into 'the whole system of law of which [Government Code section 26912] is a part.'" (Italics in original.)

Also applicable in this case is [***7] the rule that [HN4]administrative interpretations of statutes should be accorded great respect and followed if not clearly erroneous. (*Noroian v. Department of Administration* (1970) 11 Cal.App.3d 651, 655 [89 Cal.Rptr. 889].) We also rely on extrinsic aids such as the history of relevant statutes, committee reports, and the legislative debates. (*Ibid.*)

(2b) Revenue and Taxation Code section 2231, subdivision (a), includes a direction that: "[HN5]The state shall reimburse each local agency for all 'costs mandated by the state', as defined in Section 2207 . . . ." Section 2207, in turn, provides in pertinent part: "[HN6]'Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following: [para.] (a) Any law enacted after January 1, 1973, which mandates a new program or an increased level of service of an existing program; . . ."

Chapter 1275, Statutes of 1975 (Code Civ. Proc., § 1230.010 et seq.) revised and recodified the eminent domain laws of this state. The revisions included a new requirement that, upon proof of satisfaction of [***8] four stated conditions, the owner of a business conducted on the condemned property is entitled to compensation for loss of goodwill (Code Civ. Proc., § 1263.510). [1]

1 Code of Civil Procedure section 1263.510 provides: "(a) [HN7]The owner of a business conducted on the property taken, or on the remainder if such property is part of a larger parcel, shall be compensated for loss of goodwill if the owner proves all of the following:

"(1) The loss is caused by the taking of the property or the injury to the remainder.

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"(2) The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill.

"(3) Compensation for the loss will not be included in payments under Section 7262 of the Government Code.

"(4) Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.

"(b) Within the meaning of this article, 'goodwill' consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage."

[***9] The costs for which plaintiff seeks reimbursement in this proceeding were incurred by reason of this newly imposed obligation to compensate for loss of business goodwill. [2] This squarely presents the issue which we conclude [*783] is dispositive of plaintiff's appeal, i.e., is the increased cost so incurred as a result of enactment of chapter 1275, Statutes of 1975, a cost which plaintiff was *required* or *mandated* to incur?

2 Until enactment of chapter 1275, Statutes of 1975, goodwill was not compensable in eminent domain proceedings. (See 5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 586, p. 3882.)

In support of the statutory construction it urges, plaintiff points to the Board of Control's decision in March 1981 that 1275 claims were for reimbursement of state-mandated costs. (4) Plaintiff correctly notes that such a finding by a state agency is accorded great weight unless shown to be clearly erroneous. (*Noroian v. Department of Administration, supra,* 11 Cal.App.3d at p. 655.) [***10]

(2c) Defendants counter that the Legislature declared its intent that 1275 claims not be considered state-mandated by rejecting the line item of the budget providing funds for payment of 1275 claims and by directing that the Board of Control not approve or submit to the Legislature any more 1275 claims. (Stats. 1981, ch. 1090.) Defendants rely on *Tyler v. State of California* (1982) 134 Cal.App.3d 973, 977 [162 Cal.Rptr. 82], to support their position that, where a statute is unclear, a later expression of the Legislature bearing upon the intent of the prior statute may be properly [**646] considered in determining the effect and meaning of the prior statute.

More significantly, defendants argue that the Legislature made clear the discretionary nature of acquisition of property by eminent domain by passage of Code of Civil Procedure section 1230.030. Section 1230.030 was included within chapter 1275, Statutes of 1975, the same legislation that changed the law of eminent domain to require compensation for business goodwill. Section 1230.030 provides: "Nothing in this title requires that the power of eminent domain [***11] be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property."

We agree that the Legislature intended for payment of goodwill to be discretionary. The above authorities reveal that whether 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.

This construction is confirmed by subsequent legislative actions, including the enactment of Senate Bill No. 90 (Russell), 1979-1980 Regular Session. [*784] Among other things, that bill (Sen. Bill No. 90) added Revenue and Taxation Code section 2207, subdivision (h):

"[HN8]'Costs mandated by the state' means any increased costs which a local agency is required to incur [***12] 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."

Senate Bill No. 90 became effective on July 1, 1981, 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. The Report of the Assembly Revenue and Taxation Committee (June 9, 1980) includes a statement:

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"*SB 90* further defines 'mandated costs' in Sections 4 and 5 to include the following:

". . . .

"e. Where a statute or executive [***13] 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 (Aug. 4, 1980) 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.)

[*785] Both reports quoted above characterize Senate Bill No. 90 as expanding the definition of local reimbursable costs. The Legislative Analyst's Report of July 30, 1980, on Senate Bill No. 90 similarly includes a [**647] 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. [***14] Thus the cost of business goodwill for which plaintiff was required by chapter 1275, Statutes of 1975, to pay in April 1980, was not a state-mandated cost. It follows that the trial court properly denied the petition for a writ of mandamus to compel payment of that cost. Our conclusion on this pivotal issue makes it unnecessary to consider plaintiff's contentions that article XIII B of the California Constitution requires the State to provide a subvention of funds to reimburse state-mandated costs, that there are appropriated funds available to pay plaintiff's claim, and that a peremptory writ of mandate is the appropriate remedy in this case.

The judgment is affirmed.

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TAB "10"

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LEXSEE

Positive
As of: Jun 23, 2010

COUNTY OF FRESNO, Plaintiff and Appellant, v. THE STATE OF CALIFORNIA et al., Defendants and Respondents.

No. S015637.

Supreme Court of California

53 Cal. 3d 482; 808 P.2d 235; 280 Cal. Rptr. 92; 1991 Cal. LEXIS 1363; 91 Cal. Daily Op. Service 2870; 91 Daily Journal DAR 4617

April 22, 1991.

PRIOR HISTORY: Superior Court of Fresno County, No. 379518-4, Gary S. Austin, Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant county sought review of a judgment from the Court of Appeal (California), which affirmed the trial court's dismissal of appellant's petition for writ of mandate that sought a declaration that the state reimbursement statute, Cal. Gov't Code § 17556(d), was facially unconstitutional under Cal. Const. art. XIII B, § 6.

OVERVIEW: Appellant county filed a petition for writ of mandate and a complaint for declaratory relief against respondents, state, commission, and others, that sought to vacate respondent commission's decision, and sought a declaration that Cal. Gov't Code § 17556(d) was unconstitutional under Cal. Const. art. XIII B, § 6. The trial court denied appellant's petition for writ of mandate and complaint for declaratory relief. The appellate court affirmed. The court granted review for determination on whether § 17556(d) was facially constitutional under Cal. Const. art. XIII B, § 6. The court rejected appellant's argument that the state's enactment of § 17556(d) created a new exception to the reimbursement requirement of Cal. Const. art. XIII B, § 6. The court held that the § 17556(d) was facially constitutional under Cal. Const. art. XIII B, § 6. The court affirmed the appellate court's judgment.

OUTCOME: The court affirmed the appellate court's judgment, and affirmed the dismissal of appellant county's petition for writ of mandate because the state's reimbursement statute was facially constitutional under the California constitution.

CORE TERMS: local governments, mandated, user fees, reimbursement, initiative, level of service, appropriations, facially, taxation, voter, state mandates, new program, levy, constitutional provision, tax revenues, expenditure, recoverable, excluding, statewide, ballot, subvention of funds, self-financing, implementing, subvention, reimburse, spending, duck, local agency, hazardous materials, sufficient to pay

LexisNexis(R) Headnotes

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN1]See Cal. Const. art. XIII B, § 6.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
Governments > Local Governments > Administrative Boards
Governments > Local Governments > Claims By & Against
[HN2] Cal. Gov't Code §§ 17500-17630 is enacted to implement Cal. Const. art. XIII B, § 6. Cal. Gov't Code § 17500. A quasi-judicial body is created called the

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Commission on State Mandates to hear and decide upon any claim by a local government that the local government is entitled to be reimbursed by the state for costs as required by Cal. Const. art. XIII B, § 6. Cal. Gov't. Code § 17551(a).

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN3]Costs is defined as costs mandated by the state for any increased costs that the local government is required to incur as a result of any statute, or any executive order implementing any statute, which mandates a new program or higher level of service of any existing program within the meaning of Cal. Const. art. XIII B, § 6. Cal. Gov't. Code § 17514.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
Governments > Local Governments > Duties & Powers
[HN4] Cal. Gov't Code § 17556(d) declares 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.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN5]Cal. Const. arts. XIIIA, XIIIB work in tandem, together restricting the California government's power both to levy and to spend taxes for public purposes.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
Tax Law > State & Local Taxes > General Overview
[HN6]Cal. Const. art. XIIIB intention is to apply to taxation specifically that provides permanent protection for taxpayers from excessive taxation, and a reasonable way to provide discipline in tax spending at state and local levels.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN7]The relevant appropriations subject to limitation is defined as any authorization to expend during a fiscal year the proceeds of taxes. Cal. Const. art. XIIIB, § 8(b). Proceeds of taxes is defined as including all tax revenues and the proceeds to government from regulatory licenses, user charges, and user fees to the extent that such proceeds exceed the costs reasonably borne by government in providing the regulation, product, or service. Cal. Const. art. XIIIB, § 8(c). Excess proceeds from licenses, charges, and fees are taxes.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
Governments > Local Governments > Finance
[HN8]Cal. Const. art. XIIIB, § 6 is included in recognition that Cal. Const. art. XIIIA severely restricts the taxing powers of local governments. The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that are ill equipped to handle the task.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
Governments > Local Governments > Duties & Powers
[HN9] Cal. Gov't Code § 17556(d) 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.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A county filed a test claim with the Commission on State Mandates seeking, under Cal. Const., art. XIII B, § 6 (state must provide subvention of funds to reimburse local governments for costs of state-mandated programs or increased levels of service), reimbursement from the state for costs incurred in implementing the Hazardous Materials Release Response Plans and Inventory Act (Health & Saf. Code, § 25500 et seq.). The commission found the county had the authority to charge fees to pay for the program, and the program was thus not a reimbursable state-mandated program under Gov. Code, § 17556, subd. (d), which provides that costs are not state-mandated if the agency has the authority to levy a charge or fee sufficient to pay for the program. The county filed a petition for writ of mandate and a complaint for declaratory relief against the state. The trial court denied relief. (Superior Court of Fresno County, No. 379518-4, Gary S. Austin, Judge.) The Court of Appeal, Fifth Dist., No. F011925, affirmed.

The Supreme Court affirmed the decision of the Court of Appeal. The court held, as to the single issue on review, that Gov. Code, § 17556, subd. (d), was facially constitutional under Cal. Const., art. XIII B, § 6. It held art. XIII B was not intended to reach beyond taxation, and § 6 was included in art. XIII B in recognition that

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Cal. Const., art. XIII A, severely restricted the taxing powers of local governments. It held that art. XIII B, § 6 was designed to protect the tax revenues of local governments from state mandates that would require an expenditure of such revenues and, when read in textual and historical context, requires subvention only when the costs in question can be recovered solely from tax revenues. Accordingly, the court held that Gov. Code, § 17556, subd. (d), effectively construed the term "cost" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes, and that such a construction is altogether sound. (Opinion by Mosk, J., with Lucas, C. J., Broussard, Panelli, Kennard, JJ., and Best (Hollis G.), J., * concurring. Separate concurring opinion by Arabian, J.)

* Presiding Justice, Court of Appeal, Fifth Appellate District, assigned by the Chairperson of the Judicial Council.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

(1) State of California § 11--Reimbursement to Local Governments for State-mandated Costs--Costs for Which Fees May Be Levied--Validity of Exclusion. --In a proceeding by a county seeking reversal of a decision by the Commission on State Mandates that the state was not required by Cal. Const., art. XIII B, § 6, to reimburse the county for costs incurred in implementing the Hazardous Materials Release Response Plans and Inventory Act (Health & Saf. Code, § 25500 et seq.), the trial court properly found that Gov. Code, § 17556, subd. (d) (costs are not state-mandated if agency has authority to levy charge or fee sufficient to pay for program), was facially constitutional. Cal. Const., art. XIII B, was intended to apply to taxation and was not intended to reach beyond taxation, as is apparent from its language and confirmed by its history. It was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues; read in its textual and historical contexts, it requires subvention only when the costs in question can be recovered solely from tax revenues. Gov. Code, § 17556, subd. (d), effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes, and that construction is altogether sound. Accordingly, Gov. Code, § 17556, subd. (d), is facially constitutional under Cal. Const., art. XIII B, § 6.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1988) Taxation, § 124.]

COUNSEL: Max E. Robinson, County Counsel, and Pamela A. Stone, Deputy County Counsel, for Plaintiff and Appellant.

B. C. Barnum, County Counsel (Kern), and Patricia J. Randolph, Deputy County Counsel, as Amici Curiae on behalf of Plaintiff and Appellant.

John K. Van de Kamp and Daniel E. Lungren, Attorneys General, N. Eugene Hill, Assistant Attorney General, and Richard M. Frank, Deputy Attorney General, for Defendants and Respondents.

JUDGES: Mosk, J. Lucas, C.J., Broussard, J., Panelli, J., Kennard, J., Best (Hollis G.), J., * concur. Arabian, J., concurring.

* Presiding Justice, Court of Appeal, Fifth Appellate District, sitting under assignment by the Chairperson of the Judicial Council.

OPINION BY: MOSK

OPINION

[*484] [**236] [***93] MOSK, J.

We granted review in this proceeding to decide whether section 17556, subdivision (d), of the Government Code (section 17556(d)) is facially valid under article XIII B, section 6, of the California Constitution (article XIII B, section 6).

[HN1]Article XIII B, 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 program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [P] (a) Legislative mandates requested by the local agency affected; [P] (b) Legislation defining a new crime or changing an existing definition of a crime; or [P] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

The Legislature enacted [HN2] Government Code sections 17500 through 17630 to implement article XIII B, section 6. (Gov. Code, § 17500.) It created a "quasi-judicial body" (*ibid* .) called the Commission on State Mandates (commission) (*id* ., § 17525) to "hear and decide upon [any] claim" by a local government that the

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local government "is entitled to be reimbursed by the state for costs" as required by article XIII B, section 6. (Gov. Code, § 17551, subd. (a).) It defined [HN3]"costs" as "costs mandated by the state"--"any increased costs" that the local government "is required to incur . . . as a result of any statute . . . , or any executive order implementing any statute . . . , which mandates a new program or higher level of service of any existing program" within the meaning of article XIII B, section 6. (Gov. Code, § 17514.) Finally, [HN4]in section 17556(d) it declared 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."

For the reasons discussed below, we conclude that section 17556(d) is facially constitutional under article XIII B, section 6.

[*485] I. FACTS AND PROCEDURAL HISTORY

The present proceeding arose after the Legislature enacted the Hazardous Materials Release Response Plans and Inventory Act (Act). (Health & Saf. Code, § 25500 et seq.) The Act establishes minimum statewide standards for business and area plans relating to the handling and release or threatened release of hazardous materials. (*Id* ., § 25500.) It requires local governments to implement its provisions. (*Id* ., § 25502.) To cover the costs they may incur, it authorizes them to collect fees from those who handle hazardous materials. (*Id*., § 25513.)

The County of Fresno (County) implemented the Act but chose not to impose the authorized fees. Instead, it filed a so-called "test" or initial claim with the commission (Gov. Code, § 17521) seeking reimbursement from the State of California (State) under article XIII B, section 6. After a hearing, the commission rejected the claim. In its statement of decision, the commission made the following findings, among others: the Act constituted a "new program"; the County did indeed incur increased [**237] [***94] costs; but because it had authority under the Act to levy fees sufficient to cover such costs, section 17556(d) prohibited a finding of reimbursable costs.

The County then filed a petition for writ of mandate and complaint for declaratory relief against the State, the commission, and others, seeking vacation of the commission's decision and a declaration that section 17556(d) is unconstitutional under article XIII B, section 6. While the matter was pending, the commission amended its statement of decision to include another basis for denial of the test claim: the Act did not constitute a "program" under the rationale of *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*), because it did not impose unique requirements on local governments.

After a hearing, the trial court denied the petition and effectively dismissed the complaint. It determined, inter alia, that mandate under Code of Civil Procedure section 1094.5 was the County's sole remedy, and that the commission was the sole properly named respondent. It also determined that section 17556(d) is constitutional under article XIII B, section 6. It did not address the question whether the Act constituted a "program" under *County of Los Angeles* . Judgment was entered accordingly.

The Court of Appeal affirmed. It held the Act did indeed constitute a "program" under *County of Los Angeles , supra* , 43 Cal.3d 46. It also held section 17556(d) is constitutional under article XIII B, section 6.

[*486] (1) We granted review to decide a single issue, i.e., whether section 17556(d) is facially constitutional under article XIII B, section 6.

II. DISCUSSION

We begin our analysis with the California Constitution. At the June 6, 1978, Primary Election, article XIII A was added to the Constitution through the adoption of Proposition 13, an initiative measure aimed at controlling ad valorem property taxes and the imposition of new "special taxes." (*Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization* (1978) 22 Cal.3d 208, 231-232 [149 Cal.Rptr. 239, 583 P.2d 1281].) The constitutional provision imposes a limit on the power of state and local governments to adopt and levy taxes. (*City of Sacramento* v. *State of California* (1990) 50 Cal.3d 51, 59, fn. 1 [266 Cal.Rptr. 139, 785 P.2d 522] (*City of Sacramento*).)

At the November 6, 1979, Special Statewide Election, article XIII B was added to the Constitution through the adoption of Proposition 4, another initiative measure. That measure places limitations on the ability of both state and local governments to appropriate funds for expenditures.

[HN5]"Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend [taxes] for public purposes." (*City of Sacramento , supra* , 50 Cal.3d at p. 59, fn. 1.)

[HN6]Article XIII B of the Constitution was intended to apply to taxation specifically, to provide "permanent protection for taxpayers from excessive taxation" and "a reasonable way to provide discipline in tax spending at state and local levels." (See *County of Placer* v. *Corin* (1980) 113 Cal.App.3d 443, 446 [170 Cal.Rptr. 232], quoting and following Ballot Pamp.,

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Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), argument in favor of Prop. 4, p. 18.) To this end, it establishes an "appropriations limit" for both state and local governments (Cal. Const., art. XIII B, § 8, subd. (h)) and allows no "appropriations subject to limitation" in excess thereof (*id.*, § 2). (See *County of Placer* v. *Corin*, *supra*, 113 Cal.App.3d at p. 446.) It defines [HN7]the relevant "appropriations subject to limitation" as "any authorization to expend during a fiscal year the proceeds of taxes . . . ." (Cal. Const., art. XIII B, § 8, subd. (b).) It defines "proceeds of taxes" as including "all tax revenues and the proceeds to . . . government from," inter alia, "regulatory licenses, user charges, and user fees *to the extent that such proceeds exceed the costs reasonably borne by [government] in providing* [**238] [***95] *the regulation, product, or service* . . . ." (Cal. Const., art. XIII B, § 8, subd. (c), italics added.) Such "excess" proceeds from "licenses," "charges," and "fees" "are but [*487] *taxes* " for purposes here. (*County of Placer* v. *Corin*, *supra*, 113 Cal.App.3d at p. 451, italics in original.)

Article XIII B of the Constitution, however, was not intended to reach beyond taxation. That fact is apparent from the language of the measure. It is confirmed by its history. In his analysis, the Legislative Analyst declared that Proposition 4 "would not restrict the growth in appropriations financed from other [i.e., nontax] sources of revenue, including federal funds, bond funds, traffic fines, user fees based on reasonable costs, and income from gifts." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), analysis by Legislative Analyst, p. 16.)

[HN8]Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles*, *supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "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, [HN9]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.

The County argues to the contrary. It maintains that section 17556(d) in essence creates a new exception to the reimbursement requirement of article XIII B, section 6, for self-financing programs and that the Legislature cannot create exceptions to the reimbursement requirement beyond those enumerated in the Constitution.

We do not agree that in enacting section 17556(d) the Legislature created a new exception to the reimbursement requirement of article [*488] XIII B, section 6. As explained, the Legislature effectively and properly construed the term "costs" as excluding expenses that are recoverable from sources other than taxes. In a word, such expenses are outside of the scope of the requirement. Therefore, they need not be explicitly excepted from its reach.

The County nevertheless argues that no matter how characterized, section 17556(d) is indeed inconsistent with article XIII B, section 6. Its contention is in substance as follows: the source of section 17556(d) is former Revenue and Taxation Code section 2253.2; at the time of Proposition 4, subdivision (b)(4) of that former section stated that the State Board of Control shall not allow a claim for reimbursement of costs mandated by the state if the legislation contains a self-financing authority; the [**239] [***96] drafters of Proposition 4 incorporated some of the provisions of former Revenue and Taxation Code section 2253.2 into article XIII B, section 6, but did not incorporate former subdivision (b)(4); their failure to do so reveals an intent to treat as immaterial the presence or absence of a "self-financing" provision; and such an intent is confirmed by the "legislative history" set out at page 55 in Spirit of 13, Inc., Summary of Proposed Implementing Legislation and Drafters' Intent: "the state may not arbitrarily declare that it is not going to comply with Section 6 . . . if the state provides new compensating revenues."

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In our view, the County's argument is unpersuasive. Even if we assume arguendo that the intent of those who drafted Proposition 4 is as claimed, what is crucial here is the intent of those who voted for the measure. (See *County of Los Angeles , supra* , 43 Cal.3d 46, 56.) There is no substantial evidence that the voters sought what the County assumes the drafters desired. Moreover, the "legislative history" cited above cannot be considered relevant; it was written and circulated after the passage of Proposition 4. As such, it could not have affected the voters in any way.

To avoid this result, the County advances one final argument: "Based on the authority of [section 17556(d)], the Commission on State Mandates refuses to hear mandates on the merits once it finds that the authority to charge fees is given by the Legislature. This position is taken whether or not fees can actually or legally be charged to recover the entire costs of the program."

[*489] The County appears to be making one or both of the following arguments: (1) the commission applies section 17556(d) in an unconstitutional manner; or (2) the Act's self-financing authority is somehow lacking. Such contentions, however, miss the designated mark. They raise questions bearing on the constitutionality of section 17556(d) as applied and the legal efficacy of the authority conferred by the Act. The sole issue on review, however, is the facial constitutionality of section 17556(d).

III. CONCLUSION

For the reasons set forth above, we conclude that section 17556(d) is facially constitutional under article XIII B, section 6.

The judgment of the Court of Appeal is affirmed.

Lucas, C. J., Broussard, J., Panelli, J., Kennard, J., and Best (Hollis G.), J., * concurred.

* Presiding Justice, Court of Appeal, Fifth Appellate District, assigned by the Chairperson of the Judicial Council.

CONCUR BY: ARABIAN

CONCUR

ARABIAN, J., Concurring.

I concur in the determination that Government Code section 17556, subdivision (d) [1] (section 17556(d)), does not offend article XIII B, section 6, of the California Constitution (article XIII B, section 6). In my estimation, however, the constitutional measure of the issue before us warrants fuller examination than the majority allow. A literalistic analysis begs the question of whether the Legislature had the authority to act statutorily upon a subject matter the electorate has spoken to constitutionally through the initiative process.

1 Unless otherwise indicated, all further statutory references are to the Government Code.

Article XIII B, section 6, unequivocally commands that "the state shall provide a subvention of funds to reimburse . . . local government for the costs of [a new] program or increased level of service" except as specified therein. Article XIII B does not define this reference to "costs." (See Cal. Const., art. XIII B, § 8.) Rather, the Legislature assumed the task of explicating the related concept of "costs mandated by the state" when it created the Commission on State Mandates and enacted procedures intended to implement article XIII B, section 6, more effectively. (See § 17500 et seq.) As part of this statutory scheme, it exempted the state from its constitutionally imposed subvention obligation under certain enumerated circumstances. Some of these exemptions the electorate expressly contemplated in approving article XIII B, section 6 (§ 17556, subds. (a), (c), & (g); see [**240] [***97] § 17514), while others are strictly of legislative formulation and derive from [*490] former Revenue and Taxation Code section 2253.2. (§ 17556, subds. (b), (d), (e), & (f).)

The majority find section 17556 valid notwithstanding the mandatory language of article XIII B, section 6, based on the circular and conclusory rationale that "the Legislature effectively and properly construed the term 'costs' as excluding expenses that are recoverable from sources other than taxes. In a word, such expenses are outside of the scope of the [subvention] requirement. Therefore, they need not be explicitly excepted from its reach." (Maj. opn., *ante* , at p. 488.) In my view, excluding or otherwise removing something from the purview of a law is tantamount to creating an exception thereto. When an exclusionary implication is clear from the import or effect of the statutory language, use of the word "except" should not be necessary to construe the result for what it clearly is. In this circumstance, "I would invoke the folk wisdom that if an object looks like a duck, walks like a duck and quacks like a duck, it is likely to be a duck." (*In re Deborah C.* (1981) 30 Cal.3d 125, 141 [177 Cal.Rptr. 852, 635 P.2d 446] (conc. opn. by Mosk, J.).)

Of at least equal importance, section 17500 et seq. constitutes a legislative implementation of article XIII B, section 6. As such, the overall statutory scheme must comport with the express constitutional language it was designed to effectuate as well as the implicit electoral intent. Eschewing semantics, I would squarely and forth-

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rightly address the fundamental and substantial question of whether the Legislature could lawfully enlarge upon the scope of article XIII B, section 6, to include exceptions not originally designated in the initiative.

I do not hereby seek to undermine the majority holding but rather to set it on a firmer constitutional footing. "[S]tatutes must be given a reasonable interpretation, one which will carry out the intent of the legislators and render them valid and operative rather than defeat them. In so doing, sections of the Constitution, as well as the codes, will be harmonized where reasonably possible, in order that all may stand." (*Rose* v. *State of California* (1942) 19 Cal.2d 713, 723 [123 P.2d 505]; see also *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 58 [233 Cal.Rptr. 38, 729 P.2d 202].) To this end, it is a fundamental premise of our form of government that "the Constitution of this State is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature; and . . . it is competent for the Legislature to exercise all powers not forbidden . . . ." (*People* v. *Coleman* (1854) 4 Cal. 46, 49.) "Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the [*491] Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution. [Citations.] *In other words, 'we do not look to the Constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited*.' [Citation.] [P] Secondly, all intendments favor the exercise of the Legislature's plenary authority: 'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.' [Citations.]" (*Methodist Hosp. of Sacramento* v. *Saylor* (1971) 5 Cal.3d 685, 691 [97 Cal.Rptr. 1, 488 P.2d 161], italics added.) "Specifically, the express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms. [Citations.]" (*Dean* v. *Kuchel* (1951) 37 Cal.2d 97, 100 [230 P.2d 811].)

As the majority opinion impliedly recognizes, neither the language nor the intent of article XIII B conflicts with the exercise of legislative prerogative we review today. Of paramount significance, neither section 6 nor any other provision of article XIII B prohibits statutory delineation of additional [**241] [***98] circumstances obviating reimbursement for state mandated programs. (See *Dean* v. *Kuchel*, *supra*, 37 Cal.2d at p. 101; *Roth Drugs, Inc.* v. *Johnson* (1936) 13 Cal.App.2d 720, 729 [57 P.2d 1022]; see also *Kehrlein* v. *City of Oakland* (1981) 116 Cal.App.3d 332, 338 [172 Cal.Rptr. 111].)

Furthermore, the initiative was "[b]illed as a flexible way to provide discipline in government spending" by creating appropriations limits to restrict the amount of such expenditures. (*County of Placer* v. *Corin* (1980) 113 Cal.App.3d 443, 447 [170 Cal.Rptr. 232]; see Cal. Const., art. XIII B, § 1.) By their nature, user fees do not affect the equation of local government spending: While they facilitate implementation of newly mandated state programs or increased levels of service, they are excluded from the "appropriations subject to limitations" calculation and its attendant budgetary constraints. (See Cal. Const., art. XIII B, § 8; see also *City Council* v. *South* (1983) 146 Cal.App.3d 320, 334 [194 Cal.Rptr. 110]; *County of Placer* v. *Corin*, *supra*, 113 Cal.App.3d at pp. 448-449; Cal. Const., art. XIII B, § 3, subd. (b); cf. *Russ Bldg. Partnership* v. *City and County of San Francisco* (1987) 199 Cal.App.3d 1496, 1505 [246 Cal.Rptr. 21] ["fees not exceeding the reasonable cost of providing the service or regulatory activity for which the fee is charged and which are not levied for general revenue purposes, have been considered outside the realm of "special taxes" [limited by California Constitution, article XIII A]q "]; *Terminal Plaza Corp.* v. *City* [*492] *and County of San Francisco* (1986) 177 Cal.App.3d 892, 906 [223 Cal.Rptr. 379] [same].)

This conclusion fully accommodates the intent of the voters in adopting article XIII B, as reflected in the ballot materials accompanying the proposition. (See *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].) In general, these materials convey that "[t]he goals of article XIII B, of which section 6 is a part, were to protect residents from excessive taxation and government spending." (*County of Los Angeles* v. *State of California*, *supra*, 43 Cal.3d at p. 61; *Huntington Park Redevelopment Agency* v. *Martin* (1985) 38 Cal.3d 100, 109-110 [211 Cal.Rptr. 133, 695 P.2d 220].) To the extent user fees are not borne by the general public or applied to the general revenues, they do not bear upon this purpose. Moreover, by imputation, voter approval contemplated the continued imposition of reasonable user fees outside the scope of article XIII B. (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Limitation of Government Appropriations, Special Statewide Elec. (Nov. 6, 1979), arguments in favor of and against Prop. 4, p. 18 [initiative "WILL curb excessive user fees imposed by local government" but "will NOT eliminate user fees . . ."]; see *County of Placer* v. *Corin*, *supra*, 113 Cal.App.3d at p. 452.)

"The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the

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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; see *City of Sacramento* v. *State of California* (1990) 50 Cal.3d 51, 66 [266 Cal.Rptr. 139, 785 P.2d 522].) "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 preceding year and were ill equipped to take responsibility for any new programs." (*County of Los Angeles* v. *State of California* , *supra* , 43 Cal.3d at p. 61.) An exemption from reimbursement for state mandated programs for which local governments are authorized to charge offsetting user fees does not frustrate or compromise these goals or otherwise disturb the balance of local government financing [**242] [***99] and expenditure. [2] (See *County of Placer* v. *Corin* , *supra* , 113 Cal.App.3d at p. 452, [*493] fn. 7.) Article XIII B, section 8, subdivision (c), specifically includes regulatory licenses, user charges, and user fees in the appropriations limitation equation only "to the extent that those proceeds exceed the costs reasonably borne by [the governmental] entity in providing the regulation, product, or service . . . ."

2 This conclusion also accords with the traditional and historical role of user fees in promoting the multifarious functions of local government by imposing on those receiving a service the cost of providing it. (Cf. *County of Placer* v. *Corin* , *supra* , 113 Cal.App.3d at p. 454 ["Special assessments, being levied only for improvements that benefit particular parcels of land, and not to raise general revenues, are simply not the type of exaction that can be used as a mechanism for circumventing these tax relief provisions. [Citation.]"].)

The self-executing nature of article XIII B does not alter this analysis. "It has been uniformly held that the legislature has the power to enact statutes providing for reasonable regulation and control of rights granted under constitutional provisions. [Citations.]" (*Chesney* v. *Byram* (1940) 15 Cal.2d 460, 465 [101 P.2d 1106].) ""Legislation may be desirable, by way of providing convenient remedies for the protection of the right secured, or of regulating the claim of the right so that its exact limits may be known and understood; but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it." [Citations.]'" (*Id* ., at pp. 463-464; see also *County of Contra Costa* v. *State of California* (1986) 177 Cal.App.3d 62, 75 [222 Cal.Rptr. 750].) Section 17556(d) is not "merely [a] transparent attempt[] to do indirectly that which cannot lawfully be done directly." (*Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 541 [234 Cal.Rptr. 795].) On the contrary, it creates no conflict with the constitutional directive it subserves. Hence, rather than pursue an interpretive expedient, this court should expressly declare that it operates as a valid legislative implementation thereof.

"[Initiative] provisions of the Constitution and of charters and statutes should, as a general rule, be liberally construed in favor of the reserved power. [Citations.] As opposed to that principle, however, 'in examining and ascertaining the intention of the people with respect to the scope and nature of those . . . powers, it is proper and important to consider what the consequences of applying it to a particular act of legislation would be, and if upon such consideration it be found that by so applying it the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential and, perhaps, . . . indispensable, to the convenience, comfort, and well-being of the inhabitants of certain legally established districts or subdivisions of the state or of the whole state, then in such case the courts may and should assume that the people intended no such result to flow from the application of those powers and that they do not so apply.' [Citation.]" (*Hunt* v. *Mayor & Council of Riverside* (1948) 31 Cal.2d 619, 628-629 [191 P.2d 426].)

[*494] This court is not infrequently called upon to resolve the tension of apparent or actual conflicts in the express will of the people. [3] Whether that expression emanates directly from the ballot or indirectly through legislative implementation, each deserves our fullest estimation and effectuation. Given the historical and abiding role of government by initiative, I decline to circumvent that responsibility and accept uncritically the Legislature's self-validating statutory scheme as the basis for approving [***100] the exercise [**243] of its prerogative. It is not enough to say a broader constitutional analysis yields the same result and therefore is unnecessary. We provide a higher quality of justice harmonizing rather than ignoring the divers voices of the people, for such is the nature of our office.

3 See, e.g., *Zumwalt* v. *Superior Court* (1989) 49 Cal.3d 167 [260 Cal.Rptr. 545, 776 P.2d 247]; *Los Angeles County Transportation Com.* v. *Richmond* (1982) 31 Cal.3d 197 [182 Cal.Rptr. 324, 643 P.2d 941]; *California Housing Finance Agency* v. *Patitucci* (1978) 22 Cal.3d 171 [148 Cal.Rptr. 875, 583 P.2d 729]; *California Housing Finance Agency* v. *Elliott* (1976) 17 Cal.3d 575

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[131 Cal.Rptr. 361, 551 P.2d 1193]; *Blotter* v. *Farrell* (1954) 42 Cal.2d 804 [270 P.2d 481]; *Dean* v. *Kuchel* , *supra* , 37 Cal.2d 97; *Hunt* v. *Mayor & Council of Riverside* , *supra* , 31 Cal.2d 619.

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TAB "11"

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LEXSEE

Cited
As of: Jun 23, 2010

COUNTY OF LOS ANGELES et al., Plaintiffs and Appellants, v. COMMISSION ON STATE MANDATES, Defendant and Appellant; REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, Real Party in Interest and Respondent. CITY OF ARTESIA et al., Plaintiffs and Appellants, v. COMMISSION ON STATE MANDATES, Defendant and Appellant; REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, Real Party in Interest and Respondent.

B183981

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

150 Cal. App. 4th 898; 58 Cal. Rptr. 3d 762; 2007 Cal. App. LEXIS 711; 2007 Cal. Daily Op. Service 5216; 37 ELR 20107

May 10, 2007, Filed

PRIOR HISTORY: [***1] Superior Court of Los Angeles County, Nos. BS089769 and BS089785, Victoria G. Chaney, Judge.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: The Superior Court of Los Angeles County, California, issued a writ of mandate directing defendant California Commission on State Mandates to set aside its decisions affirming its executive director's rejections of test claims presented by plaintiffs, a county and cities, and to consider fully the claims and determine whether plaintiffs were entitled to reimbursement without consideration of Gov. Code, § 17516, subd. (c). The Commission appealed.

OVERVIEW: Plaintiffs cross-appealed. The court held that § 17516, subd. (c), was unconstitutional to the extent it exempted regional water quality control boards from the constitutional state mandate subvention requirement. Its creation of an exception for regional boards, which were state agencies, contravened the plain, unequivocal, and all-inclusive reference to "any state agency" in Cal. Const., art. XIII B, § 6. Moreover, a contrary conclusion was not compelled by virtue of the fact that § 17516, subd. (c), essentially mirrored the language of Rev. & Tax. Code, § 2209, subd. (c). A statute could not trump the constitution. The court found persuasive the Commission's position that should it conclude § 17516, subd. (c), was unconstitutional, the appropriate remedy was to afford the Commission the opportunity to pass on the merits of the subject test claims on the issues of whether: (1) the subject permit qualified as a state mandated program under art. XIII B, § 6; (2) the permit amounted to a new program or higher level of service; and (3) the permit imposed costs on local entities. The court concluded that plaintiffs' cross-appeal, which was simply protective in nature, was moot.

OUTCOME: The court affirmed the trial court's judgment.

CORE TERMS: regional, water boards, subvention, local governments, state mandate, reimbursement, executive order, mandated, local agencies, levels of service, new program, state agency, test claim, subvention of funds, cause of action, water quality, writ of mandate directing, federal mandate, federal law, Clean Water Act, order issued, cross-appeal, state law, pollution, pollutants, funding, statute of limitations, implementing, carrying, demurrer

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LexisNexis(R) Headnotes

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN1]See Cal. Const., art. XIII B, § 6.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN2]"Subvention" generally means a grant of financial aid or assistance, or a subsidy. 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. 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 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.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN3]The subvention requirement of Cal. Const., art. XIII B, § 6, is triggered if the legislature or any state agency mandates a new program or higher level of service. Cal. Const., art. XIII B, § 6. Such requirement is inapplicable where the additional costs on local governments are imposed by a federal mandate, i.e., the federal government. Cal. Const., art. XIII B, § 9, subd. (b), defines federally mandated appropriations as those 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.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN4]Whether a particular cost incurred by a local government arises from carrying out a state mandate for which subvention is required under Cal. Const., art. XIII B, § 6, is a matter for the California Commission on State Mandates to determine in the first instance. A local government initiates the process for subvention under Cal. Const., art. XIII B, § 6, by filing a claim with the Commission. Gov. Code, § 17521. The initial claim is referred to as a test claim. Gov. Code, § 17521. The provisions of Gov. Code, § 17500 et seq., provide the sole and exclusive procedure by which a local agency may claim reimbursement for costs mandated by the state as required by Cal. Const., art. XIII B, § 6. Gov. Code, § 17552.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN5]The legislature has created a quasi-judicial body called the California Commission on State Mandates, Gov. Code, § 17525, to hear and decide upon any claim by a local government that the local government is entitled to be reimbursed by the state for costs as required by Cal. Const., art. XIII B, § 6. Gov. Code, § 17551, subd. (a). It has defined "costs" as costs mandated by the state -- any increased costs that the local government is required to incur as a result of any statute, or any executive order implementing any statute, which mandates a new program or higher level of service of any existing program within the meaning of Cal. Const., art. XIII B, § 6. Gov. Code, § 17514. Finally, in Gov. Code, § 17556, subd. (d), it has declared 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.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Demurrers
Civil Procedure > Pretrial Judgments > Judgment on the Pleadings
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN6]A motion for judgment on the pleadings is the equivalent of a general demurrer but is made after the time for demurrer has expired. The rules governing demurrers apply. The grounds for a motion for judgment on the pleadings must appear on the face of the challenged complaint or be based on facts which the court may judicially notice. On review, an appellate court must deter-

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mine if the complaint states a cause of action as a matter of law. The appellate court reviews the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory.

Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus
Civil Procedure > Appeals > Standards of Review > De Novo Review
Civil Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview
[HN7]In reviewing a trial court's ruling on a writ of mandate, an appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. However, where the facts are undisputed and the issues present questions of law, the appellate court is not bound by the trial court's decision but may make its own determination.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview
Governments > Legislation > Statutes of Limitations > Time Limitations
[HN8]See Code Civ. Proc., § 341.5.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Demurrers
[HN9]The time-bar of a statute of limitations may be raised by demurrer where the complaint discloses on its face that the statute of limitations has run on the causes of action stated in the complaint, for the reason that it fails to state facts sufficient to state a cause of action. Forfeiture of a time-bar defense transpires by the failure to raise the applicable statute of limitations in the answer.

Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus
Governments > Legislation > Statutes of Limitations > Equitable Estoppel
Governments > Legislation > Statutes of Limitations > Waivers
[HN10]If a time limit in a mandamus proceeding is held to be jurisdictional, estoppel or waiver cannot extend the time.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview
Governments > Legislation > Statutes of Limitations > Time Limitations
[HN11]The time-bar of Code Civ. Proc., § 341.5, applies to a challenge to the constitutionality of any statute relating to state funding for counties and other local governmental entities, not to a challenge to an action by an administrative agency.

Civil Procedure > Appeals > Reviewability > Preservation for Review
Governments > Legislation > Statutes of Limitations > Time Limitations
[HN12]Case law does not stand for the proposition that the bar of the applicable statute of limitations may be raised for the first time on appeal.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > General Overview
[HN13]Part of the federal Clean Water Act, 33 U.S.C. § 1251 et seq., is the National Pollutant Discharge Elimination System (NPDES), the primary means for enforcing effluent limitations and standards under the Clean Water Act. The NPDES sets out the conditions under which the federal Environmental Protection Agency 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 water quality control boards (regional water boards) are the equivalent of the NPDES permits required by federal law. Wat. Code, § 13374. California's Porter-Cologne Act, Wat. Code, § 13000 et seq., establishes a statewide program for water quality control. Nine regional water boards, overseen by the California Water Board, administer the program in their respective regions. Wat. Code, §§ 13140, 13200 et seq., 13240, and 13301. Wat. Code, §§ 13374 and 13377, authorize the regional water board to issue federal NPDES permits for five-year periods. 33 U.S.C. § 1342, subd. (b)(1)(B).

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN14]See Gov. Code, § 17556, subd. (c).

Governments > State & Territorial Governments > General Overview

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[HN15]See Rev. & Tax. Code, § 2209, subd. (c).

Constitutional Law > State Constitutional Operation
[HN16]In construing the meaning of Cal. Const., art. XIII B, § 6, a court's inquiry is not focused on what the legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted art. XIII B, § 6. To determine this intent, the court must look to the language of the provision itself.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN17]The subvention requirement of Cal. Const., art. XIII B, § 6, applies whenever the legislature or any state agency mandates a new program or higher level of service. The all-encompassing "any state agency" language defeats any perceived presumption that the electorate intended to incorporate into Cal. Const., art. XIII B, § 6, the exclusion of a particular state agency from its subvention requirement.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview
Environmental Law > Water Quality > General Overview
Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN18]The constitutional infirmity of Gov. Code, § 17516, subd. (c), is readily apparent from its plain language that the definition of "executive order" does not include any order, plan, requirement, rule, or regulation issued by the California Water Board or by any regional water quality control board (regional water board) pursuant to Division 7 (commencing with Wat. Code, § 13000) of the California Water Code. § 17516, subd. (c). This exclusion of any order issued by any regional water board contravenes the clear, unequivocal intent of Cal. Const., art. XIII B, § 6, that subvention of funds is required whenever any state agency mandates a new program or higher level of service on any local government. § 17516, subd. (c). Therefore, § 17516, subd. (c), is unconstitutional to the extent it excludes any order issued by any regional water board pursuant to Division 7 (commencing with Wat. Code, § 13000) of the Water Code from the definition of "executive order." This conclusion leads to the further conclusion that whether one or both of the subject two obligations constitutes a state mandate necessitating subvention of funds under Cal. Const., art. XIII B, § 6, is an issue that must in the first instance be resolved by the California Commission on State Mandates.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court issued a writ of mandate directing the Commission on State Mandates to set aside its decisions affirming its executive director's rejections of test claims presented by a county and several cities and to consider fully the test claims and determine whether the county and the cities were entitled to reimbursement without consideration of Gov. Code, § 17516, subd. (c). The county and the cities sought reimbursement for carrying out obligations required by a National Pollutant Discharge Elimination System Permit for municipal storm-water and urban runoff discharges that was issued by the Regional Water Quality Control Board (Regional Water Board), Los Angeles Region. (Superior Court of Los Angeles County, Nos. BS089769 and BS089785, Victoria G. Chaney, Judge.)

The Court of Appeal affirmed the judgment, holding that Gov. Code, § 17516, subd. (c), is unconstitutional to the extent that it exempts regional water boards from the constitutional state mandate subvention requirement. Its creation of an exception for regional water boards, which are state agencies, contravenes the plain, unequivocal, and all-inclusive reference to "any state agency" in Cal. Const., art. XIII B, § 6. Moreover, a contrary conclusion was not compelled by virtue of the fact that § 17516, subd. (c), essentially mirrors the language of Rev. & Tax. Code, § 2209, subd. (c). A statute cannot trump the constitution. The court found persuasive the commission's position that should the court conclude § 17516, subd. (c), was unconstitutional, the appropriate remedy was to afford the commission the opportunity to pass on the merits of the subject test claims on the issues of whether: (1) the subject permit qualified as a state mandated program under Cal. Const., art. XIII B, § 6; (2) the permit amounted to a new program or higher level of service; and (3) the permit imposed costs on local entities (Gov. [*899] Code, §§ 17514, 17556). A cross-appeal filed by the county and the cities was premised on the theory that if subvention of funds from the commission was foreclosed by § 17516, subd. (c), they were entitled to pursue an independent action against the Regional Water Board, Los Angeles Region. Accordingly, the court concluded that the cross-appeal, which was simply protective in nature, was moot. (Opinion by Aldrich, J., with Klein, P. J., and Croskey, J., concurring.)

HEADNOTES

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CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) **State of California § 11--Fiscal Matters--Reimbursement to Local Governments--New Programs and Services--Subvention.**--"Subvention" generally means a grant of financial aid or assistance, or a subsidy. 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. 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 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. The subvention requirement of Cal. Const., art. XIII B, § 6, is triggered if the Legislature or any state agency mandates a new program or higher level of service (art. XIII B, § 6). Such requirement is inapplicable where the additional costs on local governments are imposed by a federal mandate, i.e., the federal government. Article XIII B, § 9, subd. (b), defines federally mandated appropriations as those 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. [*900]

(2) **State of California § 11--Fiscal Matters--Reimbursement to Local Governments--New Programs and Service--Subvention--Procedure for Claims.**--Whether a particular cost incurred by a local government arises from carrying out a state mandate for which subvention is required under Cal. Const., art. XIII B, § 6, is a matter for the Commission on State Mandates to determine in the first instance. A local government initiates the process for subvention under art. XIII B, § 6, by filing a claim with the commission (Gov. Code, § 17521). The initial claim is referred to as a test claim (§ 17521). The provisions of Gov. Code, § 17500 et seq., provide the sole and exclusive procedure by which a local agency may claim reimbursement for costs mandated by the state as required by art. XIII B, § 6 (Gov. Code, § 17552). The Legislature has created a quasi-judicial body called the Commission on State Mandates, Gov. Code, § 17525, to hear and decide upon any claim by a local government that the local government is entitled to be reimbursed by the state for costs as required by Cal. Const., art. XIII B, § 6 (Gov. Code, § 17551, subd. (a)). It has defined "costs" as costs mandated by the state--any increased costs that the local government is required to incur as a result of any statute, or any executive order implementing any statute, which mandates a new program or higher level of service of any existing program within the meaning of Cal. Const., art. XIII B, § 6 (Gov. Code, § 17514). Finally, in Gov. Code, § 17556, subd. (d), it has declared 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.

(3) **Limitation of Actions § 28--Defenses--Raising by Demurrer--Forfeiture.**--The time bar of a statute of limitations may be raised by demurrer where the complaint discloses on its face that the statute of limitations has run on the causes of action stated in the complaint, for the reason that it fails to state facts sufficient to constitute a cause of action. Forfeiture of a time-bar defense transpires by the failure to raise the applicable statute of limitations in the answer.

(4) **Mandamus and Prohibition § 57--Mandamus--Time Limits.**--If a time limit in a mandamus proceeding is held to be jurisdictional, estoppel or waiver cannot extend the time.

(5) **Limitation of Actions § 5--Validity, Construction, and Application of Statutes--Challenge to Constitutionality--State Funding Statute.**--The time bar of Code Civ. Proc., § 341.5, applies to a challenge to the [*901] constitutionality of any statute relating to state funding for counties and other local governmental entities, not to a challenge to an action by an administrative agency.

(6) **Pollution and Conservation Laws § 5--Water Pollution--Statewide Program for Quality Control--Administration by Regional Water Quality Control Boards--Issuance of Discharge Permits.**--Part of the federal Clean Water Act (33 U.S.C. § 1251 et seq.) is the National Pollutant Discharge Elimination System (NPDES), the primary means for enforcing effluent limitations and standards under the Clean Water Act. The NPDES sets out the conditions under which the federal Environmental Protection Agency 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 Water Quality

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Control Boards are the equivalent of the NPDES permits required by federal law (Wat. Code, § 13374). California's Porter-Cologne Act (Wat. Code, § 13000 et seq.) establishes a statewide program for water quality control. Nine regional water boards, overseen by the State Water Board, administer the program in their respective regions (Wat. Code, §§ 13140, 13200 et seq., 13240, and 13301). Wat. Code, §§ 13374 and 13377, authorize the regional water board to issue federal NPDES permits for five-year periods (33 U.S.C. § 1342, subd. (b)(1)(B)).

(7) Constitutional Law § 13--Construction of Constitutions--Language of Enactment--Voters' Intent.--In construing the meaning of Cal. Const., art. XIII B, § 6, a court's inquiry is not focused on what the Legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted art. XIII B, § 6. To determine this intent, the court must look to the language of the provision itself.

(8) State of California § 11--Fiscal Matters--Reimbursement to Local Governments--New Programs and Services--Subvention.--The subvention requirement of Cal. Const., art. XIII B, § 6, applies whenever the Legislature or any state agency mandates a new program or higher level of service. The all-encompassing "any state agency" language defeats any perceived presumption that the electorate intended to incorporate into art. XIII B, § 6, the exclusion of a particular state agency from its subvention requirement. [*902]

(9) State of California § 11--Fiscal Matters--Reimbursement to Local Governments--New Programs and Services--Subvention--Unconstitutionality of Conflicting Statute--Order Issued by Regional Water Board.--The constitutional infirmity of Gov. Code, § 17516, subd. (c), is readily apparent from its plain language that the definition of "executive order" does not include any order, plan, requirement, rule, or regulation issued by the State Water Board or by any regional water quality control board pursuant to division 7 (commencing with Wat. Code, § 13000) of the Water Code (§ 17516, subd. (c)). This exclusion of any order issued by any regional water board contravenes the clear, unequivocal intent of Cal. Const., art. XIII B, § 6, that subvention of funds is required whenever any state agency mandates a new program or higher level of service on any local government (§ 17516, subd. (c)). Therefore, § 17516, subd. (c), is unconstitutional to the extent it excludes any order issued by any regional water board pursuant to division 7 (commencing with Wat. Code, § 13000) of the Water Code from the definition of "executive order." This conclusion leads to the further conclusion that whether one or both of the subject two obligations constitutes a state mandate necessitating subvention of funds under Cal. Const., art. XIII B, § 6, is an issue that must in the first instance be resolved by the Commission on State Mandates.

(10) State of California § 11--Fiscal Matters--Reimbursement to Local Governments--New Programs and Services--Subvention--Unconstitutionality of Conflicting Statute--Order Issued by Regional Water Board--Remedy.--Because Gov. Code, § 17516, subd. (c), is unconstitutional to the extent it purports to exempt orders issued by regional water quality control boards from the definition of "executive orders" for which subvention of funds to local governments for carrying out state mandates is required pursuant to Cal. Const., art. XIII B, § 6, a trial court properly issued a writ of mandate directing the Commission on State Mandates to resolve four test claims presented by a county and several cities on the merits without reference to § 17516, subd. (c).

[5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 1043; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 119 et seq.]

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General for Regional Water Quality Control Board, Los Angeles Region as Amicus Curiae on behalf of Defendant and Appellant.

No apperance for Real Party in Interest and Respondent.

JUDGES: Aldrich, J., with Klein, P. J., and Croskey, J., concurring.

OPINION BY: Aldrich

OPINION

[**764] **ALDRICH, J.--**

INTRODUCTION

The California Commission on State Mandates (the Commission) appeals from the judgment entered following the partial grant of cross-motions for judgment on the pleadings. The County of Los Angeles, the Los Angeles County Flood Control District, and the Cities of Commerce, Carson, Downey, Hawaiian Gardens, Montebello, Santa Fe Springs, Signal Hill, Artesia, Beverly Hills, La Mirada, Monrovia, Norwalk, Rancho Palos Verdes, San Marino and Westlake Village (collectively, County/Cities) filed a cross-appeal from the judgment.

In 2001, the Regional Water Quality Control Board (Regional Water Board), Los Angeles Region, issued a National Pollutant Discharge Elimination System (NPDES) permit for municipal stormwater and urban runoff discharges, which obligated County/Cities to inspect industrial, [*904] commercial, and construction water treatment facilities (which obligation County/Cities claim [***3] the state previously performed) and to install and maintain trash receptacles at transit stops.

County/Cities presented "test claims" [1] to the executive director of the Commission [**765] seeking reimbursement for carrying out these obligations pursuant to the constitutional requirement for subvention arising from a state mandate (Cal. Const., art. XIII B, § 6). The executive director returned the claims unadjudicated, because they did not involve an executive order under section 17516 of the Government Code (Section 17516(c)). In denying the appeals of County/Cities, the Commission noted it was without authority to declare a statute unconstitutional and concluded that Section 17516(c) excludes from the subvention requirement any order, which includes a permit, issued by the Regional Water Boards of the State Water Resources Control Board (State Water Board).

1 " '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.)

[***4] Section 6 of article XIII B of the California Constitution (article XIII B, section 6) provides in pertinent part: [HN1]"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 ... ." (Italics added.)

As we shall discuss, Section 17516(c) is unconstitutional to the extent it exempts Regional Water Boards from the constitutional state mandate subvention requirement. Its creation of an exception for Regional Water Boards, which are state agencies, contravenes the plain, unequivocal, and all-inclusive reference to "any state agency" in article XIII B, section 6. Moreover, a contrary conclusion is not compelled by virtue of the fact that Section 17516(c) essentially mirrors the language of section 2209, subdivision (c) (§ 2209(c)) of the Revenue and Taxation Code. A statute cannot trump the Constitution.

We decline to consider the Commission's new claim that the constitutional challenge to Section 17516(c) by County/Cities is barred by the 90-day limitation period [***5] of section 341.5 of the Code of Civil Procedure. This statute of limitations defense, which should have been raised before the trial court, is not cognizable on this appeal. [*905]

The Commission urges that should this court conclude Section 17516(c) is unconstitutional, the appropriate remedy is to afford the Commission the opportunity to pass on the merits of the subject test claims on the issues of whether (1) the subject permit qualifies as a state-mandated program under article XIII B, section 6; (2) the permit amounts to a new program or higher level of service; and (3) the permit imposes costs on local entities (Gov. Code, §§ 17514, 17556). We find its position persuasive.

The cross-appeal filed by County/Cities is premised on the theory that if subvention of funds from the Commission is foreclosed by Section 17516(c), County/Cities are entitled to pursue an independent action against the Regional Water Board, Los Angeles Region (LA Regional Water Board). This cross-appeal, which is simply protective in nature, is moot.

In sum, we uphold the trial court's issuance of a writ of mandate directing the Commission [***6] to set aside its decisions affirming its executive director's rejections of the subject test claims and to consider fully these test claims and determine whether County/Cities are entitled to reimbursement without consideration of

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Section 17516(c), and we affirm the judgment in its entirety.

BACKGROUND

1. *Article XIII B, Section 6, Subvention of Funds for State Mandates*

"The electorate approved Proposition 4 in 1979, thus adding article XIII B to the state Constitution. [**766] While the earlier Proposition 13 limited the state and local governments' power to increase taxes (see Cal. Const., art. XIII A, added by initiative measure in Primary Elec. (June 6, 1978)), Proposition 4, the so-called 'Spirit of 13,' imposed a complementary limit on the rate of growth in governmental spending." (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 574 [7 Cal. Rptr. 2d 245, 828 P.2d 147].) This measure also "provided [for] reimbursement to local governments for the costs of complying with certain requirements mandated by the state." (*Long Beach Unified Sch. Dist. v. State of California* (1990) 225 Cal. App. 3d 155, 172 [275 Cal. Rptr. 449].)

"[V]oters were told [***7] that section 6 of Proposition 4 was intended to prevent state government attempts 'to force programs on local governments without the state paying for them.' (Ballot Pamp., Special Statewide Elec. [(Nov. 6, 1979)] p. 18.)" (*County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1282 [101 Cal. Rptr. 2d 784]; see also *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 [233 Cal. Rptr. 38, 729 P.2d 202] [intent was not all local costs arising from compliance with state law to be reimbursable; rather, intent was to prevent "the perceived [*906] 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"].)

"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. [Citation.] The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped [***8] to handle the task. [Citations.] 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.*" (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 [280 Cal. Rptr. 92, 808 P.2d 235], original italics; see also *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal. Rptr. 677, 750 P.2d 318] [a reimbursement requirement was "enshrined in the Constitution ... to provide local entities with the assurance that state mandates would not place additional burdens on their increasingly limited revenue resources"].)

Article XIII B, section 6 provides: "(a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State [***9] 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 such 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."

[HN2](1) " 'Subvention' generally means a grant of financial aid or assistance, or a [**767] subsidy. [Citation.] 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. [Citation.] This does not mean that the state is required to [*907] reimburse local agencies for any incidental [***10] 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 state law to provide to its residents. [Citation.] The subvention requirement is intended to prevent the state from transferring the costs of government from itself to local agencies. [Citation.] 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.' [Citation.]" (*Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, at 1577-1578 [15 Cal. Rptr. 2d 547].)

[HN3]The subvention requirement of article XIII B, section 6 is triggered if "the Legislature or any state agency" mandates a new program or higher level of service. (Art. XIII B, § 6.) Such requirement is inapplicable

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where the additional costs on local governments are imposed by a federal mandate, i.e., the federal government. Article XIII B, section 9, subdivision (b) of the California Constitution, defines federally mandated appropriations as those "required to comply with mandates of the courts or the federal government which, *without discretion,* [***11] require an expenditure for additional services or which *unavoidably make the provision of existing services more costly.*" [2] (Italics added.)

> 2 "In 1980, after the adoption of article XIII B, [the Legislature] amended the statutory definition of 'costs mandated by the federal government' to provide that these include 'costs resulting from enactment of a state law or regulation where failure to enact such law or regulation to meet specific federal program or service requirements would result in *substantial monetary penalties* or *loss of funds* to *public or private persons* in the state. ...' (Rev. & Tax. Code, § 2206, italics added; Stats. 1980, ch. 1256, § 3, p. 4247.)" (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 75 [266 Cal. Rptr. 139, 785 P.2d 522].)
>
> There is no precise formula or rule for determining whether the "costs" are the product of a federal mandate. Our Supreme Court explained: "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. Always, the courts and the Commission must respect the governing principle of article XIII B, section 9(b): neither state nor local agencies may escape their spending limits when their participation in federal programs is truly voluntary." (*City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 76.)

[***12] 2. *Existence of State Mandate Matter for the Commission*

[HN4](2) Whether a particular cost incurred by a local government arises from carrying out a state mandate for which subvention is required under article XIII B, section 6, is a matter for the Commission to determine in the first instance. [*908]

A local government initiates the process for subvention under article XIII B, section 6 by filing a claim with the Commission. (Gov. Code, § 17521; [**768] cf. *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89 [61 Cal. Rptr. 2d 134, 931 P.2d 312] [futility exception to exhaustion of administrative remedies doctrine applicable to failure to file claim before Commission].) The initial claim is referred to as a "test claim." (Gov. Code, § 17521.)

"The Legislature enacted Government Code sections 17500 through 17630 to implement article XIII B, section 6. (Gov. Code, § 17500.)" (*County of Fresno v. State of California, supra,* 53 Cal. 3d at p. 484.) The provisions of Government Code section 17500 et seq. "provide the sole and exclusive [***13] procedure by which a local agency ... may claim reimbursement for costs mandated by the state as required by" article XIII B, section 6. (Gov. Code, § 17552.)

[HN5]"It created a 'quasi-judicial body' (*ibid.*) called the Commission on State Mandates ... ([Gov. Code], § 17525) to 'hear and decide upon [any] claim' by a local government that the local government 'is entitled to be reimbursed by the state for costs' as required by article XIII B, section 6. (Gov. Code, § 17551, subd. (a).) It defined 'costs' as 'costs mandated by the state'--'any increased costs' that the local government 'is required to incur ... as a result of any statute ... , or any executive order implementing any statute ... , which mandates a new program or higher level of service of any existing program' within the meaning of article XIII B, section 6. (Gov. Code, § 17514.) Finally, in section 17556(d) it declared 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, [***14] or assessments sufficient to pay for the mandated program or increased level of service.' " (*County of Fresno v. State of California, supra,* 53 Cal. 3d at p. 484.)

3. *Regional Water Board Order Not "Executive Order"*

Section 17516(c) defines, in pertinent part, an " '[e]xecutive order' [as] any order, plan, requirement, rule, or regulation issued by ... [¶] ... [¶] ... [a]ny agency ... of state government, " except an " '[e]xecutive order' does not include any order, plan, requirement, rule, or regulation issued by the State Water ... Board or by any regional water ... board pursuant to Division 7 (commencing with Section 13000) of the Water Code." [3] (Added by Stats. 1984, ch. 1459, § 1, p. 5113.)

> 3 Section 17516(c) further provides: "It is the intent of the Legislature that the State Water ... Board and regional water ... boards will not adopt enforcement orders against publicly owned dis-

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> chargers which mandate major waste water treatment facility construction costs unless federal financial assistance and state financial assistance pursuant to the Clean Water Bond Act of 1970 and 1974, is simultaneously made available. 'Major' means either a new treatment facility or an addition to an existing facility, the cost of which is in excess of 20 percent of the cost of replacing the facility."
>
> LA Regional Water Board argues the trial court's ruling sustaining its demurrer to the fourth cause of action for a writ of mandate directing it to delete the subject two obligations under the permit as violative of Government Code section 17516 should be upheld, because section 17516 "applies to construction of major waste treatment facilities, not trash receptacles or inspections." This analysis, however, is inconsistent with the plain language of section 17516 in its entirety.

[*909]

[***15] In light of the above definition, the subject permit issued by an order of the LA Regional Water Board cannot constitute an "executive order implementing any statute, ... which mandates a new program or higher level of service of an existing program within the meaning of" the article XIII B, section 6 [**769] requirement of subvention of funds to local governments for carrying out a state mandate. (Gov. Code, § 17514.)

4. *Procedural Posture*

LA Regional Water Board issued order No. 01-182, which adopted NPDES permit No. CAS004001 (Permit). This Permit imposed two obligations on County/Cities for the purpose of regulating municipal stormwater and urban runoff discharges in Los Angeles County. The first required County/Cities to inspect industrial, commercial, and construction sites to ensure compliance with the law, and the other required County/Cities to install and maintain trash receptacles at transit stops.

County/Cities filed four test claims, i.e., test claims 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21, seeking reimbursement of costs for carrying out these obligations. The executive director rejected these test claims as excluded from subvention [***16] pursuant to Section 17516(c).

In the administrative appeals, the Commission found it was bound by Section 17516(c), upheld its executive director's decision, and denied the appeals.

In their amended and consolidated petitions and complaints, County/Cities sought, among other things: (1) An order requiring the State to reimburse them for the new programs or higher level of service under the Permit or, alternatively, to allow them to offset payment of permit and other fees or moneys owed or to be transferred to the state against their costs; (2) an order enjoining state from refusing to reimburse them in the future; or, alternatively, (3) a peremptory writ of mandate directing the Commission to accept their test claims and find they are entitled to reimbursement; (4) a declaration that Government Code section 17516 is unconstitutional; (5) a peremptory writ of mandate directing LA Regional Water Board either to delete or not [*910] enforce the subject obligations under the Permit; and (6) a stay of the challenged portions of the permit.

The Commission and County/Cities filed cross-motions for judgment on the pleadings. The trial court granted the Commission's motion as to the second cause of action for declaratory [***17] relief. The court explained: "The only actual controversy between [County/Cities] and [Commission] is whether [County/Cities]' claims should be deemed reimbursable. The sole and exclusive procedure by which to adjudicate this controversy is a mandate action under Code of Civil Procedure section 1094.5. ([Government Code s]ections 17552, 17559.) The only pertinent relief under ... section 1094.5 is a finding that [the Commission] 'has not proceeded in the manner required by law.' Declaratory relief is not available."

After construing the motion addressed to the third cause of action as a motion to strike improper requested relief, the court granted the motion and struck that part of the third cause of action requesting an order directing the Commission to find their claims to be reimbursable on the ground "[t]he court has no power at this time to do so. [Citations.]"

Turning to County/Cities' motion for judgment on the pleadings, the trial court granted the motion as to the third cause of action for extraordinary writ relief, except as to the stricken request for improper relief. [4]

> 4 In the third cause of action, County/Cities sought a writ of mandate (Code Civ. Proc., § 1094.5) compelling a court finding that Government Code section 17516 was unconstitutional on its face or as applied in this action and directing the Commission to accept their test claims for filing and approving them for reimbursement.

[***18] The court found that to the extent Section 17516(c) excepted the orders of Regional [**770] The Water Boards from the definition of "executive orders," Section 17516(c) was unconstitutional in that it expressly contravened article XIII B, section 6. The court ordered the Commission to set aside its order affirming its executive director's rejections of the four test claims and to consider these claims on the merits.

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In granting in part County/Cities' petitions for a writ of mandate, the trial court found the Commission, "though it proceeded as required by statutory law, as it was constrained to do, has not proceeded as required by superior constitutional law. (Code Civ. Proc., [§]1094.5, subd. (a).) The question whether [County/Cities] state valid claims for reimbursement must be remanded to [C]ommission, which is ordered to consider [these] claims on their merits. [Citations.]" [*911]

A peremptory writ of mandate was issued on May 24, 2005. Judgment was entered the same date. This appeal and cross-appeal followed.

STANDARD OF REVIEW

"The standard for reviewing a judgment on the pleadings is settled: [HN6]'A motion for judgment on the pleadings is the equivalent [***19] of a general demurrer but is made after the time for demurrer has expired. The rules governing demurrers apply. [Citation.] The grounds for a motion for judgment on the pleadings must appear on the face of the challenged complaint or be based on facts which the court may judicially notice. [Citations.] On review we must determine if the complaint states a cause of action as a matter of law.' [Citation.] 'We review the complaint de novo to determine whether [it] alleges facts sufficient to state a cause of action under any legal theory. [Citation.]' [Citation.]" (*McCormick v. Travelers Ins. Co.* (2001) 86 Cal.App.4th 404, 408 [103 Cal. Rptr. 2d 258].)

[HN7]"In reviewing the trial court's ruling on a writ of mandate, the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. (*Evans v. Unemployment Ins. Appeals Bd.* (1985) 39 Cal.3d 398, 407 [216 Cal. Rptr. 782, 703 P.2d 122].) However, where the facts are undisputed and the issues present questions of law, the appellate court is not bound by the trial court's decision but may make its own determination. (*Ibid.*)" (*Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 394 [69 Cal. Rptr. 2d 231].)

[***20] DISCUSSION

1. *Defense of Statute of Limitations Forfeited*

On appeal for the first time, the Commission asserts the challenge of County/Cities to the constitutionality of Section 17156(c) is barred by the 90-day limitation period of section 341.5 of the Code of Civil Procedure, which governs the timeliness of actions challenging the constitutionality of state funding for municipalities, school districts, special districts, and local agencies.

Code of Civil Procedure section 341.5 provides: [HN8]"Notwithstanding any other provision of law, any action or proceeding in which a county, city, city and county, school district, special district, or any other local agency is a plaintiff or petitioner, that is brought against the State of California challenging the constitutionality of any statute relating to state funding for counties, cities, cities and counties, school districts, special districts, or other local agencies, shall be commenced within 90 days of the effective date of the [*912] statute at issue in the action. For purposes of this section, 'State of California' means the State of California itself, or any of its agencies, [***21] departments, commissions, boards, or public officials." (Added by [**771] Stats. 1994, ch. 155, § 1, p. 1601, eff. July 11, 1994; amended by Stats. 1994, ch. 156, § 1, p. 1619, eff. July 11, 1994.)

The Commission argues the constitutional challenge to Section 17516(c) is time-barred, because: "Government Code section 17500 et seq., including section 17516, relates to state funding for counties and cities relative to state-mandated local programs. ... [S]ection 17516 was enacted in 1984 and became effective January 1, 1985. The petition in this case challenging section 17516 as unconstitutional was filed April 28, 2004," which was more than 90 days after the effective date of section 17516.

[HN9](3) The time bar of a statute of limitations may be raised by demurrer "[w]here the complaint discloses on its face that the statute of limitations has run on the causes of action stated in the complaint, [for the reason that] it fails to state facts sufficient to constitute a cause of action. [Citation.]" (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 833 [30 Cal. Rptr. 3d 588].) Forfeiture of a time-bar defense transpires by the failure to raise [***22] the applicable statute of limitations in the answer. (See, e.g., *Minton v. Cavaney* (1961) 56 Cal.2d 576, 581 [15 Cal. Rptr. 641, 364 P.2d 473]; *Davies v. Krasna* (1975) 14 Cal.3d 502, 508 [121 Cal. Rptr. 705, 535 P.2d 1161]; *Mitchell v. County Sanitation Dist.* (1957) 150 Cal. App. 2d 366, 371 [309 P.2d 930]; see also Code Civ. Proc., § 458.)

As the Commission concedes, it did not raise "[Code of Civil Procedure] section 341.5 as an affirmative defense in its pleadings in the trial court." This omission signifies that the Commission therefore has forfeited any right it may have had to assert section 341.5 to bar, as untimely, the claims of County/Cities to the constitutionality of Section 17516(c).

(4) For a contrary conclusion, the Commission argues "the statute of limitations to challenge an administrative action is jurisdictional and should not be considered waived. (*United Farm Workers of America v. Agricultural Labor Relations Board* (1977) 74 Cal. App. 3d 347, 350 [141 Cal. Rptr. 437]; *Tielsch v. City of Anaheim* (1984) 160 Cal. App. 3d 576, 578 [206 Cal. Rptr.

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740]; [***23] *Donnellan v. City of Novato* (2001) 86 Cal.App.4th 1097, 1103 [103 Cal. Rptr. 2d 882].) [HN10]If a time limit in a mandamus proceeding is held to be jurisdictional, estoppel or waiver cannot extend the time. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666, 674 [125 Cal. Rptr. 757, 542 P.2d 1349].)" [*913]

The Commission's fallback position is that this court should exercise its discretion to determine the applicability of the time bar, because this "issue is a question of law rather than of fact" and "[t]his matter affects the public interest since [County/Cities] are seeking reimbursement from the state for costs incurred to comply with a permit" issued by the LA Regional Water Board. In other words, "taxpayers statewide could unjustly suffer the consequences of funding a local program if Code of Civil Procedure section 341.5 is not considered and ... section 17516 is held to be unconstitutional." As authority, the Commission relies primarily on *City of Sacramento v. State of California, supra*, 50 Cal.3d at pages 64-65 (where issue of law rather than fact raised, public interest exception governs over [***24] collateral estoppel bar) and *Connell v. Superior Court, supra*, 59 Cal.App.4th at pages 387-388, 396-397 (public interest exception applicable to allow review of question of law as to whether recycled wastewater regulation constituted reimbursable state mandate.)

(5) Neither of the Commission's positions is successful. In the first instance, [HN11]the time [**772] bar of section 341.5 of the Code of Civil Procedure applies to a challenge to the constitutionality of any statute relating to state funding for counties and other local governmental entities, *not* to a challenge to an action by an administrative agency. As for the second, [HN12]neither *City of Sacramento* nor *Connell* stands for the proposition that the bar of the applicable statute of limitations may be raised for the first time on appeal.

Additionally, the Commission's characterization of the public interest to be served is a non sequitur. If Government Code section 17516 were in fact unconstitutional, it does not follow that "taxpayers statewide could *unjustly* suffer the consequences of funding a local program." (Italics added.) How could such funding result in injustice when any requirement of [***25] reimbursement to local governments would be under the constitutional compulsion of article XIII B, section 6

2. *Existence of Federal or State Mandate Issue for the Commission*

It is undisputed that a federal mandate is not subject to the subvention requirement of article XIII B, section 6 for a state mandate. Accordingly, if the Permit, including the subject two obligations thereunder, constitutes a federal mandate, the constitutionality of Section 17516(c) is not implicated, and thus, no issue as to its constitutionality is before this court to address on the merits. (See *People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912 [83 Cal. Rptr. 670, 464 P.2d 126] ["The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court."].) [*914]

In its amicus curiae brief, LA Regional Water Board takes the position that, as a matter of law, Section 17516(c) is consistent with article XIII B, section 6 (and thus not unconstitutional) "to the extent Division 7, Chapter 5.5 (commencing with Water Code section 13370)" simply implements federal mandates under the Clean Water Act (33 U.S.C. § 1342(b)). [***26] The water boards, i.e., the State Water Board and its Regional Water Boards, implement the federal permit program under chapter 5.5, which the California Legislature enacted to bypass administration of such program directly by the federal Environmental Protection Agency.

LA Regional Water Board takes the further position that the federal mandate nature of its NPDES permits remains constant although it exercises discretion to control the discharge of pollutants through municipal stormwater programs not appearing in federal regulations. Specifically, LA Regional Water Board argues: "When a state [Regional Water Board] issues an NPDES permit requiring municipalities to inspect facilities as a means of controlling their discharge of pollutants, this is not shifting state responsibilities onto local agencies[, because f]ederal law imposes inspection requirements upon municipal permittees."

As for the trash receptacle obligation, LA Regional Water Board points out the Clean Water Act allows the use of programs to control discharge of pollutants in connection with a municipal stormwater permit and argues one such program under the Permit is the ability of "municipalities to employ 'Best [***27] Management Practices' (BMPs) to ... attain water quality standards." It identifies "[t]he Permit's trash receptacle requirement as one such [BMP]."

It further argues that the trash receptacle obligation cannot be deemed a state-mandated program, because it is not "an absolute requirement. Any permittee may petition the Regional Water Board to substitute another equally effective BMP for one included within the Permit.[] [For instance, i]f a permittee demonstrates that [**773] a pre-existing program or level of service will be equally effective in controlling pollution, it may seek to substitute that program."

We are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under all circumstances.

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As explained, *ante*, the existence of a federal, as contrasted with a state, mandate is not easily ascertainable.

By letter, we invited the parties and LA Regional Water Board to address whether an obligation under an NPDES permit by a Regional Water Board can qualify as a state mandate within the meaning of article XIII B, section 6, assuming an NPDES permit itself qualified as a federal mandate, and if so, [*915] why each [***28] of the subject two obligations does or does not constitute a state mandate. We have received their responses.

a. *NPDES Permits Issued by Regional Water Boards*

"California cases have repeatedly explained the complicated web of federal and state laws and regulations concerning water pollution, especially storm sewer discharge into the public waterways. (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619-621 [26 Cal. Rptr. 3d 304, 108 P.3d 862] (*Burbank*); *Building Industry Assn. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 872-875 [22 Cal. Rptr. 3d 128] ... ; *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1092-1094 [1 Cal. Rptr. 3d 76] ... ; *WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1451-1453 [126 Cal. Rptr. 2d 389].)

(6) "For purposes of this case, the important point is described by the California Supreme Court in *Burbank*: [HN13]'Part of the Federal Clean Water Act [33 U.S.C. § 1251 et seq.] is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations [***29] and standards under the Clean Water Act. (*Arkansas v. Oklahoma* [(1992) 503 U.S. 91, 101 [117 L. Ed. 2d 239, 112 S. Ct. 1046]].) The NPDES sets out the conditions under which the federal [Enviromental Protection Agency] 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 [water] boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)' (*Burbank, supra*, 35 Cal.4th at p. 621.)

"California's Porter-Cologne Act (Wat. Code, § 13000 et seq.) establishes a statewide program for water quality control. Nine regional [water] boards, overseen by the State [Water] Board, administer the program in their respective regions. (Wat. Code, §§ 13140, 13200 et seq., 13240, and 13301.) Water Code sections 13374 and 13377 authorize the Regional [Water] Board to issue federal NPDES permits for five-year periods. (33 U.S.C. § 1342, subd. (b)(1)(B).)" [***30] [5] [**774] (*City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377, 1380-1381 [38 Cal. Rptr. 3d 450].) In a related case, Division Five of this district upheld the authority of LA Regional Water Board to issue the Permit here. (*County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 999-1000 [50 Cal. Rptr. 3d 619], review den. [holding the nine Regional Water Boards authorized under state law to issue NPDES permits].)

5 In pertinent part, article XIII B, section 6, provides: "[T]he Legislature may, but need not, provide a subvention of funds for the following mandates: [¶] ... [¶] (3) Legislative mandates enacted prior to January 1, 1975, or executive orders ... initially implementing legislation enacted prior to January 1, 1975." (Art. XIII B, § 6, subd. (a)(3).) LA Regional Water Board argues that subvention under article XIII B, section 6, is not required as to the Permit, because it is an executive order implementing the Porter-Cologne Water Quality Control Act (Wat. Code, § 13020 et seq.), which is legislation enacted in 1969. This argument fails for the reason that the executive order resulting in the 2001 Permit was not one "*initially*" implementing such pre-1975 legislation. Equally unsuccessful is LA Regional Water Board's apparent argument that Section 17516(c) should be deemed constitutional for the reason that "most of" the Porter-Cologne Act (div. 7) was enacted prior to 1975. The fatal fallacy of this position is that the exclusion of Section 17516(c) applies to all orders issued pursuant to division 7 *regardless* of the date the statute in question was enacted.

[***31] b. *Potential Federal and State Components of NPDES Permit*

As expected, LA Regional Water Board contends that as in the case of NPDES "permits as a whole, the individual conditions of an NPDES permit are federally required to meet the mandates of the Clean Water Act." It argues: "The Permit is federally required. The conditions within it are federally required to implement the Clean Water Act's mandates. The two cannot be separated into a 'federal' permit with 'state' conditions. [Citation.]"

County/Cities respond, contrariwise, that "[a]n NPDES permit can contain both federal and nonfederal requirements." As case authority, they rely primarily on *City of Burbank v. State Water Resources Control Bd., supra*, 35 Cal.4th 613. Our Supreme Court concluded that under the supremacy clause of the federal Constitution, a Regional Water Board must comply with the fed-

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eral Clean Water Act in issuing an NPDES permit. (35 Cal. 4th at pp. 626-627.) Nonetheless, "[u]nder 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. [Citation.]" (*Id.* at p. 620.) [***32] The court thus acknowledged in *Burbank* that an NPDES permit may contain terms federally mandated and terms exceeding federal law. (See also *Burbank, supra*, at pp. 618, 628.) County/Cities also point out that the potential for non-federally mandated components of an NPDES permit is acknowledged under both federal law [6] and state law. [7]

> 6 In this regard, they rely on this federal statute: "Except as expressly provided in this Act [33 USCS §§ 1251 et seq.], nothing in this Act [33 USCS §§ 1251 et seq.] shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation ... is in effect under this Act [33 USCS §§ 1251 et seq.], such State[, etc.] ... may not adopt or enforce any effluent limitation or other limitation ... which is less stringent than the effluent limitation, or other limitation ... ." (33 U.S.C.S. § 1370.)

[***33]

> 7 On this point, they rely on this statutory provision: "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 ... 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." (Wat. Code, § 13377.)

[*917]

[**775] Additionally, County/Cities argue "that an obligation imposed on a municipality arises as a result of a federal law or program does not, in and of itself, render that obligation a federal mandate." Rather, they assert that to qualify as a federal mandate, "federal law itself must impose the obligation upon the municipality." They point out Government Code section 17556 provides that costs flowing from a federal mandate may be subject [***34] to subvention if such costs exceed such mandate. [8] They also cite two cases in support of their position.

> 8 Government Code section 17556, subdivision (c), provides: [HN14]"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 ... [¶] ... [¶] [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 *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 [16 Cal. Rptr. 3d 466, 94 P.3d 589], our Supreme Court concluded the costs incurred by school districts in holding mandatory expulsion hearings under Education Code section 48915 were state mandates subject to subvention under article XIII B, section 6. [***35] The court explained that expulsion was mandated under the Education Code, rather than federal law, and thus, the fact the costs were incurred to comport with federal due process, a federal mandate, was not controlling. (*San Diego Unified School Dist. v. Commission on State Mandates, supra*, at pp. 880-882.)

In the other case, *Hayes v. Commission on State Mandates, supra*, 11 Cal.App.4th 1564, the appellate court concluded that the finding a mandate was federal turned on whether "the state freely chose to impose the costs upon the local agency as a means of implementing a federal program" and that under these circumstances, "the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government." (*Id.* at p. 1594.)

c. *Existence of State Mandates Matter for the Commission*

A review of the pleadings and the matters that may be judicially noticed (Evid. Code, §§ 451, 452, 459) leads to the inescapable conclusion that whether the two obligations in question constitute federal or state mandates [***36] presents factual issues which must be addressed in the first instance by the [*918] Commission if Section 17516(c) were found to be unconstitutional. Resolution of the federal or state nature of these obligations therefore is premature and, thus, not properly before this court.

In its response, the Commission argues that if this court determines Section 17516(c) is unconstitutional, the subject test claims "should be remanded to ... Com-

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mission to 'decide in the first instance whether a local agency is entitled to reimbursement under [article XIII B,] section 6[.]' (*Lucia Mar Unified School District v. Honig*[, *supra*,] 44 Cal.3d 830, 837; Gov. Code, § 17552.)"

The Commission stated that on such remand, it would apply the following cases in determining whether state mandates exist: *City of Sacramento v. State of California, supra*, 50 Cal.3d 51, which sets forth various factors and criteria for determining whether the federal program imposes a mandate on the state; *Hayes v. Commission on State Mandates, supra*, 11 Cal.App.4th 1564, [**776] which it contends "provides guidance on whether the state, [***37] in turn, has mandated a federal program on the local governments"; *Long Beach Unified Sch. Dist. v. State of California, supra*, 225 Cal. App. 3d 155, which analyzes whether the state-mandated activities exceed federal requirements; and *San Diego Unified School Dist. v. Commission on State Mandates, supra*, 33 Cal.4th 859, which also provides guidance on this same issue.

3. *"Executive Order" Under Revenue and Taxation Code Not Probative*

The Commission contends the exclusion of orders of the Regional Water Boards from the definition of "executive order" in Section 17516(c) does not contravene article XIII B, section 6, because Government Code section 17516 derives from the definition of "executive order" in Revenue and Taxation Code section 2209, [9] of which the voters were presumed to have known to exist [*919] when they adopted Proposition 4 (i.e., art. XIII B, § 6) in 1979, and thus, Proposition 4 intended to endorse and continue such exclusion from the definition of "executive order" which was later carried over to Section 17516(c). We disagree.

> 9 Revenue and Taxation Code section 2209(c) provides: [HN15]" 'Executive order' means any order, plan, requirement, rule or regulation issued ... [¶] ... [¶] ... [b]y any agency ... of state government; provided that the term 'executive order' shall not include any order ... issued by the State Water ... Board or by any regional water ... board pursuant to Division 7 (commencing with Section 13000) of the Water Code.
>
> "It is the intent of the Legislature that the State Water ... Board and regional water ... boards will not adopt enforcement orders against publicly owned discharges which mandate major waste water treatment facility construction costs unless federal financial assistance and state financial assistance pursuant to the Clean Water Bond Act of 1970 and 1974, is simultaneously made available.
>
> " 'Major' means either a new treatment facility or an addition to an existing facility, the cost of which is in excess of 20 percent of the cost of replacing the facility." (Rev. and Tax. Code, § 2209(c), added by Stats. 1974, ch. 457, § 2, p. 1079, and amended by Stats. 1975, ch. 486, § 2, p. 998, eff. Sept. 2, 1975.)

[***38] We further disagree with the Commission's reliance on a presumption that when the voters adopted Proposition 1A in November 2004, they knew of, and thus, necessarily approved of Section 17516(c)'s exclusion of orders of Regional Water Boards from the definition of "executive order."

(7) Our focus, instead, must be on the import of article XIII B, section 6, not on the preconstitutional scheme for subvention of funds to local agencies of which section 2209 of the Revenue and Taxation Code was part. As our Supreme Court instructs: [HN16]"In construing the meaning of the constitutional provision [i.e., article XIII B, section 6], our inquiry is not focussed on what the Legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted article XIII B in 1979. To determine this intent, we must look to the language of the provision itself. [Citation.]" (*County of Los Angeles v. California, supra*, 43 Cal.3d at p. 56.)

[HN17](8) The subvention requirement of article XIII B, section 6 applies "[w]henever the Legislature or any state agency mandates a new program or higher level of service ... ." The all-encompassing [***39] "any state agency" language defeats any perceived presumption that the electorate intended to incorporate into article XIII B, section 6 the exclusion of a particular state agency, e.g., the Regional Water Board, from its subvention requirement.

[**777] 4. *Section 17516(c) Unconstitutional as to Regional Water Boards*

LA Regional Water Board argues in its amicus curiae brief that Section 17516(c) is constitutional for the additional reason that its exemption from the subvention requirement of article XIII B, section 6, is "appropriate because the Water Boards regulate water pollution with an even hand. Whether the pollution originates from a local public agency or a private industrial source, the Water Boards must assure their permits protect water quality consistent with state and federal law."

This argument is not persuasive. Whether the permit in question issued by Regional Water Boards governs both public and private pollution dischargers to the same extent presents factual issues not yet resolved. In any event, the applicability of permits to public and private dischargers does not inform us about whether a particular

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permit or an obligation thereunder imposed on local governments constitutes [***40] a state mandate necessitating subvention under article XIII B, section 6. (See *Carmel Valley Fire Protection Dist. v. State of* [*920] *California* (1987) 190 Cal. App. 3d 521, 530-531, 534, 537, 541 [234 Cal. Rptr. 795] [executive orders for protective fire clothing and equipment state mandated even if record, which was incomplete, revealed private sector firefighters also subject to the executive orders].)

(9) In contrast, [HN18]the constitutional infirmity of Section 17516(c) is readily apparent from its plain language that the definition of " '[e]xecutive order' does not include *any* order, plan, requirement, rule, or regulation *issued by the State Water ... Board or by any regional water ... board* pursuant to Division 7 (commencing with Section 13000) of the Water Code." (§ 17516(c), italics added.) This exclusion of any order issued by any Regional Water Board contravenes the clear, unequivocal intent of article XIII B, section 6 that subvention of funds is required "[w]henever ... *any state agency* mandates a new program or higher level of service on any local government ... ." '" (Italics added.) We therefore conclude that Section 17516(c) [***41] is unconstitutional to the extent it excludes "any order ... issued by ... any regional water ... board pursuant to Division 7 (commencing with Section 13000) of the Water Code" from the definition of " '[e]xecutive order.' " (Art. XIII B, §6.)

> 10 At oral argument, when asked to identify the public policy or other reason that would be served by exempting Regional Water Boards from the constitutional subvention requirement, counsel for LA Regional Water Board responded exemption is warranted, because water is an important concern. No one can quarrel with the fact water plays an important role in California. Nonetheless, this reason does not compel the conclusion that an exemption should be carved out for Regional Water Boards as contrasted with those state agencies which regulate other important state interests.

This conclusion leads to the further conclusion that whether one or both of the subject two obligations constitutes a state mandate necessitating subvention of funds under [***42] article XIII B, section 6 is an issue that must in the first instance be resolved by the Commission. Accordingly, we uphold the trial court's issuance of a writ of mandate directing the Commission to vacate its decisions affirming its executive director's rejection of the four test claims and to consider these claims on the merits.

5. *Cross-appeal Moot*

County/Cities filed a protective cross-appeal from the judgment to the extent the trial court dismissed the portions of their writ of mandate petitions against LA Regional Water Board. " The threshold [**778] issue raised is whether County/Cities are entitled to proceed directly in superior court against LA [*921] Regional Water Board for reimbursement relief if they are statutorily precluded from obtaining a hearing before the Commission.

> 11 The trial court sustained the demurrer to the fourth cause of action for a writ of mandate directing LA Regional Water Board to delete or not enforce the inspection and trash receptacle obligations. The court granted its own motion for judgment on the pleadings without leave to amend as to LA Regional Water Board on the first cause of action for a writ of mandate directing reimbursement; the second cause of action for declaratory relief; and the fifth cause of action for a writ of mandate directing LA Regional Water Board to delete or not enforce the subject obligations.

[***43] County/Cities' position is they are entitled to a hearing on the merits of their claims before either the Commission or LA Regional Water Board. If this court determines the Commission's jurisdiction is exclusive, the Commission must afford them a hearing and determine the merits of their subvention claim under article XIII B, section 6. If not exclusive, County/Cities must be allowed to seek relief directly against Regional Water Board before the superior court.

LA Regional Water Board argues County/Cities have no right to seek subvention relief from a Regional Water Board, because reimbursement of costs mandated by the state must be pursued through the statutory subvention scheme, which is "the sole and exclusive procedure by which a local agency ... may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B ... ." (Gov. Code, § 17552.) Their claims thus must be addressed exclusively to the Commission in first instance.

The cross-appeal against LA Regional Water Board is moot in light of our above conclusion that the Commission is to hear and determine the merits of the County/Cities' test claims. We therefore do [***44] not reach the merits of the issues raised in the cross-appeal.

CONCLUSION

(10) Section 17516(c) is unconstitutional to the extent it purports to exempt orders issued by Regional Water Boards from the definition of "executive orders" for which subvention of funds to local governments for car-

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rying out state mandates is required pursuant to article XIII B, section 6. The trial court therefore properly issued a writ of mandate directing the Commission to resolve the four test claims on the merits without reference to Section 17516(c). In light of this conclusion, we need not, and therefore do not, address the issues raised on the now moot cross-appeal. [*922]

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs on appeal and cross-appeal.

Klein, P. J., and Croskey, J., concurred.

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TAB "12"

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LEXSEE

Caution
As of: Jun 23, 2010

COUNTY OF SAN DIEGO, Cross-complainant and Respondent, v. THE STATE OF CALIFORNIA et al., Cross-defendants and Appellants.

No. S046843.

SUPREME COURT OF CALIFORNIA

15 Cal. 4th 68; 931 P.2d 312; 61 Cal. Rptr. 2d 134; 1997 Cal. LEXIS 630; 97 Cal. Daily Op. Service 1555; 97 Daily Journal DAR 2296

March 3, 1997, Decided

PRIOR HISTORY: Superior Court of San Diego County, Super. Ct. No. 634931. Michael I. Greer, * Harrison R. Hollywood and Judith McConnell, Judges.

* Retired judge of the San Diego Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

DISPOSITION: The judgment of the Court of Appeal is affirmed insofar as it holds that the exclusion of adult MIP's from Medi-Cal imposed a mandate on San Diego within the meaning of section 6. The judgment is reversed insofar as it holds that the state required San Diego to spend at least $ 41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. The matter is remanded to the Commission to determine whether, and by what amount, the statutory standards of care (e.g., Health & Saf. Code, § 1442.5, former subd. (c); Welf. & Inst. Code, § 10000, 17000) forced San Diego to incur costs in excess of the funds provided by the state, and to determine the statutory remedies to which San Diego is entitled.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant state sought review of the judgment from the Court of Appeal (California), which affirmed the trial court that reversed a decision of the state mandates commission. The state mandates commission had held that respondent county was not entitled to reimbursement under Cal. Const. art. XIII B, § 6, for its treatment of medically indigent adults after the legislature excluded such persons from the California Medical Assistance Program.

OVERVIEW: The legislature excluded medically indigent adults from receiving medical care pursuant to the California Medical Assistance Program (Medi-Cal). Subsequently, respondent county provided medical care to these persons and sought reimbursement from appellant state pursuant to Cal. Const. art. XIII B, § 6. The state mandates commission held for appellant, but the trial court reversed the commission's decision, and the court of appeals affirmed the trial court. The court affirmed the court of appeal's decision in part and reversed in part. The court found that the legislature's exclusion of medically indigent adults from Medi-Cal mandated a new program within the meaning of art. XIII B, § 6. Former statutes, however, did not establish a $ 41 million spending floor for respondent's county medical services program. The court remanded the action to the state mandates commission to determine whether, and by what amount, respondent was forced to incur costs in excess of state-provided funds to comply with the standards of care provided by the former Cal. Health & Safety Code § 1442.5(c) and Cal. Welf. & Inst. Code §§ 10000, 17000.

OUTCOME: The court affirmed the court of appeal's judgment that respondent county could recover costs incurred to treat medically indigent adults because the legislature mandated a new program by excluding medically indigent adults from the California Medical Assistance Program. The court reversed the court of appeal's judgment that respondent was entitled to at least $ 41

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million and remanded to the state mandates commission for a cost determination.

CORE TERMS: medical care, adult, indigent, reimbursement, medically, funding, health care, level of service, fiscal years, new program, indigent persons, mandamus, local government, eligibility, eligible, financial responsibility, reimburse, state mandate, test claim, medical services, state-mandated, reimbursable, former subd, linked, fiscal, budget, mandated, local agencies, health services, settlement

LexisNexis(R) Headnotes

Governments > State & Territorial Governments > General Overview
Public Health & Welfare Law > Healthcare > General Overview
Public Health & Welfare Law > Social Security > Medicaid > Coverage > General Overview
[HN1]The California Medical Assistance Program, Cal. Welf. & Inst. Code § 14063, which began operating March 1, 1966, establishes a program of basic and extended health care services for recipients of public assistance and for medically indigent persons. It represents California's implementation of the federal medicaid program, 42 U.S.C.S. §§ 1396-1396v, through which the federal government provides financial assistance to states so that they may furnish medical care to qualified indigent persons.

Governments > Local Governments > Finance
Healthcare Law > Insurance > Reimbursement > General Overview
Public Health & Welfare Law > Social Security > Medicaid > Providers > Payments & Reimbursements > Hospitals
[HN2]Former Cal. Welf. & Inst. Code § 14150.1 provides in part that a county may elect to pay as its share of costs under the California Medical Assistance Program, Cal. Welf. & Inst. Code § 14063, 100 percent of the county cost of health care uncompensated from any source in 1964-65 for all categorical aid recipients, and all other persons in the county hospital or in a contract hospital, increases for such county for each fiscal year subsequent to 1964-65 by an amount proportionate to the increase in population for such county. If the county so elects, the county costs of health care in any fiscal year shall not exceed the total county costs of health care uncompensated from any source in 1964-65 for all categorical aid recipients, and all other persons in the county hospital or in a contract hospital, increases for such county for each fiscal year subsequent to 1964-65 by an amount proportionate to the increase in population for such county.

Governments > Local Governments > Finance
Healthcare Law > Insurance > Reimbursement > General Overview
Public Health & Welfare Law > Social Security > Medicaid > General Overview
[HN3]Former Cal. Welf. & Inst. Code § 14150 provides the standard method for determining the counties' share of costs under the California Medical Assistance Program, Cal. Welf. & Inst. Code § 14063. Under it, a county is required to pay the state a specific sum, in return for which the state will pay for the medical care of all categorically linked individuals. Financial responsibility for nonlinked individuals remains with the counties.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN4]Cal. Const. art. XIII A imposes a limit on the power of state and local governments to adopt and levy taxes. Cal. Const. art. XIII B imposes a complementary limit on the rate of growth in governmental spending. These two constitutional articles work in tandem, together restricting California governments' power both to levy and to spend for public purposes.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN5]Cal. Const. art. XIII B, § 6, provides in part that 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 legislative mandates that are enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

Governments > State & Territorial Governments > Finance
[HN6]Cal. Const. art. XIII B § 6, essentially requires 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.

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Governments > State & Territorial Governments > Finance
[HN7]To determine whether a statute imposes state-mandated costs on a local agency within the meaning of Cal. Const. art. XIII B, § 6, the local agency must file a test claim with the Commission on State Mandates, which, after a public hearing, decides whether the statute mandates a new program or increased level of service. Cal. Gov't Code §§ 17521, 17551, 17555. If the commission finds a claim to be reimbursable, it determines the amount of reimbursement. Cal. Gov't Code § 17557. The local agency then follows certain statutory procedures to obtain reimbursement. Cal. Gov't Code § 17558 et seq.

Civil Procedure > Declaratory Judgment Actions > State Judgments > General Overview
Governments > State & Territorial Governments > Finance
[HN8]If the legislature refuses to appropriate money for a reimbursable mandate, the local agency may file an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement. Cal. Gov't Code § 17612(c). If the Commission on State Mandates finds no reimbursable mandate, the local agency may challenge this finding by administrative mandate proceedings under Cal. Civ. Proc. Code § 1094.5. Cal. Gov't Code § 17559. Cal. Gov't Code § 17552 declares that these provisions provide the sole and exclusive procedure by which a local agency may claim reimbursement for costs mandated by the state as required by Cal. Const. art. XIII B, § 6.

Constitutional Law > The Judiciary > Case or Controversy > Standing > General Overview
[HN9]Individual taxpayers and recipients of government benefits lack standing to enforce Cal. Const. art. XIII B, § 6, because the applicable administrative procedures, which are the exclusive means for determining and enforcing the state's § 6 obligations, are available only to local agencies and school districts directly affected by a state mandate.

Administrative Law > Judicial Review > Remedies > Mandamus
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Constitutional Law > The Judiciary > Jurisdiction > General Overview
[HN10]The power of superior courts to perform mandamus review of administrative decisions derives in part from Cal. Const. art. VI, § 10. Section 10 gives the Supreme Court, courts of appeal, and superior courts original jurisdiction in proceedings for extraordinary relief in the nature of mandamus. Cal. Const. art. VI, § 10. The jurisdiction may not lightly be deemed to be destroyed. While the courts are subject to reasonable statutory regulation of procedure and other matters, they maintain their constitutional powers in order effectively to function as a separate department of government. Consequently an intent to defeat the exercise of the court's jurisdiction is not supplied by implication.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
[HN11]Under Cal. Gov't Code § 17500 et seq., the statutes governing determination of unfunded mandate claims, the court hearing the test claim has primary jurisdiction.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
[HN12]A court that refuses to defer to another court's primary jurisdiction is not without jurisdiction.

Administrative Law > Judicial Review > Administrative Record > General Overview
Civil Procedure > Appeals > Reviewability > General Overview
[HN13]The threshold determination of whether a statute imposes a state mandate is an issue of law.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
Civil Procedure > Justiciability > Exhaustion of Remedies > Administrative Remedies
Governments > Local Governments > Claims By & Against
[HN14]Counties seeking to pursue an unfunded mandate claim under Cal. Const. art. XIII B, § 6, must exhaust their administrative remedies. However, counties may pursue § 6 claims in superior court without first resorting to administrative remedies if they can establish an exception to the exhaustion requirement. The futility exception to the exhaustion requirement applies if a county can state with assurance that the Commission on State Mandates will rule adversely in its own particular case.

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Public Health & Welfare Law > Healthcare > General Overview

[HN15] Cal. Welf. & Inst. Code § 17000 creates the residual fund to sustain indigents who cannot qualify under any specialized aid programs. By its express terms, § 17000 requires a county to relieve and support indigent persons only when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions. Cal. Welf. & Inst. Code § 17000.

Governments > State & Territorial Governments > Legislatures
Public Health & Welfare Law > Healthcare > General Overview

[HN16]In adopting the California Medical Assistance Program (Medi-Cal), Cal. Welf. & Inst. Code § 14063, the state legislature, for the most part, shifted indigent medical care from being a county responsibility to a state responsibility under the Medi-Cal program.

Governments > Legislation > Effect & Operation > General Overview

[HN17]Cal. Const. art. XIII B, § 6, prohibits the state from shifting to counties the costs of state programs for which the state assumed complete financial responsibility before adoption of § 6.

Governments > Local Governments > Finance
Public Health & Welfare Law > Healthcare > General Overview

[HN18]As amended in 1982, Cal. Welf. & Inst. Code § 16704(c)(1), provides in part that the county board of supervisors shall assure that it will expend Medically Indigent Services Account funds only for the health services specified in Cal. Welf. & Inst. Code §§ 14132 and 14021 provided to persons certified as eligible for such services pursuant to Cal. Welf. & Inst. Code § 17000 and shall assure that it will incur no less in net costs of county funds for county health services in any fiscal year than the amount that is required to obtain the maximum allocation under Cal. Welf. & Inst. Code § 16702.

Governments > Local Governments > Finance
Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Coverage & Definitions > General Overview
Public Health & Welfare Law > Healthcare > Services for Disabled & Elderly Persons > General Overview

[HN19] Cal. Welf. & Inst. Code § 16704(c)(3) provides in part that any person whose income and resources meet the income and resource criteria for certification for services pursuant to Cal. Welf. & Inst. Code § 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided. Such persons may be held financially liable for these services based upon the person's ability to pay. A county may not establish a payment requirement which will deny medically necessary services. This section shall not be construed to mandate that a county provide any specific level or type of health care service.

Public Health & Welfare Law > Healthcare > General Overview

[HN20]The provisions of Cal. Welf. & Inst. Code § 16704(c)(3) shall become inoperative if a court ruling is issued which decrees that the provisions of this paragraph mandate that additional state funds be provided and which requires that additional state reimbursement be made to counties for costs incurred under this paragraph. This paragraph shall be operative only until June 30, 1983, unless a later enacted statute extends or deletes that date.

Governments > Local Governments > Charters
Public Health & Welfare Law > Healthcare > General Overview

[HN21]See Cal. Welf. & Inst. Code § 17000.

Governments > Local Governments > Duties & Powers

[HN22] Cal. Welf. & Inst. Code § 17001 confers broad discretion upon the counties in performing their statutory duty to provide general assistance benefits to needy residents.

Administrative Law > Agency Rulemaking > General Overview
Governments > Local Governments > Duties & Powers

[HN23]When a statute confers upon a state agency the authority to adopt regulations to implement, interpret, make specific or otherwise carry out its provisions, the agency's regulations must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose. Cal. Gov't Code § 11374.

Administrative Law > Judicial Review > Reviewability > Questions of Law

[HN24]Courts have the final responsibility for the interpretation of the law.

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Governments > Local Governments > Duties & Powers
Public Health & Welfare Law > Healthcare > General Overview
[HN25] Cal. Welf. & Inst. Code § 17000 requires counties to relieve and support all indigent persons lawfully resident therein, when such persons are not supported and relieved by their relatives or by some other means.

Governments > Local Governments > Duties & Powers
Public Health & Welfare Law > Healthcare > General Overview
[HN26]Counties have no discretion to refuse to provide medical care to "indigent persons" within the meaning of Cal. Welf. & Inst. Code § 17000 who do not receive it from other sources.

Public Health & Welfare Law > Healthcare > General Overview
[HN27]Adult medically indigent persons are "indigent persons" within the meaning of Cal. Welf. & Inst. Code § 17000 for medical care purposes. Section 17000 requires counties to relieve and support all indigent persons.

Evidence > Inferences & Presumptions > General Overview
Pensions & Benefits Law > Governmental Employees > County Pensions
Public Health & Welfare Law > Social Security > Medicaid > Coverage > General Overview
[HN28]An attorney general's opinion, although not binding, is entitled to considerable weight. Absent controlling authority, it is persuasive because the court presumes that the legislature is cognizant of the attorney general's construction of Cal. Welf. & Inst. Code § 17000 and would have taken corrective action if it disagreed with that construction.

Governments > Local Governments > Duties & Powers
Public Health & Welfare Law > Healthcare > General Overview
[HN29] Cal. Welf. & Inst. Code § 17000 mandates that medical care is provided to indigents and Cal. Welf. & Inst. Code § 10000 requires that such care be provided promptly and humanely. The duty is mandated by statute. There is no discretion concerning whether to provide such care.

Governments > Local Governments > Duties & Powers
Public Health & Welfare Law > Healthcare > General Overview
[HN30] Cal. Welf. & Inst. Code § 17000 imposes a mandatory duty upon all counties to provide medically necessary care, not just emergency care. It further imposes a minimum standard of care below which the provision of medical services may not fall.

Governments > Local Governments > Duties & Powers
Healthcare Law > Insurance > Reimbursement > General Overview
Public Health & Welfare Law > Healthcare > General Overview
[HN31]The former Cal. Health & Safety Code § 1442.5(c) provides that, whether a county's duty to provide care to all indigent people is fulfilled directly by the county or through alternative means, the availability of services, and the quality of the treatment that is received by people who cannot afford to pay for their health care, shall be the same as that available to nonindigent people receiving health care services in private facilities in that county.

Governments > Local Governments > Duties & Powers
Public Health & Welfare Law > Healthcare > General Overview
[HN32]The Supreme Court of California disapproves Cooke v. Superior Court, 261 Cal. Rptr. 706, 213 Cal. App. 3d 401 (1989), to the extent it held that the former Cal. Health & Safety Code § 1442.5(c) was merely a limitation on a county's ability to close facilities or reduce services provided in those facilities, and was irrelevant absent a claim that a county facility was closed or that any services in the county were reduced.

Governments > Local Governments > Duties & Powers
Governments > Local Governments > Finance
Public Health & Welfare Law > Healthcare > General Overview
[HN33]Former Cal. Welf. & Inst. Code § 16990(a) requires counties receiving California Healthcare for the Indigent Program funds, at a minimum, to maintain a level of financial support of county funds for health services at least equal to its county match and any overmatch of county funds in the 1988-89 fiscal year, adjusted annually as provided.

Public Health & Welfare Law > Healthcare > General Overview

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[HN34]See former Cal. Welf. & Inst. Code § 16991(a)(5).

Administrative Law > Judicial Review > Remedies > Mandamus
Civil Procedure > Remedies > Writs > General Overview
[HN35]Mandamus pursuant to Cal. Civ. Proc. Code § 1094.5, commonly denominated "administrative" mandamus, is mandamus still. It is not possessed of a separate and distinctive legal personality. It is not a remedy removed from the general law of mandamus or exempted from the latter's established principles, requirements and limitations. The full panoply of rules applicable to "ordinary" mandamus applies to "administrative" mandamus proceedings, except where modified by statute. Where the entitlement to mandamus relief is adequately alleged, a trial court may treat a proceeding brought under Cal. Civ. Proc. Code § 1085 as one brought under Cal. Civ. Proc. Code § 1094.5 and deny a demurrer asserting that the wrong mandamus statute is invoked.

Civil Procedure > Appeals > Standards of Review
[HN36]The determination whether statutes establish a mandate under Cal. Const. art. XIII B, § 6, is a question of law. Where a purely legal question is at issue, the courts exercise independent judgment, no matter whether the issue arises by traditional or administrative mandate.

Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus
[HN37]The denial of a peremptory disqualification motion pursuant to Cal. Civ. Proc. Code § 170.6 is reviewable only by writ of mandate under Cal. Civ. Proc. Code § 170.3(d).

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions
Civil Procedure > Appeals > Reviewability > General Overview
[HN38]A preliminary injunction is immediately and separately appealable under Cal. Civ. Proc. Code § 904.1(a)(6).

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

After a county's unsuccessful administrative attempts to obtain reimbursement from the state for expenses incurred through its County Medical Services (CMS) program, and after a class action was filed on behalf of CMS program beneficiaries seeking to enjoin termination of the program, the county filed a cross-complaint and petition for a writ of mandate (Code Civ. Proc., § 1085) against the state, the Commission on State Mandates, and various state officers, to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service). The county alleged that the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The trial court found that the state had an obligation to fund the county's CMS program. (Superior Court of San Diego County, No. 634931, Michael I. Greer, * Harrison R. Hollywood, and Judith McConnell, Judges.) The Court of Appeal, Fourth Dist., Div. One, No. D018634, affirmed the judgment of the trial court insofar as it provided that Cal. Const., art. XIII B, § 6, required the state to fund the CMS program. The Court of Appeal also affirmed the trial court's finding that the state had required the county to spend at least $ 41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. However, the Court of Appeal reversed those portions of the judgment determining the final reimbursement amount and specifying the state funds from which the state was to satisfy the judgment. The Court of Appeal remanded to the commission to determine the reimbursement amount and appropriate statutory remedies.

* Retired judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The Supreme Court affirmed the judgment of the Court of Appeal insofar as it held that the exclusion of medically indigent adults from Medi-Cal imposed a mandate on the county within the meaning of Cal. Const., art. XIII B, § 6. The Supreme Court reversed the judgment insofar as it held that the state required the county to spend at least $ 41 million on the CMS program in fiscal years 1989-1990 and 1990-1991, and remanded the matter to the commission to determine whether, and by what amount, the statutory standards of care (e.g., Health & Saf. Code, § 1442.5, former subd. (c), Welf. & Inst. Code, §§ 10000, 17000) forced the county to incur costs in excess of the funds provided by the state, and to determine the statutory remedies to which the county was entitled. The court held that the trial court had jurisdiction to adjudicate the county's mandate claim, notwithstanding that a test claim was pending in an action by a different county. The trial court should not have proceeded while the other action was pending, since one purpose of the test claim procedure is to avoid multiple proceedings addressing the same claim. However, the error was not jurisdictional; the governing

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statutes simply vest primary jurisdiction in the court hearing the test claim. The court also held that the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The state asserted the source of the county's obligation to provide such care was Welf. & Inst. Code, § 17000, enacted in 1965, rather than the 1982 legislation, and since Cal. Const., art. XIII B, § 6, did not apply to "mandates enacted prior to January 1, 1975," there was no reimbursable mandate. However, Welf. & Inst. Code, § 17000, requires a county to support indigent persons only in the event they are not assisted by other sources. The court further held that there was a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide the medical care. While Welf. & Inst. Code, § 17001, confers discretion on counties to provide general assistance, there are limits to this discretion. The standards must meet the objectives of Welf. & Inst. Code, § 17000, or be struck down as void by the courts. The court also held that the Court of Appeal, in reversing the damages portion of the trial court's judgment and remanding to the commission to determine the amount of any reimbursement due, erred in finding the county had a minimum required expenditure on its CMS program. (Opinion by Chin, J., with George, C. J., Mosk, and Baxter, JJ., Anderson, J., ** and Aldrich, J., + concurring. Dissenting opinion by Kennard, J.)

** Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

+ Associate Justice, Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) **State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program.** --Cal. Const., art. XIII A, and art. XIII B, work in tandem, together restricting California governments' power both to levy and to spend for public purposes. Their goals are to protect residents from excessive taxation and government spending. The purpose of Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), 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 Cal. Const., arts. XIII A and XIII B, impose. With certain exceptions, Cal. Const., art. XIII B, § 6, essentially requires 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.

(2a) (2b) **State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Jurisdiction--With Pending Test Claim.** --The trial court had jurisdiction to adjudicate a county's mandate claim asserting the Legislature's transfer to counties of the responsibility for providing health care for medically indigent adults constituted a new program or higher level of service that required state funding under Cal. Const., art. XIII B, § 6 (reimbursement to local government for costs of new state-mandated program), notwithstanding that a test claim was pending in an action by a different county. The trial court should not have proceeded while the other action was pending, since one purpose of the test claim procedure is to avoid multiple proceedings addressing the same claim. However, the error was not jurisdictional; the governing statutes simply vest primary jurisdiction in the court hearing the test claim. The trial court's failure to defer to the primary jurisdiction of the other court did not prejudice the state. The trial court did not usurp the Commission on State Mandates' authority, since the commission had exercised its authority in the pending action. Since the pending action was settled, no multiple decisions resulted. Nor did lack of an administrative record prejudice the state, since determining whether a statute imposes a state mandate is an issue of law. Also, attempts to seek relief from the commission would have been futile, thus triggering the futility exception to the exhaustion requirement, given that the commission rejected the other county's claim.

(3) **Administrative Law § 99--Judicial Review and Relief--Administrative Mandamus--Jurisdiction--As Derived From Constitution.** --The power of superior courts to perform mandamus review of administrative decisions derives in part from Cal. Const., art. VI, § 10. That section gives the Supreme Court, Courts of Appeal, and superior courts "original jurisdiction in proceedings for extraordinary relief in the nature of mandamus." The jurisdiction thus vested may not lightly be deemed to have been destroyed. While the courts are subject to reasonable statutory regulation of procedure and other matters, they will maintain their constitutional powers in

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order effectively to function as a separate department of government. Consequently an intent to defeat the exercise of the court's jurisdiction will not be supplied by implication.

(4) State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Existence of Mandate. --In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The state asserted the source of the county's obligation to provide such care was Welf. & Inst. Code, § 17000, enacted in 1965, rather than the 1982 legislation, and since Cal. Const., art. XIII B, § 6, did not apply to "mandates enacted prior to January 1, 1975," there was no reimbursable mandate. However, Welf. & Inst. Code, § 17000, requires a county to support indigent persons only in the event they are not assisted by other sources. To the extent care was provided prior to the 1982 legislation, the county's obligation had been reduced. Also, the state's assumption of full funding responsibility prior to the 1982 legislation was not intended to be temporary. The 1978 legislation that assumed funding responsibility was limited to one year, but similar legislation in 1979 contained no such limiting language. Although the state asserted the health care program was never operated by the state, the Legislature, in adopting Medi-Cal, shifted responsibility for indigent medical care from counties to the state. Medi-Cal permitted county boards of supervisors to prescribe rules (Welf. & Inst. Code, § 14000.2), and Medi-Cal was administered by state departments and agencies.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 123.]

(5a) (5b) State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Existence of Mandate--Discretion to Set Standards--Eligibility. --In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide such care. While Welf. & Inst. Code, § 17001, confers discretion on counties to provide general assistance, there are limits to this discretion. The standards must meet the objectives of Welf. & Inst. Code, § 17000 (counties shall relieve and support "indigent persons"), or be struck down as void by the courts. As to eligibility standards, counties must provide care to all adult medically indigent persons (MIP's). Although Welf. & Inst. Code, § 17000, does not define "indigent persons," the 1982 legislation made clear that adult MIP's were within this category. The coverage history of Medi-Cal demonstrates the Legislature has always viewed all adult MIP's as "indigent persons" under Welf. & Inst. Code, § 17000. The Attorney General also opined that the 1971 inclusion of MIP's in Medi-Cal did not alter the duty of counties to provide care to indigents not eligible for Medi-Cal, and this opinion was entitled to considerable weight. Absent controlling authority, the opinion was persuasive since it was presumed the Legislature was cognizant of the Attorney General's construction and would have taken corrective action if it disagreed. (Disapproving *Bay General Community Hospital v. County of San Diego* (1984) 156 Cal.App.3d 944 [203 Cal.Rptr. 184] insofar as it holds that a county's responsibility under Welf. & Inst. Code, § 17000, extends only to indigents as defined by the county's board of supervisors, and suggests that a county may refuse to provide medical care to persons who are "indigent" within the meaning of Welf. & Inst. Code, § 17000, but do not qualify for Medi-Cal.)

(6) Public Aid and Welfare § 4--County Assistance--Counties' Discretion. --Counties may exercise their discretion under Welf. & Inst. Code, § 17001 (county board of supervisors or authorized agency shall adopt standards of aid and care for indigent and dependent poor), only within fixed boundaries. In administering General Assistance relief the county acts as an agent of the state. When a statute confers upon a state agency the authority to adopt regulations to implement, interpret, make specific or otherwise carry out its provisions, the agency's regulations must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose (Gov. Code, § 11374). Despite the counties' statutory discretion, courts have consistently invalidated county welfare regulations that fail to meet statutory requirements.

(7) State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Existence of Mandate--Discretion to Set Standards--Service. --In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for

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state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide such care by setting its own service standards. Welf. & Inst. Code, § 17000, mandates that medical care be provided to indigents, and Welf. & Inst. Code, § 10000, requires that such care be provided promptly and humanely. There is no discretion concerning whether to provide such care. Courts construing Welf. & Inst. Code, § 17000, have held it imposes a mandatory duty upon counties to provide medically necessary care, not just emergency care, and it has been interpreted to impose a minimum standard of care. Until its repeal in 1992, Health & Saf. Code, § 1442.5, former subd. (c), also spoke to the level of services that counties had to provide under Welf. & Inst. Code, § 17000, requiring that the availability and quality of services provided to indigents directly by the county or alternatively be the same as that available to nonindigents in private facilities in that county. (Disapproving *Cooke* v. *Superior Court* (1989) 213 Cal.App.3d 401 [261 Cal.Rptr. 706] to the extent it held that Health & Saf. Code, § 1442.5, former subd. (c), was merely a limitation on a county's ability to close facilities or reduce services provided in those facilities, and was irrelevant absent a claim that a county facility was closed or that services in the county were reduced.)

(8) State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Minimum Required Expenditure. --In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), in which the trial court found that the Legislature's 1982 transfer to counties of the responsibility for providing health care for medically indigent adults mandated a reimbursable new program entitling the county to reimbursement, the Court of Appeal, in reversing the damages portion of the trial court's judgment and remanding to the Commission on State Mandates to determine the amount of any reimbursement due, erred in finding the county had a minimum required expenditure on its County Medical Services (CMS) program. The Court of Appeal relied on Welf. & Inst. Code, former § 16990, subd. (a), which set forth the financial maintenance-of-effort requirement for counties that received California Healthcare for the Indigent Program (CHIP) funding. However, counties that chose to seek CHIP funds did so voluntarily. Thus, Welf. & Inst. Code, former § 16990, subd. (a), did not mandate a minimum funding requirement. Nor did Welf. & Inst. Code, former § 16991, subd. (a)(5), establish a minimum financial obligation. That statute required the state, for fiscal years 1989-1990 and 1990-1991, to reimburse a county if its allocation from various sources was less than the funding it received under Welf. & Inst. Code, § 16703, for 1988-1989. Nothing about this requirement imposed on the county a minimum funding requirement.

(9) State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Proper Mandamus Proceeding: Mandamus and Prohibition § 23--Claim Against Commission on State Mandates. --In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), after the Commission on State Mandates indicated the Legislature's 1982 transfer to counties of the responsibility for providing health care for medically indigent adults did not mandate a reimbursable new program, a mandamus proceeding under Code Civ. Proc., § 1085, was not an improper vehicle for challenging the commission's position. Mandamus under Code Civ. Proc., § 1094.5, commonly denominated "administrative" mandamus, is mandamus still. The full panoply of rules applicable to ordinary mandamus applies to administrative mandamus proceedings, except where they are modified by statute. Where entitlement to mandamus relief is adequately alleged, a trial court may treat a proceeding under Code Civ. Proc., § 1085, as one brought under Code Civ. Proc., § 1094.5, and should overrule a demurrer asserting that the wrong mandamus statute has been invoked. In any event, the determination whether the statutes at issue established a mandate under Cal. Const., art. XIII B, § 6, was a question of law. Where a purely legal question is at issue, courts exercise independent judgment, no matter whether the issue arises by traditional or administrative mandate.

COUNSEL: Daniel E. Lungren, Attorney General, Charlton G. Holland III, Assistant Attorney General, John H. Sanders and Richard T. Waldow, Deputy Attorneys General, for Cross-defendants and Appellants.

Lloyd M. Harmon, Jr., County Counsel, John J. Sansone, Acting County Counsel, Diane Bardsley, Chief Deputy County Counsel, Valerie Tehan and Ian Fan, Deputy County Counsel, for Cross-complainant and Respondent.

JUDGES: Opinion by Chin, J., with George, C. J., Mosk, and Baxter, JJ., Anderson, J., and Aldrich, J., concurring. Dissenting opinion by Kennard, J.

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* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

** Associate Justice, Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINION BY: CHIN

OPINION

[*75] [**314] [***136] **CHIN, J.**

Section 6 of article XIII B of the California Constitution (section 6) requires the State of California (state), subject to certain exceptions, to "provide a subvention of funds to reimburse" local governments "[w]henever the Legislature or any state agency mandates a new program or higher level of service . . . ." In this action, the County of San Diego (San Diego or the County) seeks reimbursement under section 6 from the state for the costs of providing health care services to certain adults who formerly received medical care under the California Medical Assistance Program (Medi-Cal) (see Welf. & Inst. Code, [**315] [***137] § 14063) [1] because they were medically indigent, i.e., they had insufficient financial resources to pay for their own medical care. In 1979, when the electorate adopted section 6, the state provided Medi-Cal coverage to these medically indigent adults without requiring financial contributions from counties. Effective January 1, 1983, the Legislature excluded this population from Medi-Cal. (Stats. 1982, ch. 328, § 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, § 19, 86, pp. 6315, 6357.) Since that date, San Diego has provided medical care to these individuals with varying levels of state financial assistance.

1 Except as otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

To resolve San Diego's claim, we must determine whether the Legislature's exclusion of medically indigent adults from Medi-Cal "mandate[d] a new program or higher level of service" on San Diego within the meaning of section 6. The Commission on State Mandates (Commission), which the Legislature created to determine claims under section 6, has ruled that section 6 does not apply to the Legislature's action and has rejected reimbursement claims like San Diego's. (See *Kinlaw v. State of California* (1991) 54 Cal. 3d 326, 330, fn. 2 [285 Cal. Rptr. 66, 814 P.2d 1308] (*Kinlaw*).) The trial court and Court of Appeal in this case disagreed with the Commission, finding that San Diego was entitled to reimbursement. The state seeks [*76] reversal of this finding. It also argues that San Diego's failure to follow statutory procedures deprived the courts of jurisdiction to hear its claim. We reject the state's jurisdictional argument and affirm the finding that the Legislature's exclusion of medically indigent adults from Medi-Cal "mandate[d] a new program or higher level of service" within the meaning of section 6. Accordingly, we remand the matter to the Commission to determine the amount of reimbursement, if any, due San Diego under the governing statutes.

I. FUNDING OF INDIGENT MEDICAL CARE

Before the start of Medi-Cal, "the indigent in California were provided health care services through a variety of different programs and institutions." (Assem. Com. on Public Health, Preliminary Rep. on Medi-Cal (Feb. 29, 1968) p. 3 (Preliminary Report).) County hospitals "provided a wide range of inpatient and outpatient hospital services to all persons who met county indigency requirements whether or not they were public assistance recipients. The major responsibility for supporting county hospitals rested upon the counties, financed primarily through property taxes, with minor contributions from" other sources. (*Id.* at p. 4.)

[HN1]Medi-Cal, which began operating March 1, 1966, established "a program of basic and extended health care services for recipients of public assistance and for medically indigent persons." (*Morris v. Williams* (1967) 67 Cal. 2d 733, 738 [63 Cal. Rptr. 689, 433 P.2d 697] (*Morris*); *id.* at p. 740; see also Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 103.) It "represent[ed] California's implementation of the federal Medicaid program (42 U.S.C. § 1396-1396v), through which the federal government provide[d] financial assistance to states so that they [might] furnish medical care to qualified indigent persons. [Citation.]" (*Robert F. Kennedy Medical Center v. Belsh* (1996) 13 Cal. 4th 748, 751 [55 Cal. Rptr. 2d 107, 919 P.2d 721] (*Belsh*).) "[B]y meeting the requirements of federal law," Medi-Cal "qualif[ied] California for the receipt of federal funds made available under title XIX of the Social Security Act." (*Morris, supra*, 67 Cal. 2d at p. 738.) "Title [XIX] permitted the combination of the major governmental health care systems which provided care for the indigent into a single system financed by the state and federal governments. By 1975, this system, at least as originally proposed, would provide a wide range of health care services for all those who [were] indigent regardless of whether they [were] public assistance recipients . . . ." (Preliminary Rep., *supra*, at p. 4; see also Act of July 30, 1965, Pub.L. No. 89-97, § 121(a), 79 Stat. 286, reprinted in 1965 U.S. Code [*77] Cong. & Admin. News, p. 378 [states must make effort to [**316] [***138] liberalize

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eligibility requirements "with a view toward furnishing by July 1, 1975, comprehensive care and services to substantially all individuals who meet the plan's eligibility standards with respect to income and resources"].) [2]

2 Congress later repealed the requirement that states work towards expanding eligibility. (See Cal. Health and Welfare Agency, The Medi-Cal Program: A Brief Summary of Major Events (Mar. 1990) p. 1 (Summary of Major Events).)

However, eligibility for Medi-Cal was initially limited only to persons linked to a federal categorical aid program by age (at least 65), blindness, disability, or membership in a family with dependent children within the meaning of the Aid to Families with Dependent Children program (AFDC). (See Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1971-1972 Budget Bill, Sen. Bill No. 207 (1971 Reg. Sess.) pp. 548, 550 (1971 Legislative Analyst's Report).) Individuals possessing one of these characteristics (categorically linked persons) received full benefits if they actually received public assistance payments. (*Id.* at p. 550.) Lesser benefits were available to categorically linked persons who were only medically indigent, i.e., their income and resources, although rendering them ineligible for cash aid, were "not sufficient to meet the cost of health care." (*Morris, supra*, 67 Cal. 2d at p. 750; see also 1971 Legis. Analyst's Rep., *supra*, at pp. 548, 550; Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, pp. 105-106.)

Individuals not linked to a federal categorical aid program (non-categorically linked persons) were ineligible for Medi-Cal, regardless of their means. Thus, "a group of citizens, not covered by Medi-Cal and yet unable to afford medical care, remained the responsibility of" the counties. (*County of Santa Clara v. Hall* (1972) 23 Cal. App. 3d 1059, 1061 [100 Cal. Rptr. 629] (*Hall*).) In establishing Medi-Cal, the Legislature expressly recognized this fact by enacting former section 14108.5, which provided: "The Legislature hereby declares its concern with the problems which will be facing the counties with respect to the medical care of indigent persons who are not covered [by Medi-Cal] . . . and . . . whose medical care must be financed entirely by the counties in a time of heavily increasing medical costs." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 116.) The Legislature directed the Health Review and Program Council "to study this problem and report its findings to the Legislature no later than March 1, 1967." (*Ibid.*)

Moreover, although it required counties to contribute to the costs of Medi-Cal, the Legislature established a method for determining the amount of their contributions that would "leave them with []sufficient funds to provide hospital care for those persons not eligible for Medi-Cal." (*Hall, supra*, 23 Cal. App. 3d at p. 1061, fn. omitted.) Former section 14150.1, [*78] which was known as the "county option" or the "option plan," required a county "to pay the state a sum equal to 100 percent of the county's health care costs (which included both linked and nonlinked individuals) provided in the 1964-1965 fiscal year, with an adjustment for population increase; in return the state would pay the county's entire cost of medical care." [3] (*County of Sacramento v. Lackner* (1979) 97 Cal. App. 3d 576, 581 [159 Cal. Rptr. 1] (*Lackner*).) Under the county option, "the state agreed to assume all county health care costs . . . in excess of" the county's payment. (*Id.* at p. 586.) It "made no distinction between 'linked' and 'nonlinked' persons," and "simply guaranteed a medical cost ceiling to counties electing to come within the option plan." (*Ibid.*) "Any difference [**317] [***139] in actual operating costs and the limit set by the option provision [was] assumed entirely by the state." (Preliminary Rep., *supra*, at p. 10, fn. 2.) Thus, the county option "guarantee[d] state participation in the cost of care for medically indigent persons who [were] not otherwise covered by the basic Medi-Cal program or other repayment programs." [4] (1971 Legis. Analyst's Rep., *supra*, at p. 549.)

3 [HN2]Former section 14150.1 provided in relevant part: "[A] county may elect to pay as its share [of Medi-Cal costs] one hundred percent . . . of the county cost of health care uncompensated from any source in 1964-65 for all categorical aid recipients, and all other persons in the county hospital or in a contract hospital, increased for such county for each fiscal year subsequent to 1964-65 by an amount proportionate to the increase in population for such county . . . . If the county so elects, the county costs of health care in any fiscal year shall not exceed the total county costs of health care uncompensated from any source in 1964-65 for all categorical aid recipients, and all other persons in the county hospital or in a contract hospital, increased for such county for each fiscal year subsequent to 1964-65 by an amount proportionate to the increase in population for such county . . . ." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 121.)

4 [HN3]Former section 14150 provided the standard method for determining the counties' share of Medi-Cal costs. Under it, "a county was required to pay the state a specific sum, in return for which the state would pay for the medical care of all [categorically linked] individuals . . . . Financial responsibility for nonlinked individuals . . . remained with the counties." (*Lackner, supra*, 97 Cal. App. 3d at p. 581.)

Primarily through the county option. Medi-Cal caused a "significant shift in financing of health care

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from the counties to the state and federal government. . . . During the first 28 months of the program the state . . . paid approximately $ 76 million for care of non-Medi-Cal indigents in county hospitals." (Preliminary Rep., *supra*, at p. 31.) These state funds paid "costs that would otherwise have been borne by counties through increases in property taxes." (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1974-1975 Budget Bill, Sen. Bill No. 1525 (1973-1974 Reg. Sess.) p. 626 (1974 Legislative Analyst's Report).) "[F]aced with escalating Medi-Cal costs, the Legislature in 1967 imposed strict guidelines on reimbursing counties electing to come under the 'option' plan. ([Former] § 14150.2.) Pursuant to subdivision (c) of [former] section 14150.2, the state imposed a limit on its obligation to pay for medical services to nonlinked persons [*79] served by a county within the 'option' plan." (*Lackner, supra*, 97 Cal. App. 3d at p. 589; see also Stats. 1967, ch. 104, § 3, p. 1019; Stats. 1969, ch. 21, § 57, pp. 106-107; 1974 Legis. Analyst's Rep., *supra*, at p. 626.)

In 1971, the Legislature substantially revised Medi-Cal. It extended coverage to certain noncategorically linked minors and adults "who [were] financially unable to pay for their medical care." (Legis. Counsel's Dig., Assem. Bill No. 949, 3 Stats. 1971 (Reg. Sess.) Summary Dig., p. 83; see Stats. 1971, ch. 577, § 12, 23, pp. 1110-1111, 1115.) These medically indigent individuals met "the income and resource requirements for aid under [AFDC] but [did] not otherwise qualify[] as a public assistance recipient." (56 Ops.Cal.Atty.Gen. 568, 569 (1973).) The Legislature anticipated that this eligibility expansion would bring "approximately 800,000 additional medically needy Californians" into Medi-Cal. (Stats. 1971, ch. 577, § 56, p. 1136.) The 1971 legislation referred to these individuals as " '[n]oncategorically related needy person[s].' " (Stats. 1971, ch. 577, § 23, p. 1115.) Subsequent legislation designated them as "medically indigent person[s]" (MIP's) and provided them coverage under former section 14005.4. (Stats. 1976, ch. 126, § 7, p. 200; *id.* at § 20, p. 204.)

The 1971 legislation also established a new method for determining each county's financial contribution to Medi-Cal. The Legislature eliminated the county option by repealing former section 14150.1 and enacting former section 14150. That section specified (by amount) each county's share of Medi-Cal costs for the 1972-1973 fiscal year and set forth a formula for increasing the share in subsequent years based on the taxable assessed value of certain property. (Stats. 1971, ch. 577, § 41, 42, pp. 1131-1133.)

For the 1978-1979 fiscal year, the state assumed each county's share of Medi-Cal costs under former section 14150. (Stats. 1978, ch. 292, § 33, p. 610.) In July 1979, the Legislature repealed former section 14150 altogether, thereby eliminating the counties' responsibility to share in Medi-Cal costs. (Stats. 1979, ch. 282, § 74, p. 1043.) Thus, in November 1979, when the electorate adopted section 6, "the state was funding Medi-Cal coverage for [MIP's] without requiring any county financial contribution." (*Kinlaw, supra*, 54 Cal. 3d at p. 329.) The state continued to provide full funding for MIP medical care through 1982.

In 1982, the Legislature passed two Medi-Cal reform bills that, as of January 1, 1983, excluded from Medi-Cal most adults who had been eligible [*80] under the MIP category [***140] (adult [**318] MIP's or Medically Indigent Adults). [5] (Stats. 1982, ch. 328, § 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, § 19, 86, pp. 6315, 6357; *Cooke v. Superior Court* (1989) 213 Cal. App. 3d 401, 411 [261 Cal. Rptr. 706] (*Cooke*).) As part of excluding this population from Medi-Cal, the Legislature created the Medically Indigent Services Account (MISA) as a mechanism for "transfer[ing] [state] funds to the counties for the provision of health care services." (Stats. 1982, ch. 1594, § 86, p. 6357.) Through MISA, the state annually allocated funds to counties based on "the average amount expended" during the previous three fiscal years on Medi-Cal services for county residents who had been eligible as MIP's. (Stats. 1982, ch. 1594, § 69, p. 6345.) The Legislature directed that MISA funds "be consolidated with existing county health services funds in order to provide health services to low-income persons and other persons not eligible for the Medi-Cal program." (Stats. 1982, ch. 1594, § 86, p. 6357.) It further provided: "Any person whose income and resources meet the income and resource criteria for certification for [Medi-Cal] services pursuant to Section 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided." (Stats. 1982, ch. 1594, § 70, p. 6346.)

> 5 In this opinion, the terms "adult MIP's" and "Medically Indigent Adults" refer only to those persons who were excluded from the Medi-Cal program by the 1982 legislation.

After passage of the 1982 legislation, San Diego established a county medical services (CMS) program to provide medical care to adult MIP's. According to San Diego, between 1983 and June 1989, the state fully funded San Diego's CMS program through MISA. However, for fiscal years 1989-1990 and 1990-1991, the state only partially funded San Diego's CMS program. For example, San Diego asserts that, in fiscal year 1990-1991, it exhausted state-provided MISA funds by December 24, 1990. Faced with this shortfall, San Diego's board of supervisors voted in February 1991 to

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terminate the CMS program unless the state agreed by March 8 to provide full funding for the 1990-1991 fiscal year. After the state refused to provide additional funding, San Diego notified affected individuals and medical service providers that it would terminate the CMS program at midnight on March 19, 1991. The response to the County's notification ultimately resulted in the unfunded mandate claim now before us.

II. UNFUNDED MANDATES

Through adoption of Proposition 13 in 1978, the voters [HN4]added article XIII A to the California Constitution, which "imposes a limit on the power of state and local governments to adopt and levy taxes. [Citation.]" (*County of Fresno v. State of California* (1991) 53 Cal. 3d 482, 486 [280 Cal. Rptr. 92, [*81] 808 P.2d 235] (*County of Fresno*).) The next year, the voters added article XIII B to the Constitution, which "impose[s] a complementary limit on the rate of growth in governmental spending." (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal. 4th 571, 574 [7 Cal. Rptr. 2d 245, 828 P.2d 147].) **(1)** These two constitutional articles "work in tandem, together restricting California governments' power both to levy and to spend for public purposes." (*City of Sacramento v. State of California* (1990) 50 Cal. 3d 51, 59, fn. 1 [266 Cal. Rptr. 139, 785 P.2d 522].) Their goals are "to protect residents from excessive taxation and government spending. [Citation.]" (*County of Los Angeles v. State of California* (1987) 43 Cal. 3d 46, 61 [233 Cal. Rptr. 38, 729 P.2d 202] (*County of Los Angeles*).)

[HN5]Article XIII B of the California Constitution includes section 6, which is the constitutional provision at issue here. It 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 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: [P] . . . [P] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." Section 6 [**319] [***141] recognizes that articles XIII A and XIII B severely restrict the taxing and spending powers of local governments. (*County of Fresno, supra*, 53 Cal. 3d at p. 487.) 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 Fresno, supra*, 53 Cal. 3d at p. 487; *County of Los Angeles, supra*, 43 Cal. 3d at p. 61.) With certain exceptions, [HN6]section 6 "[e]ssentially" requires 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. [Citation.]" (*Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1577 [15 Cal. Rptr. 2d 547].)

In 1984, the Legislature created a statutory procedure for [HN7]determining whether a statute imposes state-mandated costs on a local agency within the meaning of section 6. (Gov. Code, § 17500 et seq.). The local agency must file a test claim with the Commission, which, after a public hearing, decides whether the statute mandates a new program or increased level of service. (Gov. Code, § 17521, 17551, 17555.) If the Commission finds a claim to be reimbursable, it must determine the amount of reimbursement. (Gov. Code, § 17557.) The local agency must then follow certain statutory procedures to [*82] obtain reimbursement. (Gov. Code, § 17558 et seq.) [HN8]If the Legislature refuses to appropriate money for a reimbursable mandate, the local agency may file "an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement." (Gov. Code, § 17612, subd. (c).) If the Commission finds no reimbursable mandate, the local agency may challenge this finding by administrative mandate proceedings under section 1094.5 of the Code of Civil Procedure. (Gov. Code, § 17559.) Government Code section 17552 declares that these provisions "provide the sole and exclusive procedure by which a local agency . . . may claim reimbursement for costs mandated by the state as required by Section 6 . . . ."

III. ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

A. *The Los Angeles Action*

On November 23, 1987, the County of Los Angeles (Los Angeles) filed a claim (the Los Angeles action) with the Commission asserting that the exclusion of adult MIP's from Medi-Cal constituted a reimbursable mandate under section 6. (*Kinlaw, supra*, 54 Cal. 3d at p. 330, fn. 2.) Alameda County subsequently filed a claim on November 30, 1987, but the Commission rejected it because of the pending Los Angeles claim. (*Id.* at p. 331, fn. 4.) Los Angeles refused to permit Alameda County to join as a claimant, but permitted San Bernardino County to join. (*Ibid.*)

In April 1989, the Commission rejected the Los Angeles claim, finding no reimbursable mandate. [6] (*Kinlaw, supra*, 54 Cal. 3d at p. 330, fn. 2.) It found that the 1982 legislation did not impose on counties a new program or a higher level of service for an existing program because counties had a "pre-existing duty" to pro-

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vide medical care to the medically indigent under section 17000. That section provides in relevant part: "Every county . . . shall relieve and support all incompetent, poor, indigent persons . . . lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." Section 17000 did not impose a reimbursable mandate under section 6, the Commission further reasoned, because it "was enacted prior to January 1, 1975 . . . ." Finally, the Commission found no mandate because the 1982 legislation "neither establish[ed] the level of care to be provided nor . . . define[d] the class of persons determined to be eligible for medical care since these criteria were established by boards of supervisors" pursuant to section 17001.

6 San Diego lodged with the trial court a copy of the Commission's decision in the Los Angeles action.

[**320] [***142] On March 20, 1990, the Los Angeles Superior Court filed a judgment reversing the Commission's decision and directing issuance of a peremptory [*83] writ of mandate. On April 16, 1990, the Commission and the state filed an appeal in the Second District Court of Appeal. (*County of Los Angeles v. State of California*, No. B049625.) [7] In early 1992, the parties to the Los Angeles action agreed to settle their dispute and to seek dismissal. In April 1992, after learning of this agreement, San Diego sought to intervene. Explaining that it had been waiting for resolution of the action, San Diego requested that the Court of Appeal deny the dismissal request and add (or substitute in) the County as a party. The Court of Appeal did not respond. On December 15, 1992, the parties to the Los Angeles action entered into a settlement agreement that provided for vacation of the superior court judgment and dismissal of the appeal and superior court action. Consistent with the settlement agreement, on December 29, 1992, the Court of Appeal filed an order vacating the superior court judgment, dismissing the appeal, and instructing the superior court to dismiss the action without prejudice on remand. [8]

7 In setting forth the facts relating to the Los Angeles action, we rely in part on the appellate record from that action, of which we take judicial notice. (Evid. Code, § 452, subd. (d), 459.)

8 The settlement resulted from 1991 legislation that changed the system of health care funding as of June 30, 1991. (See § 17600 et seq.; Stats. 1991, chs. 87, 89, pp. 231-235, 243-341.) That legislation provided counties with new revenue sources, including a portion of state vehicle license fees, to fund health care programs. However, the legislation declared that the statutes providing counties with vehicle license fees would "cease to be operative on the first day of the month following the month in which the Department of Motor Vehicles is notified by the Department of Finance of a final judicial determination by the California Supreme Court or any California court of appeal" that "[t]he state is obligated to reimburse counties for costs of providing medical services to medically indigent adults pursuant to Chapters 328 and 1594 of the Statutes of 1982." (Rev. & Tax. Code, § 10753.8, subd. (b)(2), 11001.5, subd. (d)(2); see also Stats. 1991, ch. 89, § 210, p. 340.) Los Angeles and San Bernardino Counties settled their action to avoid triggering these provisions. Unlike the dissent, we do not believe that consideration of these recently enacted provisions is appropriate in analyzing the 1982 legislation. Nor do we assume, as the dissent does, that our decision necessarily triggers these provisions. That issue is not before us.

B. *The San Diego Action*

1. *Administrative Attempts to Obtain Reimbursement*

On March 13, 1991, San Diego submitted an invoice to the State Controller seeking reimbursement of its uncompensated expenditures on the CMS program for fiscal year 1989-1990. The Controller is a member of the Commission. (Gov. Code, § 17525.) On April 12, the Controller returned the invoice "without action," stating that "[n]o appropriation has been given to this office to allow for reimbursement" of medical costs for adult MIP's, and noting that litigation was pending regarding the state's reimbursement obligation. On December 18, 1991, San Diego submitted a similar invoice for the 1990-1991 fiscal year. The state has not acted regarding this second invoice.

[*84] 2. *Court Proceedings*

Responding to San Diego's notice of intent to terminate the CMS program, on March 11, 1991, the Legal Aid Society of San Diego filed a class action on behalf of CMS program beneficiaries seeking to enjoin termination of the program. The trial court later issued a preliminary injunction prohibiting San Diego "from taking any action to reduce or terminate" the CMS program.

On March 15, 1991, San Diego filed a cross-complaint and petition for writ of mandate under Code of Civil Procedure section 1085 against the state, the Commission, and various state officers. [9] The cross-complaint alleged that, by excluding adult MIP's from Medi-Cal and transferring responsibility for [**321] [***143] their medical care to counties, the

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state had mandated a new program and higher level of service within the meaning of section 6. The cross-complaint further alleged that the state therefore had a duty under section 6 to reimburse San Diego for the entire cost of its CMS program, and that the state had failed to perform its duty.

9 The cross-complaint named the following state officers: (1) Kenneth W. Kizer, Director of the Department of Health Services; (2) Kim Belsh, Acting Secretary of the Health and Welfare Agency; (3) Gray Davis, the State Controller; (4) Kathleen Brown, the State Treasurer; and (5) Thomas Hayes, the Director of the Department of Finance. Where the context suggests, subsequent references in this opinion to "the state" include these officers.

Proceeding from these initial allegations, the cross-complaint alleged causes of action for indemnification, declaratory and injunctive relief, reimbursement and damages, and writ of mandate. In its first declaratory relief claim, San Diego alleged (on information and belief) that the state contended the CMS program was a nonreimbursable, county obligation. In its claim for reimbursement, San Diego alleged (again on information and belief) that the Commission had "previously denied the claims of other counties, ruling that county medical care programs for [adult MIP's] are not state-mandated and, therefore, counties are not entitled to reimbursement from the State for the costs of such programs." "Under these circumstances," San Diego asserted, "denial of the County's claim by the Commission . . . is virtually certain and further administrative pursuit of this claim would be a futile act."

For relief, San Diego requested a judgment declaring the following: (1) that the state must fully reimburse San Diego if it "is compelled to provide any CMS Program services to plaintiffs . . . after March 19, 1991"; (2) that section 6 requires the state "to fully fund the CMS Program" (or, alternatively, that the CMS program is discretionary); (3) that the state must pay San Diego for all of its unreimbursed costs for the CMS program during [*85] the 1989-1990 and 1990-1991 fiscal years; and (4) that the state shall assume responsibility for operating any court-ordered continuation of the CMS program. San Diego also requested that the court issue a writ of mandamus requiring the state to fulfill its reimbursement obligation. Finally, San Diego requested issuance of preliminary and permanent injunctions to ensure that the state fulfilled its obligations to the County.

In April 1991, San Diego determined that it could continue operating the CMS program using previously unavailable general fund revenues. Accordingly, San Diego and plaintiffs settled their dispute, and plaintiffs dismissed their complaint.

The matter proceeded solely on San Diego's cross-complaint. The court issued a preliminary injunction and alternative writ in May 1991. At a hearing on June 25, 1991, the court found that the state had an obligation to fund San Diego's CMS program, granted San Diego's request for a writ of mandate, and scheduled an evidentiary hearing to determine damages and remedies. On July 1, 1991, it issued an order reflecting this ruling and granting a peremptory writ of mandate. The writ did not issue, however, because of the pending hearing to determine damages. In December 1992, after an extensive evidentiary hearing and posthearing proceedings on the claim for a peremptory writ of mandate, the court issued a judgment confirming its jurisdiction to determine San Diego's claim, finding that section 6 required the state to fund the entire cost of San Diego's CMS program, determining the amount that the state owed San Diego for fiscal years 1989-1990 and 1990-1991, identifying funds available to the state to satisfy the judgment, and ordering issuance of a peremptory writ of mandate. " The court also issued a peremptory writ of mandate directing the state and various state officers to comply with the judgment.

10 The judgment dismissed all of San Diego's other claims.

The Court of Appeal affirmed the judgment insofar as it provided that section 6 requires the state to fund the CMS program. The Court of Appeal also affirmed the trial court's finding that the state had required San Diego to spend at least $ 41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. However, the Court of Appeal reversed those portions of the judgment determining the final reimbursement amount and specifying the state funds from which the state was to satisfy the judgment. It remanded the matter to the Commission to determine the reimbursement amount and appropriate statutory remedies. We then granted the state's petition for review.

[**322] [***144] IV. SUPERIOR COURT JURISDICTION

(2a) Before reaching the merits of the appeal, we must address the state's assertion that the superior court lacked jurisdiction to hear San [*86] Diego's mandate claim. According to the state, in *Kinlaw, supra*, 54 Cal. 3d 326, we "unequivocally held that the orderly determination of [unfunded] mandate questions demands that only one claim on any particular alleged mandate be entertained by the courts at any given time." Thus, if a test claim is pending, "other potential claims must be held in abeyance . . . ." Applying this principle, the state asserts

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that, since "the test claim litigation was pending" in the Los Angeles action when San Diego filed its cross-complaint seeking mandamus relief, "the superior court lacked jurisdiction from the outset, and the resulting judgment is a nullity. That defect cannot be cured by the settlement of the test claim, which occurred after judgment was entered herein."

In *Kinlaw*, we held that [HN9]individual taxpayers and recipients of government benefits lack standing to enforce section 6 because the applicable administrative procedures, which "are the exclusive means" for determining and enforcing the state's section 6 obligations, "are available only to local agencies and school districts directly affected by a state mandate . . . ." (*Kinlaw, supra*, 54 Cal. 3d at p. 328.) In reaching this conclusion, we explained that the reimbursement right under section 6 "is a right given by the Constitution to local agencies, not individuals either as taxpayers or recipients of government benefits and services." (*Id.* at p. 334.) We concluded that "[n]either public policy nor practical necessity compels creation of a judicial remedy by which individuals may enforce the right of the county to such revenues." (*Id.* at p. 335.)

In finding that individuals do not have standing to enforce the section 6 rights of local agencies, we made several observations in *Kinlaw* pertinent to operation of the statutory process as it applies to entities that do have standing. Citing Government Code section 17500, we explained that "the Legislature enacted comprehensive administrative procedures for resolution of claims arising out of section 6 . . . because the absence of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process." (*Kinlaw, supra*, 54 Cal. 3d at p. 331.) Thus, the governing statutes "establish[] procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created." (*Id.* at p. 333.) Specifically, "[t]he legislation establishes a test-claim procedure to expeditiously resolve disputes affecting multiple agencies . . . ." (*Id.* at p. 331.) Describing the Commission's application of the test-claim procedure to claims regarding exclusion of adult MIP's from Medi-Cal, we observed: "The test claim by the County of Los Angeles was filed prior to that [*87] proposed by Alameda County. The Alameda County claim was rejected for that reason. (See [Gov. Code,] § 17521.) Los Angeles County permitted San Bernardino County to join in its claim which the Commission accepted as a test claim intended to resolve the [adult MIP exclusion] issues . . . . Los Angeles County declined a request from Alameda County that it be included in the test claim . . . ." (*Id.* at p. 331, fn. 4.)

Consistent with our observations in *Kinlaw*, we here agree with the state that the trial court should not have proceeded to resolve San Diego's claim for reimbursement under section 6 while the Los Angeles action was pending. A contrary conclusion would undermine one of "the express purpose[s]" OF THE STATUTORY PROCEDURE: to "avoid[] multiple proceedings . . . addressing the same claim that a reimbursable state mandate has been created." (*Kinlaw, supra*, 54 Cal. 3d at p. 333.)

(3) However, we reject the state's assertion that the error was jurisdictional. [HN10] The power of superior courts to perform mandamus review [**323] [***145] of administrative decisions derives in part from article VI, section 10 of the California Constitution. (*Bixby v. Pierno* (1971) 4 Cal. 3d 130, 138 [93 Cal. Rptr. 234, 481 P.2d 242]; *Lipari v. Department of Motor Vehicles* (1993) 16 Cal. App. 4th 667, 672 [20 Cal. Rptr. 2d 246].) That section gives "[t]he Supreme Court, courts of appeal, [and] superior courts . . . original jurisdiction in proceedings for extraordinary relief in the nature of mandamus . . . ." (Cal. Const., art. VI, § 10.) "The jurisdiction thus vested may not lightly be deemed to have been destroyed." (*Garrison v. Rourke* (1948) 32 Cal. 2d 430, 435 [196 P.2d 884], overruled on another ground in *Keane v. Smith* (1971) 4 Cal. 3d 932, 939 [95 Cal. Rptr. 197, 485 P.2d 261].) "While the courts are subject to reasonable statutory regulation of procedure and other matters, they will maintain their constitutional powers in order effectively to function as a separate department of government. [Citations.] Consequently an intent to defeat the exercise of the court's jurisdiction will not be supplied by implication." (*Garrison, supra*, at p. 436.) **(2b)** Here, we find no statutory provision that either "expressly provide[s]" (*id.* at p. 435) or otherwise "clearly indicate[s]" (*id.* at p. 436) that the Legislature intended to divest all courts other than the court hearing the test claim of their mandamus jurisdiction.

Rather, following *Dowdall v. Superior Court* (1920) 183 Cal. 348 [191 P. 685] (*Dowdall*), we interpret the governing statutes as simply vesting primary jurisdiction in the court hearing the test claim. In *Dowdall*, we determined the jurisdictional effect of Code of Civil Procedure former section 1699 on actions to settle the account of trustees of a testamentary trust. Code of Civil Procedure former section 1699 provided in part: "Where any trust [*88] has been created by or under any will to continue after distribution, the Superior Court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust." (Stats. 1889, ch. 228, § 1, p. 337.) We explained that, under this section, "the superior court, sitting in probate upon the distribu-

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tion of an estate wherein the will creates a trust, retain[ed] jurisdiction of the estate for the purpose of the settlement of the accounts under the trust." (*Dowdall, supra,* 183 Cal. at p. 353.) However, we further observed that "the superior court of each county in the state has general jurisdiction in equity to settle trustees' accounts and to entertain actions for injunctions. This jurisdiction is, in a sense, concurrent with that of the superior court, which, by virtue of the decree of distribution, has jurisdiction of a trust created by will. The latter, however, is the primary jurisdiction, and if a bill in equity is filed in any other superior court for the purpose of settling the account of such trustee, that court, upon being informed of the jurisdiction of the court in probate and that an account is to be or has been filed therein for settlement, should postpone the proceeding in its own case and allow the account to be settled by the court having primary jurisdiction thereof." (*Ibid.*)

Similarly, we conclude that, [HN11]under the statutes governing determination of unfunded mandate claims, the court hearing the test claim has primary jurisdiction. Thus, if an action asserting the same unfunded mandate claim is filed in any other superior court, that court, upon being informed of the pending test claim, should postpone the proceeding before it and allow the court having primary jurisdiction to determine the test claim.

However, a court's erroneous refusal to stay further proceedings does not render those further proceedings void for lack of jurisdiction. As we explained in *Dowdall*, [HN12]a court that refuses to defer to another court's primary jurisdiction "is not without jurisdiction." (*Dowdall, supra,* 183 Cal. at p. 353.) Accordingly, notwithstanding pendency of the Los Angeles action, the trial court here did not lack jurisdiction to determine San Diego's mandamus petition. (See *Collins v. Ramish* (1920) 182 Cal. 360, 366-369 [188 P. 550] [although trial court erred in refusing to abate action because of former action pending, new trial was not warranted on issues that the trial court correctly decided]; *People* ex rel. *Garamendi v. American Autoplan, Inc.* (1993) 20 Cal. App. 4th 760, 772 [***146] [25 Cal. Rptr. 2d 192] [**324] (*Garamendi*) ["rule of exclusive concurrent jurisdiction is not 'jurisdictional' in the sense that failure to comply renders subsequent proceedings void"]; *Stearns v. Los Angeles City School Dist.* (1966) 244 Cal. App. 2d 696, 718 [53 Cal. Rptr. 482, 21 A.L.R.3d 164] [where trial court errs in failing to stay proceedings in [*89] deference to jurisdiction of another court, reversal would be frivolous absent errors regarding the merits].) "

> 11 In *Garamendi, supra,* 20 Cal. App. 4th at pages 771-775, the court discussed procedural requirements for raising a claim that another court has already exercised its concurrent jurisdiction. Given our conclusion that the trial court's error here was not jurisdictional, we express no opinion about this discussion in *Garamendi* or the sufficiency of the state's efforts to raise the issue in this case.

The trial court's failure to defer to the primary jurisdiction of the court hearing the Los Angeles action did not prejudice the state. Contrary to the state's assertion, the trial court did not "usurp" the Commission's "authority to determine, in the first place, whether or not legislation creates a mandate." The Commission had already exercised that authority in the Los Angeles action. Moreover, given the settlement of the Los Angeles action, which included vacating the judgment in that action, the trial court's exercise of jurisdiction here did not result in one of the principal harms that the statutory procedure seeks to prevent: multiple decisions regarding an unfunded mandate question. Finally, the lack of an administrative record specifically relating to San Diego's claim did not prejudice the state [HN13]because the threshold determination of whether a statute imposes a state mandate is an issue of law. (*County of Fresno v. Lehman* (1991) 229 Cal. App. 3d 340, 347 [280 Cal. Rptr. 310].) To the extent that an administrative record was necessary, the record developed in the Los Angeles action could have been submitted to the trial court. [12] (See *Los Angeles Unified School Dist. v. State of California* (1988) 199 Cal. App. 3d 686, 689 [245 Cal. Rptr. 140].)

> 12 Notably, in discussing the options still available to San Diego, the state asserts that San Diego "might have been able to go to superior court and file a [mandamus] petition based on the record of the prior test claim."

We also find that, on the facts of this case, San Diego's failure to submit a test claim to the Commission before seeking judicial relief did not affect the superior court's jurisdiction. [HN14]Ordinarily, counties seeking to pursue an unfunded mandate claim under section 6 must exhaust their administrative remedies. (*Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal. App. 4th 621, 641 [21 Cal. Rptr. 2d 453]; *County of Contra Costa v. State of California* (1986) 177 Cal. App. 3d 62, 73-77 [222 Cal. Rptr. 750] (*County of Contra Costa*).) However, counties may pursue section 6 claims in superior court without first resorting to administrative remedies if they "can establish an exception to" the exhaustion requirement. (*County of Contra Costa, supra,* 177 Cal. App. 3d at p. 77.) The futility exception to the exhaustion requirement applies if a county can "state with assurance that the [Commission] would rule adversely in its own particular case. [Cita-

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tions.]" (*Lindeleaf v. Agricultural Labor Relations Bd.* (1986) 41 Cal. 3d 861, 870 [226 Cal. Rptr. 119, 718 P.2d 106]; see also *County of Contra Costa, supra*, 177 Cal. App. 3d at pp. 77-78.)

[*90] We agree with the trial court and the Court of Appeal that the futility exception applied in this case. As we have previously noted, San Diego invoked this exception by alleging in its cross-complaint that the Commission's denial of its claim was "virtually certain" because the Commission had "previously denied the claims of other counties, ruling that county medical care programs for [adult MIP's] are not state-mandated and, therefore, counties are not entitled to reimbursement . . . ." Given that the Commission rejected the Los Angeles claim (which alleged the same unfunded mandate claim that San Diego alleged) and appealed the judicial reversal of its decision, the trial court correctly determined that further attempts to seek relief from the Commission would have been futile. Therefore, we reject the state's jurisdictional argument and proceed to the merits of the appeal.

[**325] [***147] V. EXISTENCE OF A MANDATE UNDER SECTION 6

(4) In determining whether there is a mandate under section 6, we turn to our decision in *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal. 3d 830 [244 Cal. Rptr. 677, 750 P.2d 318] (*Lucia Mar*). There, we discussed section 6's application to Education Code section 59300, which "requires a school district to contribute part of the cost of educating pupils from the district at state schools for the severely handicapped." (*Lucia Mar, supra*, at p. 832.) Before 1979, the Legislature had statutorily required school districts "to contribute to the education of pupils from the districts at the state schools [citations] . . . ." (*Id.* at pp. 832-833.) The Legislature repealed the statutory requirements in 1979 and, on July 12, 1979, the state assumed full-funding responsibility. (*Id.* at p. 833.) On July 1, 1980, when section 6 became effective, the state still had full-funding responsibility. On June 28, 1981, Education Code section 59300 took effect. (*Lucia Mar, supra*, at p. 833.)

Various school districts filed a claim seeking reimbursement under section 6 for the payments that Education Code section 59300 requires. The Commission denied the claim, finding that the statute did not impose on the districts a new program or higher level of service. The trial court and Court of Appeal agreed, the latter "reasoning that a shift in the funding of an existing program is not a new program or a higher level of service" under section 6. (*Lucia Mar, supra*, 44 Cal. 3d at p. 834.)

We reversed, finding that a contrary result would "violate the intent underlying section 6 . . . ." (*Lucia Mar, supra*, 44 Cal. 3d at p. 835.) That section "was intended to preclude the state from shifting to local agencies the financial responsibility for providing public services in view of the[] [*91] restrictions on the taxing and spending power of the local entities" that articles XIII A and XIII B of the California Constitution imposed. (*Lucia Mar, supra*, at pp. 835-836.) "The intent of the section would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 . . . because the programs are not 'new.' Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, *or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIII B*, the result seems equally violative of the fundamental purpose underlying section 6 . . . ." (*Id.* at p. 836, italics added, fn. omitted.) We thus concluded in *Lucia Mar* "that because [Education Code] section 59300 shifts partial financial responsibility for the support of students in the state-operated schools from the state to school districts--an obligation the school districts did not have at the time article XIII B was adopted--it calls for [the school districts] to support a 'new program' within the meaning of section 6." (*Ibid.*, fn. omitted.)

The similarities between *Lucia Mar* and the case before us "are striking. In *Lucia Mar*, prior to 1979 the state and county shared the cost of educating handicapped children in state schools; in the present case from 1971-197[8] the state and county shared the cost of caring for [adult MIP's] under the Medi-Cal program. . . . [F]ollowing enactment of [article XIII A], the state took full responsibility for both programs." (*Kinlaw, supra*, 54 Cal. 3d at p. 353 (dis. opn. of Broussard, J.).) As to both programs, the Legislature cited adoption of article XIII A of the California Constitution, and specifically its effect on tax revenues, as the basis for the state's assumption of full funding responsibility. (Stats. 1979, ch. 237, § 10, p. 493; Stats. 1979, ch. 282, § 106, p. 1059.) "Then in 1981 (for handicapped children) and 1982 (for [adult MIP's]), the state sought to shift some of the burden back to the counties." (*Kinlaw, supra*, [**326] [***148] 54 Cal. 3d at p. 353 (dis. opn. of Broussard, J.).)

Adopting the Commission's analysis in the Los Angeles action, the state nevertheless argues that *Lucia Mar* "is inapposite." The school program at issue in *Lucia Mar* "had been wholly operated, administered and financed by the state" and "was unquestionably a 'state program.' " " 'In contrast,' " the state argues, " 'the program here has never been operated or administered by the State of California. The counties have always borne legal and financial responsibility for' " it under section

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17000 and its predecessors. [13] The courts have interpreted section 17000 as "impos[ing] upon counties a duty to [*92] provide hospital and medical services to indigent residents. [Citations.]" (*Board of Supervisors v. Superior Court* (1989) 207 Cal. App. 3d 552, 557 [254 Cal. Rptr. 905].) Thus, the state argues, the source of San Diego's obligation to provide medical care to adult MIP's is section 17000, not the 1982 legislation. Moreover, because the Legislature enacted section 17000 in 1965, and section 6 does not apply to "mandates enacted prior to January 1, 1975," there is no reimbursable mandate. Finally, the state argues that, because section 17001 give counties "complete discretion" in setting eligibility and service standards under section 17000, there is no mandate. A contrary conclusion, the state asserts, "would erroneously expand the definition of what constitutes a 'new program' under" section 6. As we explain, we reject these arguments.

13 "County General Assistance in California dates from 1855, and for many years afforded the only form of relief to indigents." (*Mooney v. Pickett* (1971) 4 Cal. 3d 669, 677 [94 Cal. Rptr. 279, 483 P.2d 1231] (*Mooney*).) Section 17000 is substantively identical to former section 2500, which was enacted in 1937. (Stats. 1937, chs. 369, 464, pp. 1097, 1406.)

A. *The Source and Existence of San Diego's Obligation*

1. *The Residual Nature of the Counties' Duty Under Section 17000*

The state's argument that San Diego's obligation to provide medical care to adult MIP's predates the 1982 legislation contains numerous errors. First, the state misunderstands San Diego's obligation under section 17000. That [HN15]section creates "the *residual* fund" to sustain indigents "who cannot qualify . . . under any specialized aid programs." (*Mooney, supra*, 4 Cal. 3d at p. 681, italics added; see also *Board of Supervisors v. Superior Court, supra*, 207 Cal. App. 3d at p. 562; *Boehm v. Superior Court* (1986) 178 Cal. App. 3d 494, 499 [223 Cal. Rptr. 716] [general assistance "is a program of last resort"].) By its express terms, the statute requires a county to relieve and support indigent persons *only* "when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." (§ 17000.) [14] "Consequently; to the extent that the state or federal governments provide[d] care for [adult MIP's], the [C]ounty's obligation to do so [was] reduced . . . ." (*Kinlaw, supra*, 54 Cal. 3d at p. 354, fn. 14 (dis. opn. of Broussard, J.).) [15]

14 See also *County of Los Angeles v. Frisbie* (1942) 19 Cal. 2d 634, 639 [122 P.2d 526] (construing former section 2500); *Jennings v. Jones* (1985) 165 Cal. App. 3d 1083, 1091 [212 Cal. Rptr. 134] (counties must support all indigent persons "having no other means of support"); *Union of American Physicians & Dentists v. County of Santa Clara* (1983) 149 Cal. App. 3d 45, 51, fn. 10 [196 Cal. Rptr. 602]; *Rogers v. Detrich* (1976) 58 Cal. App. 3d 90, 95 [128 Cal. Rptr. 261] (counties have duty of support "where such support is not otherwise furnished").

15 In asserting that Medi-Cal coverage did not supplant San Diego's obligation under section 17000, the dissent incorrectly relies on *Madera Community Hospital v. County of Madera* (1984) 155 Cal. App. 3d 136 [201 Cal. Rptr. 768] (*Madera*) and *Cooke, supra*, 213 Cal. App. 3d 401. (Dis. opn. of Kennard, J., *post*, at p. 115.) In *Madera*, the court voided a county ordinance that extended county benefits under section 17000 only to persons " 'meeting all eligibility standards for the Medi-Cal program.' " (*Madera, supra*, 155 Cal. App. 3d at p. 150.) The court explained: "Because all funding for the Medi-Cal program comes from either the federal or the state government . . ., [c]ounty has denied any financial obligation whatsoever from county funds for the medical care of its indigent and poor residents." (*Ibid.*) Thus, properly understood, *Madera* held only that Medi-Cal does not relieve counties of their obligation to provide medical care to persons who are "indigent" within the meaning of section 17000 but who are ineligible for Medi-Cal. The limit of *Madera*'s holding is apparent from the court's reliance on a 1979 opinion of the Attorney General discussing the scope of a county's authority under section 17000. (*Madera, supra*, 155 Cal. App. 3d at pp. 151-152.) The Attorney General explained that "[t]he county obligation [under section 17000] to provide general relief extends to those indigents who do not qualify under specialized aid programs, . . . including Medi-Cal." (62 Ops.Cal.Atty.Gen. 70, 71, fn. 1 (1979).) Moreover, the *Madera* court expressly recognized that state and federal programs "alleviate, to a greater or lesser extent, [a] [c]ounty's burden." (*Madera, supra*, 155 Cal. App. 3d at p. 151.) In *Cooke*, the court simply made a passing reference to *Madera* in dictum describing the coverage history of Medi-Cal. (*Cooke, supra*, 213 Cal. App. 3d at p. 411.) It neither analyzed the issue before us nor explained the meaning of the dictum that the dissent cites.

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[**327] [***149] As we have explained, the state began providing adult MIP's with medical care under Medi-Cal in 1971. Although it initially required counties to [*93] contribute generally to the costs of Medi-Cal, it did not set forth a specific amount for coverage of MIP's. The state was primarily responsible for the costs of the program, and the counties were simply required to contribute funds to defray the state's costs. Beginning with the 1978-1979 fiscal year, the state paid all costs of the Medi-Cal program, including the cost of medical care for adult MIP's. Thus, when section 6 was adopted in November 1979, to the extent that Medi-Cal provided medical care to adult MIP's, San Diego bore no financial responsibility for these health care costs. [16]

16 As we have previously explained, even before 1971 the state, through the county option, assumed much of the financial responsibility for providing medical care to adult MIP's.

The California Attorney General has expressed a similar understanding of Medi-Cal's effect on the counties' medical care responsibility under section 17000. After the 1971 extension of Medi-Cal coverage to MIP's, Fresno County sought an opinion regarding the scope of its duty to provide medical care under section 17000. It asserted that the 1971 repeal of former section 14108.5, which declared the Legislature's concern with the counties' problems in caring for indigents not eligible for Medi-Cal, evidenced a legislative intent to preempt the field of providing health services. (56 Ops.Cal.Atty.Gen., *supra*, at p. 571.) The Attorney General disagreed, concluding that the 1971 change "did not alter the duty of the counties to provide medical care to those indigents not eligible for Medi-Cal." (*Id.* at p. 569.) The Attorney General explained: "The statement of concern acknowledged the obligation of counties to continue to provide medical assistance under section 17000; the removal of the statement of concern was not accompanied by elimination of such duty on the part of the counties, *except as the addition of* [*MIP's*] *to the Medi-Cal program would remove the burden on the counties to provide medical care for such persons*." (*Id.* at p. 571, italics added.)

[*94] Indeed, the Legislature's statement of intent in an uncodified section of the 1982 legislation excluding adult MIP's from Medi-Cal suggests that it also shared our understanding of section 17000. Section 8.3 of the 1982 Medi-Cal revisions expressly declared the Legislature's intent "[i]n eliminating [M]edically [I]ndigent [A]dults from the Medi-Cal program . . . ." (Stats. 1982, ch. 328, § 8.3, p. 1575; Stats. 1982, ch. 1594, § 86, p. 6357.) It stated in part: "It is further the intent of the Legislature to provide counties with as much flexibility as possible in organizing county health services to serve *the population being transferred.*" (Stats. 1982, ch. 328, § 8.3, p. 1576; Stats. 1982, ch. 1594, § 86, p. 6357, italics added.) If, as the state contends, counties had always been responsible under section 17000 for the medical care of adult MIP's, the description of adult MIP's as "the population being transferred" would have been inaccurate. By so describing adult MIP's, the Legislature indicated its understanding that counties did not have this responsibility while adult MIP's were eligible for Medi-Cal. These sources fully support our rejection of the state's argument that the 1982 legislation did not impose a mandate because, under section 17000, counties had always borne the responsibility for providing medical care to adult MIP's.

2. *The State's Assumption of Full Funding Responsibility for Providing Medical Care to Adult MIP's Under Medi-Cal*

To support its argument that it never relieved counties of their obligation under section [**328] [***150] 17000 to provide medical care to adult MIP's, the state characterizes as "temporary" the Legislature's assumption of full-funding responsibility for adult MIP's. According to the state, "any ongoing responsibility of the county was, at best, only temporarily, partially, alleviated (and never supplanted)." The state asserts that the Court of Appeal thus "erred by focusing on one phase in th[e] shifting pattern of arrangements" for funding indigent health care, "a focus which led to a myopic conclusion that the state alone is forever responsible for funding the health care for" adult MIP's.

A comparison of the 1978 and 1979 statutes that eliminated the counties' share of Medi-Cal costs refutes the state's claim. The Legislature expressly limited the effect of the 1978 legislation to one fiscal year, providing that the state "shall pay" each county's Medi-Cal cost share "for the period from July 1, 1978, to June 30, 1979." (Stats. 1978, ch. 292, § 33, p. 610.) The Legislative Counsel's Digest explained that this section would require the state to pay "[a]ll county costs for Medi-Cal" for "the 1978-79 fiscal year only." (Legis. Counsel's Dig., Sen. Bill No. 154, 4 Stats. 1978 (Reg. Sess.), Summary Dig., p. 71.) The digest further explained that the purpose of the bill containing this section was "the *partial* relief of local government from the *temporary* difficulties brought about by the approval of Proposition 13." [*95] (*Id.* at p. 70, italics added.) Clearly, the Legislature knew how to include words of limitation when it intended the effects of its provisions to be temporary.

By contrast, the 1979 legislation contains no such limiting language. It simply provided: " Section 14150 of the Welfare and Institutions Code is repealed." (Stats. 1979, ch. 282, § 74, p. 1043.) In setting forth the need to enact the legislation as an urgency statute, the Legisla-

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ture explained: "The adoption of Article XIII A . . . may cause the curtailment or elimination of programs and services which are vital to the state's public health, safety, education, and welfare. In order that such services not be interrupted, it is necessary that this act take effect immediately." (Stats. 1979, ch. 282, § 106, p. 1059.) In describing the effect of this legislation, the Legislative Counsel first explained that, "[u]nder existing law, the counties pay a specified annual share of the cost of" Medi-Cal. (Legis. Counsel's Dig., Assem. Bill No. 8, 4 Stats. 1979 (Reg. Sess.), Summary Dig., p. 79.) Referring to the 1978 legislation, it further explained that "[f]or the 1978-79 fiscal year only, the state pays . . . [P] . . . [a]ll county costs for Medi-Cal . . . ." (*Ibid.*) The 1979 legislation, the digest continued, "provid[ed] for state assumption of all county costs of Medi-Cal." (*Ibid.*) We find nothing in the 1979 legislation or the Legislative Counsel's summary indicating a legislative intent to eliminate the counties' cost share of Medi-Cal only temporarily.

The state budget process for the 1980-1981 fiscal year confirms that the Legislature's assumption of all Medi-Cal costs was not viewed as "temporary." In the summary of his proposed budget, then Governor Brown described Assembly Bill No. 8, 1981-1982 Regular Session, generally as "a long-term local financing measure" (Governor's Budget for 1980-1981 as submitted to Legislature (1979-1980 Reg. Sess.) Summary of Local Government Fiscal Relief, p. A-30) through which "[t]he total cost of [the Medi-Cal] program was *permanently* assumed by the State . . . ." (*Id.* at p. A-32, italics added.) Similarly, in describing to the Joint Legislative Budget Committee the Medi-Cal funding item in the proposed budget, the Legislative Analyst explained: "Item 287 includes the state cost of 'buying out' the county share of Medi-Cal expenditures. Following passage of Proposition 13, [Senate Bill No.] 154 appropriated $ 418 million to relieve counties of all fiscal responsibility for Medi-Cal program costs. Subsequently, [Assembly Bill No.] 8 was enacted, *which made permanent state assumption of county Medi-Cal costs.*" (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1980-1981 Budget Bill, Assem. Bill No. 2020 (1979-1980 Reg. Sess.) at p. 721, italics added.) Thus, the state errs in asserting that the 1979 legislation eliminated the counties' financial support of Medi-Cal "only temporarily."

[*96] [**329] [***151] 3. *State Administration of Medical Care for Adult MIP's Under Medi-Cal*

The state argues that, unlike the school program before us in Lucia Mar, supra, 44 Cal. 3d 830, which "had been wholly operated, administered and financed by the state," the program for providing medical care to adult MIP's " 'has never been operated or administered by' " the state. According to the state, Medi-Cal was simply a state "reimbursement program" for care that section 17000 required counties to provide. The state is incorrect.

One of the legislative goals of Medi-Cal was "to allow eligible persons to secure basic health care in the same manner employed by the public generally, and without discrimination or segregation based purely on their economic disability." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 104.) "In effect, this meant that poorer people could have access to a private practitioner of their choice, and not be relegated to a county hospital program." (California Medical Assn. v. Brian (1973) 30 Cal. App. 3d 637, 642 [106 Cal. Rptr. 555].) Medi-Cal "provided for reimbursement to both public and private health care providers for medical services rendered." (Lackner, supra, 97 Cal. App. 3d at p. 581.) It further directed that, "[i]nsofar as practical," public assistance recipients be afforded "free choice of arrangements under which they shall receive basic health care." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 115.) Finally, since its inception, Medi-Cal has permitted county boards of supervisors to "prescribe rules which authorize the county hospital to integrate its services with those of other hospitals into a system of community service which offers free choice of hospitals to those requiring hospital care. The intent of this section is to eliminate discrimination or segregation based on economic disability so that the county hospital and other hospitals in the community share in providing services to paying patients and to those who qualify for care in public medical care programs." (§ 14000.2.) Thus, "Medi-Cal eligibles were to be able to secure health care in the same manner employed by the general public (i.e., in the private sector or at a county facility)." (1974 Legis. Analyst's Rep., *supra*, at p. 625; see also Preliminary Rep., *supra*, at p. 17.) By allowing eligible persons "a choice of medical facilities for treatment," Medi-Cal placed county health care providers "in competition with private hospitals." (Hall, supra, 23 Cal. App. 3d at p. 1061.)

Moreover, administration of Medi-Cal over the years has been the responsibility of various state departments and agencies. (§ 10720-10721, 14061-14062, 14105, 14203; Belsh, supra, 13 Cal. 4th at p. 751; Morris, supra, 67 Cal. 2d at p. 741; Summary of Major Events, *supra*, at pp. 2-3, 15.) Thus, [HN16]"[i]n adopting the Medi-Cal program the state Legislature, for the most part, shifted indigent medical care from being a county responsibility to a State [*97] responsibility under the Medi-Cal program. [Citation.]" (Bay General Community Hospital v. County of San Diego (1984) 156 Cal. App. 3d 944, 959 [203 Cal. Rptr. 184] (*Bay General*); see also Preliminary Rep., *supra*, at p. 18 [with certain exceptions, Medi-Cal "shifted to the state" the responsibility for administration of the medical care pro-

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vided to eligible persons].) We therefore reject the state's assertion that, while Medi-Cal covered adult MIP's, county facilities were the sole providers of their medical care, and counties both operated and administered the program that provided that care.

The circumstances we have discussed readily distinguish this case from *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal. App. 4th 805 [38 Cal. Rptr. 2d 304], on which the state relies. There, the court rejected the claim that Penal Code section 987.9, which required counties to provide criminal defendants with certain defense funds, imposed an unfunded state mandate. Los Angeles filed the claim after the state, which had enacted appropriations between 1977 and 1990 "to reimburse counties for their costs under" the statute, made no appropriation for the 1990-1991 fiscal year. (*County of Los Angeles v. Commission on State Mandates, supra,* at p. 812.) In rejecting the claim, [**330] [***152] the court first held that there was no state mandate because Penal Code section 987.9 merely implemented the requirements of federal law. (*County of Los Angeles v. Commission on State Mandates, supra,* at pp. 814-816.) Thus, the court stated, "[a]ssuming, arguendo, the provisions of [Penal Code] section 987.9 [constituted] a new program" under section 6, there was no state mandate. (*County of Los Angeles v. Commission on State Mandates, supra,* at p. 818.) Here, of course, it is unquestionably the state that has required San Diego to provide medical care to indigent persons.

In dictum, the court also rejected the argument that, under *Lucia Mar, supra,* 44 Cal. 3d 830, the state's "decision not to reimburse the counties for their programs under [Penal Code] section 987.9" imposed a new program by shifting financial responsibility for the program to counties. (*County of Los Angeles v. Commission on State Mandates, supra,* 32 Cal. App. 4th at p. 817.) The court explained: "In contrast [to *Lucia Mar*], the program here has never been operated or administered by the State of California. The counties have always borne legal and financial responsibility for implementing the procedures under [Penal Code] section 987.9. The state merely reimbursed counties for specific expenses incurred by the counties in their operation of a program for which they had a primary legal and financial responsibility." (*Ibid.*) Here, as we have explained, between 1971 and 1983, the state administered and bore financial responsibility for the medical care that adult MIP's received under Medi-Cal. The Medi-Cal program was not simply a [*98] method of reimbursement for county costs. Thus, the state's reliance on this dictum is misplaced. [17]

17 Because *County of Los Angeles v. Commission on State Mandates, supra,* 32 Cal. App. 4th 805, is distinguishable, we need not (and do not) express an opinion regarding the court's analysis in that decision or its conclusions.

In summary, our discussion demonstrates the Legislature excluded adult MIP's from Medi-Cal *knowing* and *intending* that the 1982 legislation would trigger the counties' responsibility to provide medical care as providers of last resort under section 17000. Thus, through the 1982 legislation, the Legislature attempted to do precisely that which the voters enacted section 6 to prevent: "transfer[] to [counties] the fiscal responsibility for providing services which the state believed should be extended to the public." [18] (*County of Los Angeles, supra,* 43 Cal. 3d at p. 56; see also *City of Sacramento v. State of California, supra,* 50 Cal. 3d at p. 68 [A "central purpose" of section 6 was "to prevent the state's transfer of the *cost of government* from *itself* to the local level."].) Accordingly, we view the 1982 legislation as having mandated a " 'new program' " on counties by "compelling them to accept financial responsibility in whole or in part for a program," i.e., medical care for adult MIP's, "which was funded entirely by the state before the advent of article XIII B." [19] (*Lucia Mar, supra,* 44 Cal. 3d at p. 836.)

18 The state properly does not contend that the provision of medical care to adult MIP's is not a "program" within the meaning of section 6. (See *County of Los Angeles, supra,* 43 Cal. 3d at p. 56 [section 6 applies to "programs that carry out the governmental function of providing services to the public"].)

19 Alternatively, the 1982 legislation can be viewed as having mandated an increase in the services that counties were providing through existing section 17000 programs, by adding adult MIP's to the indigent population that counties already had to serve under that section. (See *County of Los Angeles, supra,* 43 Cal. 3d at p. 56 ["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' "].)

A contrary conclusion would defeat the purpose of section 6. Under the state's interpretation of that section, because section 17000 was enacted before 1975, the Legislature could eliminate the *entire* Medi-Cal program and shift to the counties under section 17000 complete financial responsibility for medical care that the state has been providing [**331] [***153] since 1966. However, the taxing and spending limitations imposed by articles XIII A and XIII B would greatly limit the ability of counties to meet their expanded section 17000 obligation. "County taxpayers would be forced to accept new taxes or see the county forced to cut existing pro-

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grams further . . . ." (*Kinlaw, supra*, 54 Cal. 3d at p. 351 (dis. opn. of Broussard, J.).) As we have previously explained, the voters, recognizing that articles XIII A and XIII B left counties "ill equipped" to assume such increased financial responsibilities, adopted section 6 precisely to avoid this result. (*County of Los Angeles*, [*99] *supra*, 43 Cal. 3d at p. 61.) Thus, it was the voters who decreed that we must, as the state puts it, "focus[] on one phase in th[e] shifting pattern of [financial] arrangements" between the state and the counties. Under section 6, the state simply cannot "compel[] [counties] to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIII B . . . ." [20] (*Lucia Mar, supra*, 44 Cal. 3d at p. 836.)

20 In reaching a contrary conclusion, the dissent ignores the electorate's purpose in adopting section 6. The dissent also mischaracterizes our decision. We do not hold that "whenever there is a change in a state program that has the effect of increasing a county's financial burden under section 17000 there must be reimbursement by the state." (Dis. opn. of Kennard, J., *post*, at p. 116.) Rather, we hold that [HN17]section 6 prohibits the state from shifting to counties the costs of state programs for which the state assumed complete financial responsibility before adoption of section 6. Whether the state may discontinue assistance that it initiated after section 6's adoption is a question that is not before us.

B. *County Discretion to Set Eligibility and Service Standards*

(5a) The state next argues that, because San Diego had statutory discretion to set eligibility and service standards, there was no reimbursable mandate. Citing section 16704, the state asserts that the 1982 legislation required San Diego to spend MISA funds "only on those whom the county deems eligible under § 17000," "gave the county exclusive authority to determine the level and type of benefits it would provide," and required counties "to include [adult MIP's] in their § 17000 eligibility **only to the extent state funds were available and then only for 3 years.**" (Original emphasis.) [21] According to the state, under section 17001, "[t]he counties [*100] have complete discretion over the determination of eligibility, scope of benefits and how the services will be provided." [22]

21 [HN18]As amended in 1982, section 16704, subdivision (c)(1), provided in relevant part: "The [county board of supervisors] shall assure that it will expend [MISA] funds only for the health services specified in Sections 14132 and 14021 provided to persons certified as eligible for such services pursuant to Section 17000 and shall assure that it will incur no less in net costs of county funds for county health services in any fiscal year than the amount required to obtain the maximum allocation under Section 16702." (Stats. 1982, ch. 1594, § 70, p. 6346.) [HN19]Section 16704, subdivision (c)(3), provided in relevant part: "Any person whose income and resources meet the income and resource criteria for certification for services pursuant to Section 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided. Such persons may be held financially liable for these services based upon the person's ability to pay. A county may not establish a payment requirement which would deny medically necessary services. This section shall not be construed to mandate that a county provide any specific level or type of health care service . . . [HN20]. The provisions of this paragraph shall become inoperative if a court ruling is issued which decrees that the provisions of this paragraph mandates [*sic*] that additional state funds be provided and which requires that additional state reimbursement be made to counties for costs incurred under this paragraph. This paragraph shall be operative only until June 30, 1983, unless a later enacted statute extends or deletes that date." (Stats. 1982, ch. 1594, § 70, pp. 6346-6347.)

22 [HN21]Section 17001 provides: "The board of supervisors of each county, or the agency authorized by county charter, shall adopt standards of aid and care for the indigent and dependent poor of the county or city and county."

The state exaggerates the extent of a county's discretion under section 17001. It is true "case law . . . has recognized that [HN22]section 17001 confers broad discretion upon the counties in performing their statutory duty to provide general assistance benefits to needy residents. [Citations.]" (*Robbins v.* [**332] [***154] *Superior Court* (1985) 38 Cal. 3d 199, 211 [211 Cal. Rptr. 398, 695 P.2d 695] (*Robbins*).) However, there are "clear-cut limits" to this discretion. (*Ibid.*) (6) The counties may exercise their discretion "only within fixed boundaries. In administering General Assistance relief the county acts as an agent of the state. [Citation.] [HN23]When a statute confers upon a state agency the authority to adopt regulations to implement, interpret, make specific or otherwise carry out its provisions, the agency's regulations must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose. (Gov. Code, § 11374.)" (*Mooney, supra*, 4

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Cal. 3d at p. 679.) Thus, the counties' eligibility and service standards must "carry out" the objectives of section 17000. (*Mooney, supra*, 4 Cal. 3d at p. 679; see also *Poverty Resistance Center v. Hart* (1989) 213 Cal. App. 3d 295, 304-305 [261 Cal. Rptr. 545]; § 11000 ["provisions of law relating to a public assistance program shall be fairly and equitably construed to effect the stated objects and purposes of the program"].) County standards that fail to carry out section 17000's objectives "are void and no protestations that they are merely an exercise of administrative discretion can sanctify them." (*Morris, supra*, 67 Cal. 2d at p. 737.) [HN24]Courts, which have " 'final responsibility for the interpretation of the law,' " must strike them down. (*Id.* at p. 748.) Indeed, despite the counties' statutory discretion, "courts have consistently invalidated . . . county welfare regulations that fail to meet statutory requirements. [Citations.]" (*Robbins, supra*, 38 Cal. 3d at p. 212.)

1. *Eligibility*

(5b) Regarding eligibility, we conclude that counties must provide medical care to all adult MIP's. As we emphasized in *Mooney*, [HN25]section 17000 requires counties to relieve and support " '*all indigent persons* lawfully resident therein, "when such persons are not supported and relieved by their relatives" or by some other means.' " (*Mooney, supra*, 4 Cal. 3d at p. 678; see also *Bernhardt v. Board of Supervisors* (1976) 58 Cal. App. 3d 806, 811 [130 Cal. Rptr. 189].) Moreover, section 10000 declares that the statutory "purpose" of division 9 of the Welfare and Institutions Code, which includes section 17000, "is to provide for protection, care, and assistance to the [*101] people of the state in need thereof, and to promote the welfare and happiness of all of the people of the state by providing appropriate aid and services to *all* of its needy and distressed." (Italics added.) Thus, [HN26]counties have no discretion to refuse to provide medical care to "indigent persons" within the meaning of section 17000 who do not receive it from other sources. [23] (See *Bell v. Board of Supervisors* (1994) 23 Cal. App. 4th 1695, 1706 [28 Cal. Rptr. 2d 919] [eligibility standards may not "defeat the purpose of the statutory scheme by depriving qualified recipients of mandated support"]; *Washington v. Board of Supervisors* (1993) 18 Cal. App. 4th 981, 985 [22 Cal. Rptr. 2d 852] [courts have repeatedly "voided county ordinances which have attempted to redefine eligibility standards set by state statute"].)

23 We disapprove *Bay General, supra*, 156 Cal. App. 3d at pages 959-960, insofar as it (1) states that a county's responsibility under section 17000 extends only to indigents as defined by the county's board of supervisors, and (2) suggests that a county may refuse to provide medical care to persons who are "indigent" within the meaning of section 17000 but do not qualify for Medi-Cal.

Although section 17000 does not define the term "indigent persons," the 1982 legislation made clear that all adult MIP's fall within this category for purposes of defining a county's obligation to provide medical care. [24] As part of its exclusion of adult MIP's, that legislation required counties to participate in the MISA program. (Stats. 1982, ch. 1594, § 68, 70, 86, pp. 6343-6347, 6357.) Regarding that program, the 1982 legislation amended section 16704, subdivision (c)(1), to require [**333] [***155] that a county board of supervisors, in applying for MISA funds, "assure that it will expend such funds only for [specified] health services . . . provided to persons certified as eligible for such services pursuant to Section 17000 . . . ." (Stats. 1982, ch. 1594, § 70, p. 6346.) At the same time, the 1982 legislation amended section 16704, subdivision (c)(3), to provide that "[a]ny person whose income and resources meet the income and resource criteria for certification for services pursuant to Section 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided." (Stats. 1982, ch. 1594, § 70, p. 6346.) As the state correctly explains, under this provision, "counties had to include [Medically Indigent Adults] in their [section] 17000 eligibility" standards. By requiring counties to make all adult MIP's eligible for services paid for with MISA funds, while at the same time requiring counties to promise to spend such funds *only* on those certified as eligible under section 17000, the Legislature established that all adult MIP's are "indigent persons" for purposes of the counties' duty to provide medical care under section 17000. Otherwise, the counties could not comply with their promise.

24 Our conclusion is limited to this aspect of a county's duty under section 17000. We express no opinion regarding the scope of a county's duty to provide other forms of relief and support under section 17000.

[*102] Our conclusion is not affected by language in section 16704, subdivision (c)(3), making it "operative only until June 30, 1985, unless a later enacted statute extends or deletes that date." [25] As we have explained, the subdivision established that [HN27]adult MIP's are "indigent persons" within the meaning of section 17000 for medical care purposes. As we have also explained, section 17000 requires counties to relieve and support *all* "indigent persons." Thus, even if the state is correct in asserting that section 16704, subdivision (c)(3), is now inoperative and no longer prohibits counties from excluding adult MIP's from eligibility for medical services, section 17000 has that effect. [26]

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25 The 1982 legislation made the subdivision operative until June 30, 1983. (Stats. 1982, ch. 1594, § 70, p. 6347.) In 1983, the Legislature repealed and reenacted section 16704, and extended the operative date of subdivision (c)(3) to June 30, 1985. (Stats. 1983, ch. 323, § 131.1, 131.2, pp. 1079-1080.)

26 Given our analysis, we express no opinion about the statement in *Cooke, supra*, 213 Cal. App. 3d at page 412, footnote 9, that the "life" of section 16704, subdivision (c)(3), "was implicitly extended" by the fact that the "paragraph remains in the statute despite three subsequent amendments to the statute . . . ."

Additionally, the coverage history of Medi-Cal demonstrates that the Legislature has always viewed all adult MIP's as "indigent persons" within the meaning of section 17000 for medical care purposes. As we have previously explained, when the Legislature created the original Medi-Cal program, which covered only categorically linked persons, it "declar[ed] its concern with the problems which [would] be facing the counties with respect to the medical care of indigent persons who [were] not covered" by Medi-Cal, "whose medical care [had to] be financed entirely by the counties in a time of heavily increasing medical costs." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 116 [enacting former § 14108.5].) Moreover, to ensure that the counties' Medi-Cal cost share would not leave counties "with insufficient funds to provide hospital care for those persons not eligible for Medi-Cal," the Legislature also created the county option. (*Hall, supra*, 23 Cal. App. 3d at p. 1061.) Through the county option, "the state agreed to assume all county health care costs . . . in excess of county costs incurred during the 1964-1965 fiscal year, adjusted for population increases." (*Lackner, supra*, 97 Cal. App. 3d at p. 586.) Thus, the Legislature expressly recognized that the categorically linked persons initially eligible for Medi-Cal did not constitute all "indigent persons" entitled to medical care under section 17000, and required the state to share in the financial responsibility for providing that care.

In adding adult MIP's to Medi-Cal in 1971, the Legislature extended Medi-Cal coverage to noncategorically linked persons "who [were] financially unable to pay for their medical care." (Legis. Counsel's Dig., Assem. Bill No. 949, 3 Stats. 1971 (Reg. Sess.) Summary Dig., p. 83.) This [*103] description was consistent with prior judicial decisions that, for purposes of a county's duty to provide "indigent persons" with hospitalization, [***156] had [**334] defined the term to include a person "who has insufficient means to pay for his maintenance in a private hospital after providing for those who legally claim his support." (*Goodall v. Brite* (1936) 11 Cal. App. 2d 540, 550 [54 P.2d 510].)

Moreover, the fate of amendments to section 17000 proposed at the same time suggests that, in the Legislature's view, the category of "indigent persons" entitled to medical care under section 17000 extended even *beyond* those eligible for Medi-Cal as MIP's. The June 17, 1971, version of Assembly Bill No. 949 amended section 17000 by adding the following: "however, the health needs of such persons shall be met under [Medi-Cal]." (Assem. Bill No. 949 (1971 Reg. Sess.) § 53.3, as amended June 17, 1971.) The Assembly deleted this amendment on July 20, 1971. (Assem. Bill No. 949 (1971 Reg. Sess.) as amended July 20, 1971, p. 37.) Regarding this change, the Assembly Committee on Health explained: "The proposed amendment to Section 17000, . . . which would have removed the counties' responsibilities as health care provider of last resort, is deleted. This change was originally proposed to clarify the guarantee to hold counties harmless from additional Medi-Cal costs. It is deleted since it cannot remove the fact that counties are, by definition, a 'last resort' for any person, with or without the means to pay, who does not qualify for federal or state aid." (Assem. Com. on Health, Analysis of Assem. Bill No. 949 (1971 Reg. Sess.) as amended July 20, 1971 (July 21, 1971), p. 4.)

The Legislature's failure to amend section 17000 in 1971 figured prominently in the Attorney General's interpretation of that section only two years later. In a 1973 published opinion, the Attorney General stated that the 1971 inclusion of MIP's in Medi-Cal "did not alter the duty of the counties to provide medical care to those indigents not eligible for Medi-Cal." (56 Ops.Cal.Atty.Gen., *supra*, at p. 569.) He based this conclusion on the 1971 legislation, relevant legislative history, and "the history of state medical care programs." (*Id.* at p. 570.) The opinion concluded; "The definition of medically indigent in [the chapter establishing Medi-Cal] is applicable only to that chapter and *does not include all those enumerated in section 17000*. If the former medical care program, by providing care only for a specific group, public assistance recipients, did not affect the responsibility of the counties to provide such service under section 17000, we believe the most recent expansion of the medical assistance program does not affect, *absent an express legislative intent to the contrary*, the duty of the counties under section 17000 to continue to provide services to those eligible under section 17000 but not under [Medi-Cal]." (*Ibid.*, italics added.) [HN28]The Attorney General's opinion, although not binding, is entitled to considerable weight. [*104] (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal. 4th 821, 829 [25 Cal. Rptr. 2d 148, 863 P.2d 218].) Absent controlling

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authority, it is persuasive because we presume that the Legislature was cognizant of the Attorney General's construction of section 17000 and would have taken corrective action if it disagreed with that construction. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal. 3d 1, 17 [270 Cal. Rptr. 796, 793 P.2d 2].)

In this case, of course, we need not (and do not) decide whether San Diego's obligation under section 17000 to provide medical care extended beyond adult MIP's. Our discussion establishes, however, that the obligation extended *at least* that far. The Legislature has made it clear that all adult MIP's are "indigent persons" under section 17000 for purposes of San Diego's obligation to provide medical care. Therefore, the state errs in arguing that San Diego had discretion to refuse to provide medical care to this population. [27]

27 Although asserting that nothing required San Diego to provide "all" adult MIP's with medical care, the state never precisely identifies which adult MIP's were legally entitled to medical care and which ones were not. Nor does the state ever directly assert that some adult MIP's were not "indigent persons" under section 17000. On the contrary, despite its argument, the state seems to suggest that San Diego's medical care obligation under section 17000 extended even beyond adult MIP's. It asserts: "At no time prior to or following 1983 did Medi-Cal ever provide medical services to, or pay for medical services provided to, all persons who could not afford such services and therefore might be deemed 'medically indigent.' . . . For some period prior to 1983, Medi-Cal paid for services for some indigent adults under its 'medically indigent adults' category. . . . [A]t no time did the state ever assume financial responsibility for all adults who are too indigent to afford health care." (Original emphasis.)

[**335] [***157] 2. *Service Standards*

(7) A number of statutes are relevant to the state's argument that San Diego had discretion in setting service standards. Section 17000 requires in general terms that counties "relieve and support" indigent persons. Section 10000, which sets forth the purpose of the division containing section 17000, declares the "legislative intent that aid shall be administered and services provided promptly and humanely, with due regard for the preservation of family life," so "as to encourage self-respect, self-reliance, and the desire to be a good citizen, useful to society." (§ 10000.) "[HN29]Section 17000, as authoritatively interpreted, mandates that medical care be provided to indigents and section 10000 requires that such care be provided promptly and humanely. The duty is mandated by statute. There is no discretion concerning whether to provide such care . . . ." (*Tailfeather v. Board of Supervisors* (1996) 48 Cal. App. 4th 1223, 1245 [56 Cal. Rptr. 2d 255] (*Tailfeather*).)

Courts construing section 17000 have held that [HN30]it "imposes a mandatory duty upon all counties to provide 'medically necessary care,' not just [*105] emergency care. [Citation.]" (*County of Alameda v. State Bd. of Control* (1993) 14 Cal. App. 4th 1096, 1108 [18 Cal. Rptr. 2d 487]; see also *Gardner v. County of Los Angeles* (1995) 34 Cal. App. 4th 200, 216 [40 Cal. Rptr. 2d 271]; § 16704.1 [prohibiting a county from requiring payment of a fee or charge "before [it] renders medically necessary services to . . . persons entitled to services under Section 17000"].) It further "ha[s] been interpreted . . . to impose a minimum standard of care below which the provision of medical services may not fall." (*Tailfeather, supra*, 48 Cal. App. 4th at p. 1239.) In *Tailfeather*, the court stated that "section 17000 requires provision of medical services to the poor at a level which does not lead to unnecessary suffering or endanger life and health . . . ." (*Id.* at p. 1240.) In reaching this conclusion, it cited *Cooke, supra*, 213 Cal. App. 3d at page 404, which held that section 17000 requires counties to provide "dental care sufficient to remedy substantial pain and infection." (See also § 14059.5 [defining "[a] service [as] 'medically necessary' . . . when it is reasonable and necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain"].)

During the years for which San Diego sought reimbursement, Health and Safety Code section 1442.5, former subdivision (c) (former subdivision (c)), also spoke to the level of services that counties had to provide under Welfare and Institutions Code section 17000. [28] As enacted in September 1974, [HN31]former subdivision (c) provided that, whether a county's duty to provide care to all indigent people "is fulfilled directly by the county or through alternative means, the availability of services, and the quality of the treatment received by people who cannot afford to pay for their health care shall be the same as that available to nonindigent people receiving health care services in private facilities in that county." (Stats. 1974, ch. 810, § 3, p. 1765.) The express "purpose and intent" of the act that contained former subdivision (c) was "to insure that the duty of counties to provide health care to indigents [was] properly and continuously fulfilled." (Stats. 1974, ch. 810, § 1, p. 1764.) Thus, until its repeal in September 1992, [29] former subdivision (c) "[r]equire[d] that the availability and quality of services provided to indigents directly by the county or alternatively be the same as that available to nonindigents in private facilities in that county." (Legis. Counsel's Dig., Sen. Bill No. 2369, 2 Stats. 1974 (Reg. Sess.) Summary Dig., p. 130; see also *Gardner v.* [**336] [***158]

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County of Los Angeles, supra, 34 Cal. App. 4th at p. 216; [*106] Board of Supervisors v. Superior Court, supra, 207 Cal. App. 3d at p. 564 [former subdivision (c) required that care provided "be *comparable* to that enjoyed by the nonindigent"].) [30] "For the 1990-91 fiscal year," the Legislature qualified this obligation by providing: "nothing in [former] subdivision (c) . . . shall require any county to exceed the standard of care provided by the state Medi-Cal program. Notwithstanding any other provision of law, counties shall not be required to increase eligibility or expand the scope of services in the 1990-91 fiscal year for their programs." (Stats. 1990, ch. 457, § 23, p. 2013.)

28 The state argues that former subdivision (c) is irrelevant to our determination because, like section 17000, it "predate[d] 1975." Our previous analysis rejecting this argument in connection with section 17000 applies here as well.

29 Statutes 1992, chapter 719, section 2, page 2882, repealed former subdivision (c) and enacted a new subdivision (c) in its place. This urgency measure was approved by the Governor on September 14, 1992, and filed with the Secretary of State on September 15, 1992.

30 [HN32]We disapprove Cooke, supra, 213 Cal. App. 3d at page 410, to the extent it held that Health and Safety Code section 1442.5, former subdivision (c), was merely "a limitation on a county's ability to close facilities or reduce services provided in those facilities," and was irrelevant absent a claim that a "county facility was closed [or] that any services in [the] county . . . were reduced." Although former subdivision (c) was contained in a section that dealt in part with closures and service reductions, nothing limited its reach to that context.

Although we have identified statutes relevant to service standards, we need not here define the precise contours of San Diego's statutory health care obligation. The state argues generally that San Diego had discretion regarding the services it provided. However, the state fails to identify either the specific services that San Diego provided under its CMS program or which of those services, if any, were not required under the governing statutes. Nor does the state argue that San Diego could have eliminated all services and complied with statutory requirements. Accordingly, we reject the state's argument that, because San Diego had some discretion in providing services, the 1982 legislation did not impose a reimbursable mandate. [31]

31 During further proceedings before the Commission to determine the amount of reimbursement due San Diego, the state may argue that particular services available under San Diego's CMS program exceeded statutory requirements.

VI. MINIMUM REQUIRED EXPENDITURE

(8) The Court of Appeal held that, under the governing statutes, the Commission must initially determine the precise amount of any reimbursement due San Diego. It therefore reversed the damages portion of the trial court's judgment and remanded the matter to the Commission for this determination. Nevertheless, the Court of Appeal affirmed the trial court's finding that the Legislature required San Diego to spend at least $ 41 million on its CMS program for fiscal years 1989-1990 and 1990-1991. In affirming this finding, the Court of Appeal relied primarily on section 16990, subdivision (a), as it read at all relevant times. The state contends this provision did not mandate that San Diego spend any minimum amount on the CMS program. It further asserts that the Court of Appeal's "ruling in effect sets a damages baseline, in contradiction to [its] ostensible reversal of the damage award."

[*107] Former section 16990, subdivision (a), set forth the financial maintenance-of-effort requirement for counties that received funding under the California Healthcare for the Indigent Program (CHIP). The Legislature enacted CHIP in 1989 to implement Proposition 99, the Tobacco Tax and Health Protection Act of 1988 (codified at Rev. & Tax. Code, § 30121 et seq.). Proposition 99, which the voters approved on November 8, 1988, increased the tax on tobacco products and allocated the resulting revenue in part to medical and hospital care for certain persons who could not afford those services. (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal. 3d 245, 248, 254 [279 Cal. Rptr. 325, 806 P.2d 1360].) During the 1989-1990 and 1990-1991 fiscal years, [HN33]former section 16990, subdivision (a), required counties receiving CHIP funds, "at a minimum," to "maintain a level of financial support of county funds for health services at least equal to its county match and any overmatch of county funds in the 1988-89 fiscal year," adjusted annually as provided. (Stats. 1989, ch. 1331, § 9, p. 5427.) Applying this provision, the Court of Appeal affirmed the trial court's finding that the state had required San Diego to spend in fiscal years 1989-1990 and 1990-1991 [**337] [***159] at least $ 41 million on the CMS program.

We agree with the state that this finding is erroneous. Unlike participation in MISA, which was mandatory, participation in CHIP was voluntary. In establishing CHIP, the Legislature appropriated funds "for allocation to counties *participating* in" the program. (Stats. 1989, ch. 1331, § 10, p. 5436, italics added.) Section 16980, subdivision (a), directed the State Department of Health

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Services to make CHIP payments "upon application of the county assuring that it will comply with" applicable provisions. Among the governing provisions were former sections 16990, subdivision (a), and 16995, subdivision (a), which provided: "To be eligible for receipt of funds under this chapter, a county may not impose more stringent eligibility standards for the receipt of benefits under Section 17000 or reduce the scope of benefits compared to those which were in effect on November 8, 1988." (Stats. 1989, ch. 1331, § 9, p. 5431.)

However, San Diego has cited no provision, and we have found none, that *required* eligible counties to participate in the program or apply for CHIP funds. Through Revenue and Taxation Code section 30125, which was part of Proposition 99, the electorate directed that funds raised through Proposition 99 "shall be used to supplement existing levels of service and not to fund existing levels of service." (See also Stats. 1989, ch. 1331, § 1, 19, pp. 5382, 5438.) Counties not wanting to supplement their existing levels of service, and which therefore did not want CHIP funds, were not bound by the program's requirements. Those counties, including San Diego, that chose [*108] to seek CHIP funds did so voluntarily. [32] Thus, the Court of Appeal erred in concluding that former section 16990, subdivision (a), mandated a minimum funding requirement for San Diego's CMS program.

> 32 Consistent with the electorate's direction, in its application for CHIP funds, San Diego assured the state that it would "[e]xpend [CHIP] funds only to supplement existing levels of services provided and not to fund existing levels of service . . . ." Because San Diego's initial decision to seek CHIP funds was voluntary, the evidence it cites of state threats to withhold CHIP funds if it eliminated the CMS program is irrelevant.

Nor did former section 16991, subdivision (a)(5), which the trial court and Court of Appeal also cited, establish a minimum financial obligation for San Diego's CMS program. Former section 16991 generally "establish[ed] a procedure for the allocation of funds to each county receiving funds from the [MISA] . . . for the provision of services to persons meeting certain Medi-Cal eligibility requirements, based on the percentage of newly legalized individuals under the federal Immigration Reform and Control Act (IRCA)." (Legis. Counsel's Dig., Assem. Bill No. 75, 4 Stats. 1989 (Reg. Sess.) Summary Dig., p. 548.) Former section 16991, subdivision (a)(5), required the state, for fiscal years 1989-1990 and 1990-1991, to reimburse a county if its combined allocation from various sources was less than the funding it received under section 16703 for fiscal year 1988-1989. [33] Nothing about this state reimbursement requirement imposed on San Diego a minimum funding requirement for its CMS program.

> 33 [HN34]Former section 16991, subdivision (a)(5), provided in full: "If the sum of funding that a county received from its allocation pursuant to Section 16703, the amount of reimbursement it received from federal State Legalization Impact Assistance Grant [(SLIAG)] funding for indigent care, and its share of funding provided in this section is less than the amount of funding the county received pursuant to Section 16703 in fiscal year 1988-89 the state shall reimburse the county for the amount of the difference. For the 1990-91 fiscal year, if the sum of funding received from its allocation, pursuant to Section 16703 and the amount of reimbursement it received from [SLIAG] Funding for indigent care that year is less than the amount of funding the county received pursuant to Section 16703 in the 1988-89 fiscal year, the state shall reimburse the amount of the difference. If the department determines that the county has not made reasonable efforts to document and claim federal SLIAG funding for indigent care, the department shall deny the reimbursement." (Stats. 1989, ch. 1331, § 9, p. 5428.)

Thus, we must reverse the judgment insofar as it finds that former sections 16990, subdivision (a), and 16991, subdivision (a)(5), established a $ 41 million spending floor for San Diego's CMS program. Instead, the various statutes that we have previously discussed (e.g., § 10000, 17000, and Health & [**338] [***160] Saf. Code, § 1442.5, former subd. (c)), the cases construing those statutes, and any other relevant authorities must guide the Commission's determination of the level of services that San Diego had to provide and any reimbursement to which it is entitled.

[*109] VII. REMAINING ISSUES

(9) The state raises a number of additional issues. It first complains that a mandamus proceeding under Code of Civil Procedure section 1085 was an improper vehicle for challenging the Commission's position. It asserts that, under Government Code section 17559, review by administrative mandamus under Code of Civil Procedure section 1094.5 is the exclusive method for challenging a Commission decision denying a mandate claim. The Court of Appeal rejected this argument, reasoning that the trial court had jurisdiction under Code of Civil Procedure section 1085 because, under section 6, the state has a ministerial duty of reimbursement when it imposes a mandate.

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Like the Court of Appeal, but for different reasons, we reject the state's argument. [HN35]"[M]andamus pursuant to [Code of Civil Procedure] section 1094.5, commonly denominated 'administrative' mandamus, is mandamus still. It is not possessed of 'a separate and distinctive legal personality. It is not a remedy removed from the general law of mandamus or exempted from the latter's established principles, requirements and limitations.' [Citations.] The full panoply of rules applicable to 'ordinary' mandamus applies to 'administrative' mandamus proceedings, except where modified by statute. [Citations.]" (*Woods v. Superior Court* (1981) 28 Cal. 3d 668, 673-674 [170 Cal. Rptr. 484, 620 P.2d 1032].) Where the entitlement to mandamus relief is adequately alleged, a trial court may treat a proceeding brought under Code of Civil Procedure section 1085 as one brought under Code of Civil Procedure section 1094.5 and should deny a demurrer asserting that the wrong mandamus statute has been invoked. (*Woods, supra*, 28 Cal. 3d at pp. 673-674; *Anton v. San Antonio Community Hosp.* (1977) 19 Cal. 3d 802, 813-814 [140 Cal. Rptr. 442, 567 P.2d 1162].) Thus, even if San Diego identified the wrong mandamus statute, the error did not affect the trial court's ability to grant mandamus relief.

"In any event, distinctions between traditional and administrative mandate have little impact on this appeal. . . ." (*McIntosh v. Aubry* (1993) 14 Cal. App. 4th 1576, 1584 [18 Cal. Rptr. 2d 680].) [HN36]The determination whether the statutes here at issue established a mandate under section 6 is a question of law. (*County of Fresno v. Lehman, supra*, 229 Cal. App. 3d at p. 347.) In reaching our conclusion, we have relied on no facts that are in dispute. Where, as here, a "purely legal question" is at issue, courts "exercise independent judgment . . ., no matter whether the issue arises by traditional or administrative mandate. [Citations.]" (*McIntosh, supra*, 14 Cal. App. 4th at p. 1584.) As the state concedes, even under Code of Civil Procedure section 1094.5, a judgment must "be reversed if based on erroneous conclusions of law." Thus, any differences between the two mandamus statutes have had no impact on our analysis.

[*110] The state next contends that the trial court prejudicially erred in denying the "peremptory disqualification" motion that the Director of the Department of Finance filed under Code of Civil Procedure section 170.6. We will not review this ruling, however, because [HN37]it is reviewable only by writ of mandate under Code of Civil Procedure section 170.3, subdivision (d). (*People v. Webb* (1993) 6 Cal. 4th 494, 522-523 [24 Cal. Rptr. 2d 779, 862 P.2d 779]; *People v. Hull* (1991) 1 Cal. 4th 266 [2 Cal. Rptr. 2d 526, 820 P.2d 1036].)

Nor can we address the state's argument that the trial court erred in granting a preliminary injunction. The May 1991 order granting the [HN38]preliminary injunction was "immediately and separately appealable" under Code of Civil Procedure section 904.1, subdivision (a)(6). (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal. App. 4th 640, 645 [4 Cal. Rptr. 2d 689].) Thus, the state's attempt to challenge the order in an appeal filed after entry of final judgment in December 1992 [**339] [***161] was untimely. [34] (See *Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal. App. 3d 230, 251 [256 Cal. Rptr. 194].) Moreover, the state's attempt to appeal the order granting the preliminary injunction is moot because of (1) the trial court's July 1 order granting a peremptory writ of mandate, which expressly "supersede[d] and replace[d]" the preliminary injunction order and (2) entry of final judgment. (*Sheward v. Citizens' Water Co.* (1891) 90 Cal. 635, 638-639 [27 P. 439]; *People v. Morse* (1993) 21 Cal. App. 4th 259, 264-265 [25 Cal. Rptr. 2d 816]; *Art Movers, Inc., supra*, 3 Cal. App. 4th at p. 647.)

34 Despite its argument here, when it initially appealed, the state apparently recognized that it could no longer challenge the May 1991 order. In its March 1993 notice of appeal, it appealed only from the judgment entered December 18, 1992, and did not mention the May 1991 order.

Finally, the state requests that we reverse the trial court's reservation of jurisdiction regarding an award of attorney fees. This request is premature. In the judgment, the trial court "retain[ed] jurisdiction to determine any right to and amount of attorneys' fees . . . ." This provision does not declare that San Diego in fact has a right to an award of attorney fees. Nor has San Diego asserted such a right. As San Diego states, at this point, "[t]here is nothing for this Court to review." We will not give an advisory ruling on this issue.

VIII. DISPOSITION

The judgment of the Court of Appeal is affirmed insofar as it holds that the exclusion of adult MIP's from Medi-Cal imposed a mandate on San Diego within the meaning of section 6. The judgment is reversed insofar as it holds that the state required San Diego to spend at least $ 41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. The matter is [*111] remanded to the Commission to determine whether, and by what amount, the statutory standards of care (e.g., Health & Saf. Code, § 1442.5, former subd. (c); Welf. & Inst. Code, § 10000, 17000) forced San Diego to incur costs in excess of the funds provided by the state, and to determine the statutory remedies to which San Diego is entitled.

George, C. J., Mosk, J., Baxter, J., Anderson, J., * and Aldrich, J., ** concurred.

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* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

** Associate Justice, Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

DISSENT BY: KENNARD

DISSENT

KENNARD, J.

I dissent.

As part of an initiative measure placing spending limits on state and local government, the voters in 1979 added article XIII B to the California Constitution. Section 6 of this article provides that when the state "mandates a new program or higher level of service on any local government," the state must reimburse the local government for the cost of such program or service. Under subdivision (c) of this constitutional provision, however, the state "may, but need not," provide such reimbursement *if the state mandate was enacted before January 1, 1975.* (Cal. Const., art. XIII B, § 6, subd. (c).) Subdivision (c) is the critical provision here.

Because the counties have for many decades been under a state mandate to provide for the poor, a mandate that existed before the voters added article XIII B to the state Constitution, the express language of subdivision (c) of section 6 of article XIII B exempts the state from any *legal obligation* to reimburse the counties for the cost of medical care to the needy. The fact that for a certain period after 1975 the state directly paid under the state Medi-Cal program for these costs did not lead to the creation of a new mandate once the state stopped doing so. To hold to the contrary, as the majority does, is to render subdivision (c) a nullity.

The issue here is not whether the poor are entitled to medical care. They are. The issue is whether the state or the counties must pay for this care. The majority places this obligation on the state. The counties' [**340] [***162] win, however, may be a pyrrhic victory. For, in anticipation of today's decision, the Legislature has enacted legislation that will drastically reduce the counties' share of other state revenue, as discussed in part III below.

I

Beginning in 1855, California imposed a legal obligation on the counties to take care of their poor. (*Mooney v. Pickett* (1971) 4 Cal. 3d 669, 677-678 [*112] [94 Cal. Rptr. 279, 483 P.2d 1231].) Since 1965, this obligation has been codified in Welfare and Institutions Code section 17000. (Stats. 1965, ch. 1784, § 5, p. 4090.) That statute states in full: "Every county and every city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." (Welf. & Inst. Code, § 17000.) Included in this is a duty to provide medical care to indigents. (*Board of Supervisors v. Superior Court* (1989) 207 Cal. App. 3d 552, 557 [254 Cal. Rptr. 905].)

A brief overview of the efforts by federal, state, and local governments to furnish medical services to the poor may be helpful.

Before March 1, 1966, the date on which California began its Medi-Cal program, medical services for the poor "were provided in different ways and were funded by the state, county, and federal governments in varying amounts." (Assem. Com. on Public Health, Preliminary Rep. on Medi-Cal (Feb. 29, 1968) p. 3.) The Medi-Cal program, which California adopted to implement the federal Medicaid program (42 U.S.C. § 1396 et seq.; see *Morris v. Williams* (1967) 67 Cal. 2d 733, 738 [63 Cal. Rptr. 689, 433 P.2d 697]), at first limited eligibility to those persons "linked" to a federal categorical aid program by being over age 65, blind, disabled, or a member of a family with dependent children. (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1971-1972 Budget Bill, Sen. Bill No. 207 (1971 Reg. Sess.), pp. 548, 550.) Persons not linked to federal programs were ineligible for Medi-Cal; they could obtain medical care from the counties. (*County of Santa Clara v. Hall* (1972) 23 Cal. App. 3d 1059, 1061 [100 Cal. Rptr. 629].)

In 1971, the Legislature revised Medi-Cal by extending coverage to certain so-called "noncategorically linked" persons, or "medically indigent persons." (Stats. 1971, ch. 577, § 12, 13, 22.5, 23, pp. 1110-1111, 1115.) The revisions included a formula for determining each county's share of Medi-Cal costs for the 1972-1973 fiscal year, with increases in later years based on the assessed value of property. (*Id.* at § 41, 42, pp. 1131-1133.)

In 1978, California voters added to the state Constitution article XIII A (Proposition 13), which severely limited property taxes. In that same year, to help the counties deal with the drastic drop in local tax revenue, the Legislature assumed the counties' share of Medi-Cal costs. (Stats. 1978, ch. 292, § 33, p. 610.) In 1979, the Legislature relieved the counties of their obligation to share in Medi-Cal costs. (Stats. 1979, ch. 282, § 106, p. 1059.) [*113] Also in 1979, the voters added to the state Constitution article XIII B, which placed spending

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limits on state and local governments and added the mandate/reimbursement provisions at issue here.

In 1982, the Legislature removed from Medi-Cal eligibility the category of "medically indigent persons" that had been added in 1971. The Legislature also transferred funds for indigent health care services from the state to the counties through the Medically Indigent Services Account. (Stats. 1982, ch. 328, § 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, § 19, 86, pp. 6315, 6357.) Medically Indigent Services Account funds were then combined with county health service funds to provide health care to persons not eligible for Medi-Cal (Stats. 1982, ch. 1594, § 86, p. 6357), and counties were to provide health services to persons in this category "to the extent that state funds are provided" (*id.*, § 70, p. 6346).

From 1983 through June 1989, the state fully funded San Diego County's program for furnishing medical care to the poor. Thereafter, in fiscal years 1989-1990 and 1990-1991, the state partially funded San Diego [**341] [***163] County's program. In early 1991, however, the state refused to provide San Diego County full funding for the 1990-1991 fiscal year, prompting a threat by the county to terminate its indigent medical care program. This in turn led the Legal Aid Society of San Diego to file an action against the County of San Diego, asserting that Welfare and Institutions Code section 17000 imposed a legal obligation on the county to provide medical care to the poor. The county cross-complained against the state. The county argued that the state's 1982 removal of the category of "medically indigent persons" from Medi-Cal eligibility mandated a "new program or higher level of service" within the meaning of section 6 of article XIII B of the California Constitution, because it transferred the cost of caring for these persons to the county. Accordingly, the county contended, section 6 required the state to reimburse the county for its cost of providing such care, and prohibited the state from terminating reimbursement as it did in 1991. The county eventually reached a settlement with the Legal Aid Society of San Diego, leading to a dismissal of the latter's complaint.

While the County of San Diego's case against the state was pending, litigation was proceeding in a similar action against the state by the County of Los Angeles and the County of San Bernardino. In that action, the Superior Court for the County of Los Angeles entered a judgment in favor of Los Angeles and San Bernardino Counties. The state sought review in the Second District Court of Appeal in Los Angeles. In December 1992, the parties to the Los Angeles case entered into a settlement agreement providing for dismissal of the appeal and vacating of the superior court judgment. [*114] The Court of Appeal thereafter ordered that the superior court judgment be vacated and that the appeal be dismissed.

The County of San Diego's action against the state, however, was not settled. It proceeded on the county's claim against the state for reimbursement of the county's expenditures for medical care to the indigent. [1] The majority holds that the county is entitled to such reimbursement. I disagree.

1 I agree with the majority that the superior court had jurisdiction to decide this case. (Maj. opn., *ante*, at pp. 85-90.)

II

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, *except that the Legislature may, but need not, provide such subvention of funds for the following mandates:* [P] . . . [P] *(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.) [2]

2 Section 6 of article XIII B pertains to two types of mandates: new programs and higher levels of service. The words "such subvention" in the first paragraph of this constitutional provision makes the subdivision (c) exemption applicable to both types of mandates.

Of importance here is Welfare and Institutions Code section 17000 (hereafter sometimes section 17000). It imposes a legal obligation on the counties to provide, among other things, medical services to the poor. (*Board of Supervisors* v. *Superior Court, supra*, 207 Cal. App. 3d at p. 557; *County of San Diego v. Viloria* (1969) 276 Cal. App. 2d 350, 352 [80 Cal. Rptr. 869].) Section 17000 was enacted long before, and has existed continuously since, January 1, 1975, the date set forth in subdivision (c) of section 6 of article XIII B of the California Constitution. Thus, section 17000 falls within subdivision (c)'s language of "[l]egislative mandates enacted prior to January 1, 1975," rendering it exempt from the reimbursement provision of section 6.

Contrary to the majority's conclusion, the Legislature's 1982 legislation removing the category of "medically indigent persons" from Medi-Cal did not meet California Constitution, article XIII B, section 6's requirement of imposing on local government "a new program or higher level of service," and therefore did not entitle the counties to reimbursement [**342] [***164]

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from the state under section 6 of article XIII B. The counties' legal obligation to provide medical care arises from section 17000, not from the subsequently enacted [*115] 1982 legislation. The majority itself concedes that the 1982 legislation merely "trigger[ed] the counties' responsibility to provide medical care as providers of last resort under section 17000." (Maj. opn., *ante*, at p. 98.) Although certain actions by the state and the federal government during the 1970's and 1980's may have alleviated the counties' financial burden of providing medical care for the indigent, those actions did not supplant or remove the counties' existing legal obligation under section 17000 to furnish such care. (*Cooke v. Superior Court* (1989) 213 Cal. App. 3d 401, 411 [261 Cal. Rptr. 706]; *Madera Community Hospital v. County of Madera* (1984) 155 Cal. App. 3d 136, 151 [201 Cal. Rptr. 768].)

The state's reimbursement obligation under section 6 of article XIII B of the California Constitution arises only if, after January 1, 1975, the date mentioned in subdivision (c) of section 6, the state imposes on the counties "a new program or higher level of service." That did not occur here. As I pointed out above, the counties' legal obligation to provide for the poor arises from section 17000, enacted long before the January 1, 1975, cutoff date set forth in subdivision (c) of section 6. That statutory obligation remained in effect when, during a certain period after 1975, the state assumed the financial burden of providing medical care to the poor, in an effort to help the counties deal with a drastic drop in local revenue as a result of the voters' passage of Proposition 13, which severely limited property taxes. Because the counties' statutory obligation to provide health care to the poor was created before 1975 and has existed unchanged since that time, the state's 1982 termination of Medi-Cal eligibility for "medically indigent persons" did not create a "new program or higher level of service" within the meaning of section 6 of article XIII B, and therefore did not obligate the state to reimburse the counties for their expenditures in health care for the poor.

III

In imposing on the state a legal obligation to reimburse the counties for their cost of furnishing medical services to the poor, the majority's holding appears to bail out financially strapped counties. Not so.

Today's decision will immediately result in a reduction of state funds available to the counties. Here is why. In 1991, the Legislature added section 11001.5 to the Revenue and Taxation Code, providing that 24.33 percent of the moneys collected by the Department of Motor Vehicles as motor vehicle license fees must be deposited in the State Treasury to the credit of the Local Revenue Fund. In anticipation of today's decision, the Legislature stated in subdivision (d) of this statute: "This section shall cease to be operative on [*116] the first day of the month following the month in which the Department of Motor Vehicles is notified by the Department of Finance of a final judicial determination by the California Supreme Court or any California court of appeal [that]: [P] . . . [P] (2) The state is obligated to reimburse counties for costs of providing medical services to medically indigent adults pursuant to Chapters 328 and 1594 of the Statutes of 1982." (Rev. & Tax. Code, § 11001.5, subd. (d); see also *id.*, § 10753.8, subd. (b).)

The loss of such revenue, which the Attorney General estimates at "hundreds of millions of dollars," may put the counties in a serious financial bind. Indeed, realization of the scope of this revenue loss appears to explain why the County of Los Angeles, after a superior court victory in its action seeking state reimbursement for the cost of furnishing medical care to "medically indigent persons," entered into a settlement with the state under which the superior court judgment was effectively obliterated by a stipulated reversal. (See *Neary v. Regents of University of California* (1992) 3 Cal. 4th 273 [10 Cal. Rptr. 2d 859, 834 P.2d 119].) In a letter addressed to the Second District Court of Appeal, sent while the County of Los Angeles was engaged in settlement negotiations with the state, the county's attorney referred to the legislation mentioned above in these terms: "This legislation was quite clearly written with this case in mind. Consequently, [**343] [***165] to pursue this matter, *the County of Los Angeles risks losing a funding source it must have to maintain its health services programs at current levels.* The additional funding that might flow to the County from a final judgment in its favor in this matter, is several years away *and is most likely of a lesser amount than this County's share of the vehicle license fees.*" (Italics added.) Thus, the County of Los Angeles had apparently determined that a legal victory entitling it to reimbursement from the state for the cost of providing medical care to the category of "medically indigent persons" would not in fact serve its economic interests.

I have an additional concern. According to the majority, whenever there is a change in a state program that has the effect of increasing a county's financial burden under section 17000 there must be reimbursement by the state. This means that so long as section 17000 continues to exist, an increase in state funding to a particular county for the care of the poor, once undertaken, may be irreversible, thus locking the state into perpetual financial assistance to that county for health care to the needy. This would, understandably, be a major disincentive for the Legislature to ever increase the state's funding of a county's medical care for the poor.

The rigidity imposed by today's holding will have unfortunate consequences should the state's limited fi-

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nancial resources prove insufficient to [*117] reimburse the counties under section 6 of article XIII B of the California Constitution for the "new program or higher level of service" of providing medical care to the poor under section 17000. In that event, the state may be required to modify this "new program or higher level of service" in order to reconcile the state's reimbursement obligation with its finite resources and its other financial commitments. Such modifications are likely to take the form of limitations on eligibility for medical care or on the amount or kinds of medical care that the counties must provide to the poor under section 17000. A more flexible system--one that actively encouraged shared state and county responsibility for indigent medical care, using a variety of innovative funding mechanisms--would be less likely to result in a curtailment of medical services to the poor.

And if the Legislature is unable or unwilling to appropriate funds to comply with the majority's reimbursement order, the law allows the county to file "in the Superior Court of the County of Sacramento an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement." (Gov. Code, § 17612, subd. (c); see maj. opn., *ante*, at p. 82.) Such a declaration would do nothing to alleviate the plight of the poor.

Conclusion

The dispute in this case ultimately arises from a collision between the taxing limitations on the counties imposed by article XIII A of the state Constitution and the preexisting, open-ended mandate imposed on them under Welfare and Institutions Code section 17000 to provide medical care for the poor. As I have explained, the Legislature's assumption thereafter of some of the resulting financial burden to the counties did not repeal section 17000's mandate, nor did the Legislature's later termination of its financial support create a new mandate. In holding to the contrary, the majority imposes on the Legislature an obligation that the Legislature does not have under the law.

I recognize that my resolution of this issue--that under existing law the state has *no legal obligation* to reimburse the counties for health expenditures for the poor--would leave the counties in the same difficult position in which they find themselves now: providing funding for indigent medical care while maintaining other essential public services in a time of fiscal austerity. But complex policy questions such as the structuring and funding of indigent medical care are best left to the counties, the Legislature, and ultimately the electorate, rather than to the courts. It is the counties that must figure out how to allocate the limited budgets imposed on them by the electorate's adoption of articles XIII A and XIII B of the California Constitution among indigent medical care programs and a host of other pressing [*118] and essential needs. It is the Legislature that must decide whether to furnish financial assistance to the counties so [***166] they [**344] can meet their section 17000 obligations to provide for the poor, and whether to continue to impose the obligations of section 17000 on the counties. It is the electorate that must decide whether, given the ever-increasing costs of meeting the needs of indigents under section 17000, counties should be afforded some relief from the taxing and spending limits of articles XIII A and XIII B, both enacted by voters' initiative. These are hard choices, but for the reasons just given they are better made by the representative branches of government and the electorate than by the courts.

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LEXSEE

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As of: Jun 25, 2010

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.

SUPREME COURT OF CALIFORNIA

30 Cal. 4th 727; 68 P.3d 1203; 134 Cal. Rptr. 2d 237; 2003 Cal. LEXIS 3353; 2003 Daily Journal DAR 5463

May 22, 2003, Decided
May 22, 2003, Filed

PRIOR HISTORY: Superior Court of Sacramento County, No. C037645, No. 00CS00866, Ronald B. Robie Judge.
Department of Finance v. Commission on State Mandates, 100 Cal. App. 4th 243, 2002 Cal. App. LEXIS 4406, 122 Cal. Rptr. 2d 447 (Cal. App. 3d Dist., 2002)

DISPOSITION: The judgment of the Court of Appeal is reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: The Court of Appeal of California, Third Appellate District, Sacramento County, held that respondents, California Commission on State Mandates, representing the real parties in interest and respondent school districts, had a right to reimbursement for their costs in complying with the statutory notice and agenda requirements related to voluntary state education-related programs. Appellant, the California Department of Finance, sought review.

OVERVIEW: A number of statutes established various school-related educational programs. One example was the School-Based Pupil Motivation and Maintenance Program and Dropout Recovery Act, Cal. Educ. Code § 54720 et seq. Participating school districts were granted funds to operate such programs and were required to establish school site councils or advisory committees to administer the program. Subsequent legislation required new statutory notice and agenda requirements related to public meetings concerning such programs. The department of finance asserted that, because local entities were not required to participate in the programs, the State, had not imposed a "mandate," and the State was not responsible for said notice and agenda costs. On the other hand, the commission asserted the school districts were legally "compelled" to incur such costs and were entitled to reimbursement. The appellate court held the school districts did not have a right to reimbursement from the State. The funded programs did not amount to a reimbursable state mandate, they were not "compelled" upon the districts, and a portion of the provided funds could be used for the notice and agenda costs at issue.

OUTCOME: The appellate court held that the claimants failed to establish that they were entitled to reimbursement with regard to any of the program costs issue. The judgment of the lower court was reversed.

CORE TERMS: claimant, school districts, state mandate, agenda, notice, reimbursable, reimbursement, compelled, funded, incur, compulsion, advisory committees, local governments, local entity, local agencies, italics, eminent domain, mandated, curiae, school site, funding, optional, taxation, spending, goodwill, entity's, elect, reasonable alternative, federal mandate, education programs

LexisNexis(R) Headnotes

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Education Law > Funding > Allocation
Education Law > Instruction > Curricula > Curriculum Committees
Public Health & Welfare Law > Social Services > Native Americans
[HN1]A number of statutes establish various school-related educational programs, such as the School-Based Pupil Motivation and Maintenance Program and Dropout Recovery Act, Cal. Educ. Code § 54720 et seq., Programs to Encourage Parental Involvement, Cal. Educ. Code § 11500 et seq., and the federal Indian Education Program, 20 U.S.C.S. § 7421 et seq. (former 25 U.S.C.S. § 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. Funding is provided by the state for school improvement programs, at least in-part, under Cal. Educ. Code §§ 52010 et seq., and Cal. Educ. Code §§ 62000, 62000.2(b) and 62002.

Administrative Law > Governmental Information > Public Meetings > General Overview
Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Proceedings
[HN2] Cal. Educ. Code § 35147 generally exempts school district councils and advisory committees of nine specific programs from compliance with all provisions of the Brown Act, Cal. Gov't. Code § 54950.5 et seq, 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.

Governments > Local Governments > Administrative Boards
[HN3]See Cal. Gov't. Code § 54952.

Administrative Law > Governmental Information > Public Meetings > General Overview
Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Proceedings
Governments > Local Governments > Administrative Boards
[HN4]See Cal. Educ. Code § 35147.

Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Proceedings
Education Law > Funding > Allocation
Governments > State & Territorial Governments > Finance
[HN5]The statutory notice and agenda requirements of Cal. Educ. Code § 35147 impose reimbursable state mandates for the costs of preparing meeting agendas, posting agendas, and providing the public an opportunity to address the respective school district councils or committees.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN6]Cal. Const. art. XIII A limits the spending authority of state and local government.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN7]See Cal. Const. art. XIII B, § 6.

Education Law > Administration & Operation > School Districts > Financial Liabilities
Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN8]Cal. Const. art. XIII B, § 6 recognizes that Cal. Const. arts. XIII A and XIII B severely restrict the taxing and spending powers of local governments. 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 Cal. Const. arts. XIII A and XIII B impose. A reimbursable state mandate does not arise merely because a local entity finds itself bearing an "additional cost" imposed by state law. 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 Cal. Const. art. XIII B, § 6.

Governments > Local Governments > Administrative Boards
Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance

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[HN9]Extension of the subvention requirements to costs "incidentally" imposed on local governments will require the legislature to assess the fiscal effect on local agencies of each law of general application. Moreover, it will subject much general legislation to the supermajority vote required to pass a companion local-government revenue bill. Each such necessary appropriation will, in turn, cut into the state's article Cal. Const. art. XIII B spending limit. Cal. Const. art. XIII B, § 8(a). Nothing in the language, history, or apparent purpose of Cal. Const. art. XIII B suggests such far-reaching limitations on legitimate state power.

Governments > Local Governments > Administrative Boards
Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN10]See former Cal. Rev. & Tax Code § 2231(a) (currently Cal. Gov't. Code § 17561(a)).

Governments > Local Governments > Administrative Boards
Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN11]See former Rev. § Tax Code § 2207 (currently Cal. Gov't. Code § 17514).

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN12]See former Cal. Rev. & Tax Code § 2207(h).

Education Law > Funding > Allocation
Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN13]See former Cal. Rev. & Tax Code § 2207.5.

Governments > Local Governments > Finance
[HN14]Former Cal. Rev. and Tax. Code §§ 2231 and 2207 served as the model for Cal. Const. art. XIII B, § 6, and 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 California Revenue and Taxation Code.

Education Law > Administration & Operation > School Districts > Financial Liabilities
Education Law > Instruction > Curricula > Standards
Governments > State & Territorial Governments > Finance
[HN15]See Cal. Gov't Code § 17514.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
Tax Law > State & Local Taxes > General Overview
[HN16]In the legislature's 1984 overhaul of the statutory scheme implementing Cal. Const. art. XIII B, § 6, the legislature embraced and codified the narrow definition of reimbursable state mandate set out in former Cal. Rev. & Tax Code § 2207 (and construed in City of Merced) as the appropriate test in implementing the constitutional provision. The legislature limited the continued use of the broader definition of a statutorily imposed reimbursable state mandate (set out in the amendments to former Cal. Rev. & Tax Code §§ 2207 and 2207.5, effective in mid-1981) to a small and ever-decreasing number of cases. Five years later, the legislature repealed former Cal. Rev. & Tax Code §§ 2207 and 2207.5, thereby finally discarding the broad definition of statutorily imposed reimbursable state mandate found in former Cal. Rev. & Tax Code §§ 2207(h) and 2207.5(h).

Education Law > Administration & Operation > School Districts > Financial Liabilities
Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN17]Particularly in the context of school funding, based upon the language of Cal. Const. art. XIII B, § 6, and the statutory and case law history, 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.

Education Law > Administration & Operation > School Districts > Financial Liabilities
Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN18]Particularly in the context of school funding, 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 nonpartici-

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pation) 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.

Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Proceedings
Education Law > Administration & Operation > School Districts > Financial Liabilities
Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > Just Compensation
[HN19]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 of Cal. Educ. Code § 35147, as related to that program does not constitute a reimbursable state mandate.

Education Law > Administration & Operation > School Districts > Financial Liabilities
Governments > State & Territorial Governments > Finance
[HN20]In the context of school district financing, the proper focus under a legal compulsion inquiry is upon the nature of a claimant's participation in the underlying programs themselves.

Education Law > Funding > Allocation
Governments > Local Governments > Finance
Public Health & Welfare Law > Social Services > Native Americans
[HN21]The American Indian Early Childhood Education Program, Cal. Educ. 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, Cal. Educ. Code § 52063) and, if accepted to participate, will receive program funding. Cal. Educ. Code § 52062. Cal. Educ. Code § 52065 in turn states that each school district that receives funds provided by § 52062 shall establish a district wide American Indian advisory committee for American Indian early childhood education.

Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Authority
Education Law > Administration & Operation > School Districts > Financial Liabilities
Governments > State & Territorial Governments > Finance
[HN22]Participation in most of the programs listed in Cal. Educ. Code § 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.

Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Authority
Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Proceedings
Education Law > Instruction > Curricula > Curriculum Committees
[HN23]See Cal. Educ. Code § 52010.

Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Authority
Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Proceedings
Education Law > Instruction > Curricula > Curriculum Committees
[HN24]Reasonably construed, the statutory scheme require only that a school district adopt "policies" (i.e., a plan) "to ensure" that if the district elects to participate in the California School Improvement Program, a school site council will, "prior to phase-in" of the district wide 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 statutory scheme 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.

Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Authority
Education Law > Instruction > Curricula > Curriculum Committees
[HN25]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. Cal. Educ. Code § 52850 et seq. and Cal. Educ. Code § 54720 et seq. The statutes make it clear that these requirements apply "only to school districts and schools which participate in" the respective programs. Cal. Educ. Code §§

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52850, 54722. Each statutory scheme provides that school site councils shall be established at each school which participates in the program. Cal. Educ. Code §§ 52852 and 54722.

Education Law > Funding > Allocation
Education Law > Students > Bilingual Students
Governments > Local Governments > Finance
[HN26]The appellate court finds nothing to suggest that a school district is precluded from using a portion of the funds obtained from the state for the implementation of an underlying funded program to pay associated notice and agenda costs. Indeed, the Chacon-Moscone Bilingual-Bicultural Education program explicitly authorizes school districts to do so. Under Cal. Educ. Code § 52168(b) school districts may claim funds appropriated for purposes of expenditures in, but not limited to reasonable district administrative expenses. It is plain that the costs of complying with program-related notice and agenda requirements qualify as "reasonable district administrative expenses." Therefore, even if the appellate court assume for purposes of analysis that school districts are legally compelled to participate in the funded Chacon-Moscone Bilingual-Bicultural Education program, the appellate court views the state's provision of program funding as satisfying, in advance, any reimbursement requirement.

Education Law > Administration & Operation > School Districts > Financial Liabilities
Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN27]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 state mandate under Cal. Const. art. XIII B, § 6.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN28]See Cal. Const. art. XIII B, § 9.

Governments > Legislation > Interpretation
[HN29]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. While a constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words, the literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers.

Education Law > Administration & Operation > School Districts > Creation
Governments > Local Governments > Administrative Boards
Governments > State & Territorial Governments > Relations With Governments
[HN30]Unlike the federal-state relationship, sovereignty is not an issue between state and local governments. School districts are agencies of the state, and not separate or distinct political entities.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN31]Cal. Const. art. XIII B, § 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 light of that purpose, the appellate court does not foreclose the possibility that a reimbursable state mandate under Cal. Const. art. XIII B, § 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.

Education Law > Students > Bilingual Students
Governments > Local Governments > Finance
Public Health & Welfare Law > Social Services > Native Americans
[HN32]Authority to use program funds obtained from the state to pay associated notice and agenda costs is explicit, or at least strongly implied in the federal Indian Education Program, 20 U.S.C.S. § 7425(d), the California School Improvement Program, Cal. Educ. Code § 63000(c) and (g), and the McAteer Act, Cal. Educ. Code § 63001.

Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Proceedings
Governments > State & Territorial Governments > Finance

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[HN33]In the context of the expenditure of granted program funds on the notice and agenda costs, 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. Cal. Educ. Code §§ 63000(c) and 63001.

Education Law > Administration & Operation > School Districts > Financial Liabilities
Education Law > Funding > Allocation
Governments > State & Territorial Governments > Finance
[HN34]Presumably, a school district will continue to participate in optional funded programs 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.

Education Law > Administration & Operation > School Districts > Financial Liabilities
Education Law > Funding > Allocation
Governments > State & Territorial Governments > Finance
[HN35]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 continued participation in the program, just as such a participant will be disappointed if the total amount of the annual funds provided for the program is 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. Cal. Const. art. XIII B, § 6, provides no right of reimbursement when the state reduces revenue granted to local government. The appellate court rejects the suggestion 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.

Education Law > Administration & Operation > School Districts > Financial Liabilities
Education Law > Funding > Allocation
Governments > Local Governments > Finance
[HN36]A claimant that elects to discontinue participation in a state optional funded program does not face certain and severe penalties such as double taxation or other "draconian" consequences, 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 Cal. Const. art. XIII B, § 6.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS 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 statute do not constitute a reimbursement 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 reimbursement 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, since 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

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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

CALIFORNIA OFFICIAL REPORTS 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 statute, 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 Appeals erred in concluding that the claimants (two public school districts and a county) were 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 reimbursement 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, since 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.]

(2a) (2b) (2c) **State of California § 11--Fiscal Matters--Reimbursement 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 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 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.

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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.

JUDGES: (Opinion by George, C. J., expressing the unanimous view of the court.)

OPINION BY: GEORGE

OPINION

[*730] [**1205] [***240] 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, § 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; Ed. Code, § 35147.) [*731] 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 [***241] 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.

I.

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[HN1] [**1206] [*732] 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. [1] 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, [HN2]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. [2]

1 Government Code section 54952, a provision of the Brown Act, provides in relevant part: [HN3]"As used in this chapter, 'legislative body' means: [P] (a) The governing body of a local agency or any other local body created by state or federal statute. [P] (b) A commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body. . . ."

2 Education Code section 35147 provides in relevant part: [HN4]"(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. . . . [P] (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. [P] (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

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Education Program (20 U.S.C. § 7421 et seq. [former 25 U.S.C. § 2601 et seq.].)

[**1207] [***242] [*733] 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 California Constitution article XIII B, section 6].) [3] In a statement of decision issued in mid-April 2002, the Commission found in favor of claimants. It concluded that [HN5]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.

3 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.

[*734] 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. [4] The Department of Finance [***243] 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.

4 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. [5]

5 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.

[**1208] 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), [HN6]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: [HN7]"Whenever the Legislature or any state agency mandates a new program or higher level of service on

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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: [P] (a) Legislative mandates requested by the local agency affected; [P] (b) Legislation defining a new crime or changing an existing definition of a crime; or [P] (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 [HN8]"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." [***244] (*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* (1999) 44 Cal. 3d 830, 835 [244 Cal. Rptr.677, 750 P.3d 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*). [6])

> 6 As we observed in *City of Sacramento, supra*, 50 Cal.3d at page 70, [HN9]"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 [**1209] 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 circumstances 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 [***245] 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: [HN10]"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: " [HN11]'Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the [*737] following: [P] (a) Any law enacted after January 1, 1973, which mandates a new program or an increased level of service of an existing program . . . ."

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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 of 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.)

[**1210] [*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 [***246] 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 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): [P] ' [HN12]"Costs mandated by the state" means any increased costs which a local agency is required to incur as the result of the following: [P] . . . [P] (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

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section 2207.5 -a specialized section that addressed reimbursable state mandates as they related to a school district.) [7]

> 7 Revised section 2207.5 provided that " [HN13]'[c]osts mandated by the state' means any increased costs which a school district is required to incur as a result of . . . [P] . . . [P] (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 [***247] 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* [**1211] *existing law.*" (*City of Merced, supra,* 153 Cal. App. 3d 777, 784, italics added.)

After examining two legislative committee reports, [8] 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.)

> 8 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: [P] . . . [P] 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.) [P] 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: [P] . . . [P] 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 [HN14]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. [9]

> 9 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. [10] The [***248] 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, § 2207]; Stats. 1977, ch. 1135, § 5, p. 3646 [Rev. & Tax. Code, § 2207]; Stats. 1984, ch. 1459, § 1,

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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 [**1212] as a reimbursable state mandate only that imposed when the local entity is legally compelled to engage in the underlying practice or program.

> 10 Government Code section 17514 reads: [HN15]" '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.)

[*741] 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, [HN16]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 [HN17]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 School District 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' "]; [***249] *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].) "

> 11 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. [*742]

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."

[**1213] 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

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program to which the conditions attach. As suggested above, the core point articulated by the court in *City of Merced* is that [HN18]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 [***250] *City of Merced, supra*, 153 Cal. App. 3d 777 [200 Cal. Rptr. 642]. 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, [HN19]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. [12]

> 12 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 discretionary 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 [HN20]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 [**1214] 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, [HN21]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 [***251] 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

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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: [HN22]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 [13] --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: [HN23]"*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: [P] . . . [P] (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.)

> 13 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. [HN24]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. [14]

> 14 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 [HN25]"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.)

[**1215] [***252] 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. [15]

> 15 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. [*746]

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

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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 [***253] 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.

[**1216] 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. [16] And, even more significantly, [HN26]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: [P] . . . [P] (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.

16 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.)

[HN27]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

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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 [***254] 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. [17]

> 17 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 . . . ." (5 Cal. Code Regs., §§ 3900(g) & 3947(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 [**1217] 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, [18] 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.

> 18 That provision states: [HN28]" 'Appropriations subject to limitation' for each entity of government do not include: [P] . . . [P] (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 [***255] 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.

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[*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 [**1218] 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. [19] Second, in conformity with [***256] 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. [P] 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. [HN29]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.)

19 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). 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. [20] (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.

20 [HN30]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. Huff* (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 [**1219] the context of article XIII B, 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 B, 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

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[HN31]"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 [***257] 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, [HN32]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. [21]

21 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, [HN33]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, subds. (g), 63001 [15 percent limitation].)

[**1220] [***258] 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. [HN34]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

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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. [HN35]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. [22] (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.

> 22 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,* 50 Cal.3d 51 [266 Cal. Rptr. 139, 785 P.2d 522],[HN36] [***259] 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 [**1221] 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.

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TAB "14"

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LexisNexis

Positive
As of: Jun 02, 2011

DIVERS' ENVIRONMENTAL CONSERVATION ORGANIZATION, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Respondents; UNITED STATES DEPARTMENT OF THE NAVY et al., Real Parties in Interest and Respondents.

D046112

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

145 Cal. App. 4th 246; 51 Cal. Rptr. 3d 497; 2006 Cal. App. LEXIS 1874; 2006 Cal. Daily Op. Service 10951; 36 ELR 20237

November 29, 2006, Filed

SUBSEQUENT HISTORY: Rehearing denied by *Divers' Environmental Conservation Organization v. State Water Resource Control Board, 2006 Cal. App. LEXIS 2102 (Cal. App. 4th Dist., Dec. 27, 2006)*

PRIOR HISTORY: **[***1]** Superior Court of San Diego County, No. 01C819689, Ronald S. Prager, Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant environmental group sought review of an order of the Superior Court of San Diego County (California), which denied the group's petition for a writ of mandate challenging the issuance of a National Pollutant Discharge Elimination System (NPDES) permit by respondent, a regional water quality control board, pursuant to the federal Clean Water Act, *33 U.S.C. § 1251 et seq.*

OVERVIEW: Instead of imposing numeric limits on chemicals in storm water discharges, the regional board required that the permittee limit its storm water discharges by employing best management practices. The court held that the NPDES permit was not defective for its failure to analyze or impose numeric limits on chemicals in the storm water discharges. *40 C. F.R. § 122.44(d)(1)* did not require that in all cases a permitting authority analyze the particular pollutants in an applicant's storm water discharges when issuing a permit under *33 U.S.C. § 1342(p)*. Rather, the permitting authority was required only to use procedures that accounted for existing controls, the variability of the pollutants in effluent, the sensitivity of species to toxicity, and the dilution of effluent in receiving waters. While a numeric analysis of particular pollutants would in most instances be the most effective means of meeting the requirements of *40 C.F.R. § 122.44(d)(1)(ii)*, that was not the only means of meeting the requirements of the regulation. The best management practices authorized by *§ 122.44(k)(2)* constituted water quality-based effluent limitations that a permitting authority could employ.

OUTCOME: The court affirmed the trial court's judgment.

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Standards of Review > Statutory Interpretation
[11N1] An appellate court's standard of review must extend appropriate deference to administrative agencies and

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their technical expertise. And while interpretation of a statute or regulation is ultimately a question of law, an appellate court must also defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > General Overview
[HN2] The federal Water Pollution Control Act, *33 U.S.C. § 1251 et seq.*, commonly known as the Clean Water Act (CWA), is intended to restore and maintain the chemical, physical, and biological integrity of the nation's waters. § *1251(a)*. Generally, the CWA prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions. The most important of those exceptions is pollution discharge under a valid National Pollutant Discharge Elimination System (NPDES) permit, which can be issued either by the Environmental Protection Agency (EPA), or by an EPA-approved state permit program such as California's. NPDES permits are valid for five years.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
[HN3] In general terms, the federal Clean Water Act, *33 U.S.C. § 1251 et seq.*, and governing regulations require that in addition to determining an applicant's obligations by focusing on what technology can be used on the applicant's discharges, the permitting agency must also focus on the quality of the body of water into which the applicant is discharging pollutants. Thus, under *40 C.F.R. § 122.44(d)(1)(i)*, water quality-based effluent limitations (WQBELs) must be imposed on applicants whenever the permitting agency determines that pollutants are or may be discharged at a level which will cause, or have the reasonable potential to cause, or contribute to an excursion above any state water quality standard. Under § *122.44(d)(1)(ii)*, in making the determination about whether WQBELs are required, 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.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
[BN4] When, after employing the procedures and analysis required by *40 C.F.R. § 122.44(d)(1)(ii)*, a permitting agency determines that an applicant's discharges have the reasonable potential to cause an in-stream excursion above a state water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant. *Section 122.44(d)(1)(iii).*

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[11N5] See *33 U.S.C. § 1342(p).*

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > General Overview
[HN6] See *40 C.F.R. § 122.44(k).*

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN7] 40 C.F.R. § 122.44(d)(1) does not require that in all cases a permitting authority analyze the particular pollutants in an applicant's storm water discharges. The procedures a permitting agency must engage in in performing the required reasonable potential analysis are set forth in § *122.44(d)(1)(ii)*. By its terms that portion of the regulation does not require any analysis of particular pollutants. Rather, it only requires that the permitting authority use procedures which account for existing controls, the variability of the pollutants in effluent, the sensitivity of species to toxicity, and the dilution of effluent in receiving waters. While a numeric analysis of particular pollutants would in most instances be the most effective means of meeting the requirements of § *122.44(d)(1)(ii)*, that is not the only means of meeting the requirements of the regulation. Storm water consists of a variable stew of pollutants, including toxic pollutants, from a variety of sources which impact a receiving body on a basis which is only as predictable as the weather. An agency reasonably can conclude that an attempt to provide a numeric analysis of pollutants in storm water discharges is not the most effective means of determining whether water quality-based effluent limitations are needed for storm water discharges.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN8] Inherent in the flexibility in *40 C.F.R. § 122.44(d)(1)(ii)* is the conclusion that the best management practices authorized by § *122.44(k)(2)* are in fact water quality-based effluent limitations which a permitting authority may employ when it has found that storm water discharges may cause a receiving body to exceed state water quality standards.

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Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

[HN9] Where, as in the case of storm water discharges, best management practices (BMPs) will be the water quality-based effluent limitations (WQBELs) employed, the study performed under *40 C.F.R. § 122.44(d)(1)(ii)* must at a minimum look to the likely impact of storm water as a whole on the receiving body; however, the BMPs which may be imposed if there is a determination that state water quality standards will be exceeded are usually systemic procedures tailored to decrease the overall risk toxic pollutants from the discharger will reach storm water runoff. Because there is no direct correlation between the type and volume of toxic pollutants in storm water and the BMPs which will be employed to reduce those volumes, a permitting authority can reasonably conclude that in the case of storm water discharges such a detailed numeric analysis is not a cost effective means of performing a reasonable potential analysis.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

[HMO] There is nothing on the face of 33 *U.S.C. § 1342(p)* which suggests that in making express reference to best management practices (BMPs) in particular instances Congress intended to limit use of BMPs in controlling storm water discharges in general. Indeed, there seems to be no rationale which would permit BMPs in the case of municipalities and other nonindustrial storm water discharges but bar them in the case of industrial discharges. Thus, it is reasonable to conclude that in enacting *§ 1342(p),* Congress intended to permit the Environmental Protection Agency and permitting authorities wide discretion in regulating storm water runoff, including the use of BMPs where the agencies believed they were appropriate.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court denied an environmental group's petition for a writ of mandate challenging the issuance of a National Pollutant Discharge Elimination System (NPDES) permit by a regional water quality control board pursuant to the Clean Water Act, *33 U.S.C. § 1251 et seq.* Instead of imposing numeric limits on chemicals in stormwater discharges, the regional board required that the permittee limit its stormwater discharges by employing best management practices. (Superior Court of San Diego County, No. GIC819689, Ronald S. Prager, Judge.)

The Court of Appeal affirmed the judgment, holding that the NPDES permit was not defective for its failure to analyze or impose numeric limits on chemicals in the stormwater discharges. *40 C.F.R. § 122.44(d)(1)* (2005) does not require that in all cases a permitting authority analyze the particular pollutants in an applicant's stormwater discharges when issuing a permit under *33 U.S.C. § 1342(p).* Rather, the permitting authority is required only to use procedures that account for existing controls, the variability of the pollutants in effluent, the sensitivity of species to toxicity, and the dilution of effluent in receiving waters. While a numeric analysis of particular pollutants would in most instances be the most effective means of meeting the requirements of *40 C.F.R. § 122.44(d)(1)(ii),* that is not the only means of meeting the requirements of the regulation. The best management practices authorized by § *122.44(k)(2)* constitute water-quality-based effluent limitations that a permitting authority may employ. (Opinion by Benke, Acting P. J., with Nares and Haller, JJ., concurring.) [*247]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--Discharge Permits.--The federal Water Pollution Control Act *(33 U.S.C. § 1251 et seq.),* commonly known as the Clean Water Act (CWA), is intended to restore and maintain the chemical, physical, and biological integrity of the nation's waters (§ *1251(a)).* Generally, the CWA prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions. The most important of those exceptions is pollution discharge under a valid National Pollutant Discharge Elimination System (NPDES) permit, which can be issued either by the Environmental Protection Agency (EPA), or by an EPA-approved state permit program such as California's. NPDES permits are valid for five years.

(2) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--Discharge Permits--Effluent Limitations.--In general terms, the Clean Water Act (33 *U.S. C. § 1251 et seq.)* and governing regulations require that in addition to determining an applicant's obligations by focusing on what technology can be used on the applicant's discharges, the permitting agency must also focus on the quality of the body of water into which the applicant is discharging pollutants. Thus, under *40 C.F.R. § 122.44(d)(1)(i)* (2005), water-quality-based effluent limitations (WQBEL's) must be imposed on applicants whenever the permitting agency determines that pollutants are or may be discharged at a level which will cause, or have the reasonable potential to cause, or contribute to an excursion above any state water quality standard.

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Under *40 C.F.R. § 122.44(d)(1)(ii),* in making the determination about whether WQBEL's are required, 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.

(3) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--Discharge Permits--Effluent Limitations.--When, after employing the procedures and analysis required by *40 C.F.R. § 122.44(d)(1)(ii)* (2005), a permitting agency determines that an [*248] applicant's discharges have the reasonable potential to cause an in-stream excursion above a state water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant (§ *122.44(d)(1)(iii)).*

(4) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--Discharge Permits--Effluent Limitations--Numeric Analysis.--40 *C.F.R. § 122.44(d)(1)* (2005) does not require that in all cases a permitting authority analyze the particular pollutants in an applicant's stormwater discharges. The procedures a permitting agency must engage in in performing the required reasonable potential analysis are set forth in § *122.44(d)(1)(ii).* By its terms that portion of the regulation does not require any analysis of particular pollutants. Rather, it only requires that the permitting authority use procedures which account for existing controls, the variability of the pollutants in effluent, the sensitivity of species to toxicity, and the dilution of effluent in receiving waters. While a numeric analysis of particular pollutants would in most instances be the most effective means of meeting the requirements of § *122.44(d)(1)(ii),* that is not the only means of meeting the requirements of the regulation. Stormwater consists of a variable stew of pollutants, including toxic pollutants, from a variety of sources which impact a receiving body on a basis which is only as predictable as the weather. An agency reasonably can conclude that an attempt to provide a numeric analysis of pollutants in stormwater discharges is not the most effective means of determining whether water-quality-based effluent limitations are needed for stormwater discharges.

(5) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--Discharge Permits--Effluent Limitations--Best Management Practices.--Inherent in the flexibility in *40 C.F.R. § 122.44(d)(1)(ii)* (2005) is the conclusion that the best management practices (BMP's) authorized by § *122.44(k)(2)* are in fact water-quality-based effluent limitations which a permitting authority may employ when it has found that stormwater discharges may cause a receiving body to exceed state water quality standards. There is nothing on the face of 33 *U.S.C. § 1342(p)* which suggests that in making express reference to BMP's in particular instances Congress intended to limit use of BMP's in controlling stormwater discharges in general. Indeed, there seems to be no rationale that would permit BMP's in the case of municipalities and other nonindustrial stormwater discharges but bar them in the case of industrial discharges. Thus, it is reasonable to conclude that in enacting *33 U.S.C. § 1342(p),* Congress intended to permit the Environmental Protection Agency and permitting authorities wide discretion in regulating stormwater runoff, including the use of BMP's where the agencies believed they were appropriate. [*249]

(6) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--Discharge Permits--Effluent Limitations--Numeric Analysis.--Where, as in the case of stormwater discharges, best management practices (BMP's) will be the water-quality-based effluent limitations employed, the study performed under *40 C.F.R. § 122.44(d)(1)(ii)* (2005) must at a minimum look to the likely impact of stormwater as a whole on the receiving body; however, the BMP's that may be imposed if there is a determination that state water quality standards will be exceeded are usually systemic procedures tailored to decrease the overall risk toxic pollutants from the discharger will reach stormwater runoff. Because there is no direct correlation between the type and volume of toxic pollutants in stormwater and the BMP's that will be employed to reduce those volumes, a permitting authority can reasonably conclude that in the case of stormwater discharges such a detailed numeric analysis is not a cost effective means of performing a reasonable potential analysis. Accordingly, contrary to an environmental group's contention, a regional water quality control board was not required to perform a numeric analysis of each pollutant in stormwater discharges when it issued a discharge permit.

[12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 896.]

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No appearance for Real Parties in Interest and Respondents.

JUDGES: Benke, Acting P. J., with Nares and Haller, JJ., concurring.

OPINION BY: Benke [*250]

OPINION
[**499]

BENKE, Acting P. J.--This is an appeal from an order denying a petition for a writ of mandate. The petition challenged a discharge permit respondent California Regional Water Quality Control Board, San Diego Region (the Regional Board), issued to real parties in interest United States Department of the Navy et al. (Navy). We affirm. Although the Regional Board could have issued a permit that imposed numeric limits on chemicals in the Navy's stormwater discharges into San Diego Bay, under provisions of the Federal Water Pollution Control [***2] Act *(33 U.S.C. § 1251 et seq.),* commonly known as the Clean Water Act (CWA), and applicable regulations, the Regional Board was authorized to instead require that the Navy limit its stormwater chemical discharges by employing so-called "best management practices" (BMP's). Given these circumstances, we reject appellant Divers' Environmental Conservation Organization's (Divers') contention that the permit was defective for its failure to analyze or impose numeric limits on chemicals in the Navy's stormwater discharges.

SUMMARY

In November 2002 the Regional Board issued a National Pollutant Discharge Elimination System (NPDES) permit to the Navy governing discharges from the Naval Base San Diego Complex (the base complex) to San Diego Bay. The permit includes regulations governing stormwater discharges from the base complex to the bay. In particular, the permit requires that the Navy develop and adopt a "Storm Water Pollution Prevention Plan" (the prevention plan), which employs BMP's [2] designed to reduce or eliminate pollutants received into the bay from industrial activities at the base complex. The permit requires that the prevention plan identify [***3] and evaluate sources of pollution [**500] that might affect stormwater discharges from the base complex and then implement site-specific BMP's to reduce or prevent pollutants in the base complex's stormwater discharges. Under the permit the Navy is required [*251] to consider implementing nonstructural BMP's, such as good housekeeping, preventative maintenance, spill response procedures, material handling and storage procedures, employee training programs, recycling procedures, and erosion controls. Where nonstructural BMP's are not effective, the permit requires that the Navy consider structural BMP's, such as structures which cover chemicals and other pollutants, retention ponds, berms and other devices which channel runoff away from pollutant sources and treatment facilities, such as vegetative swales, which reduce pollutants in stormwater discharges.

1 The base complex includes four installations: Naval Station, San Diego; Mission Gorge Recreational Facility; Broadway Complex; and the Naval Medical Center, San Diego.

2 The permit defines BMP's as "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. The BMPs also include treatment measures, operating procedures, and practices to control facility site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. The BMPs may include any type of pollution prevention and pollution control measure necessary to achieve compliance with this Order."

[***4] In addition to the prevention plan and based on the Regional Board's study of water quality, the permit contains a numeric limit on the amount of toxicity in the Navy's total effluent. This limitation requires that test organisms be able to survive in the effluent. The permit also prohibits the discharge of the first quarter-inch of runoff from "high-risk" areas.

The Regional Board's study of water quality noted that levels of copper and zinc in stormwater runoff were matters of concern. In addition to the BMP's and limitation on toxicity in the total effluent discharges, the permit set forth "benchmarks" for copper and zinc. The permit requires the Navy to measure the concentration of copper and zinc in its stormwater discharges and if they exceed the benchmark levels, the Navy must commence an iterative process of reviewing and upgrading its BMP's.

The permit requires that the Navy annually review all BMP's to determine "whether the BMP's are properly designed, implemented, and are effective in reducing and preventing pollutants in storm water discharges." In the event the Regional Board finds the prevention plan does meet the requirements of the permit, the permit requires [***5] the plan be revised to implement additional BMP's.

Before the permit was finally adopted by the Regional Board, Divers' challenged it administratively. Divers' argued that applicable federal regulations required that instead of regulating the Navy's industrial stormwater discharges by way of a BMP's-based prevention plan, the Regional Board was required to set numeric "water qual-

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ity based effluent limitations" (WQBEL's) on the Navy's stormwater discharges and that before setting those [**501] numeric WQBEL's the Navy was required to conduct an analysis of particular pollutants for which there was a reasonable potential the stormwater [*252] discharges would cause or contribute to a violation of any state water quality standard. The Regional Board rejected Divers's argument and adopted the permit without numeric WQBEL's and without performing any analysis of particular pollutants in the Navy's stormwater discharges. Divers' filed an administrative petition with respondent State Water Resources Control Board (State Board). The administrative petition was dismissed on the grounds it failed to raise substantial issues appropriate for review by the State Board.

Divers' filed a petition [***6] for a writ of administrative mandate *(Code Civ. Proc., § 1094.5)* against the State Board and the Regional Board. The trial court dismissed the State Board as a defendant. As against the Regional Board, Divers' alleged the board abused its discretion in failing to conduct an analysis of the reasonable potential impact of particular stormwater pollutants on state water quality standards and in failing to impose numeric WQBEL's on the Navy's stormwater discharges. The trial court denied Divers's petition. Divers' filed a timely notice of appeal.

DISCUSSION

Standard of Review

[F1N1] " [O]ur standard of review must extend appropriate deference to the administrative agencies in this case, and their technical expertise. [Citations.] And while interpretation of a statute or regulation is ultimately a question of law, we must also defer to an administrative agency's interpretation of a statute or regulation involving its area of 'expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision." *(Communities for a Better Environment v. State Water Resources Control Bd. (2003) 109 Cal.App.4th 1089, 1103-1104 [1 Cal. Rptr. 3d 76] [***7] (Communities).)*

II

The Clean Water Act

(1) "In 1972, Congress enacted [HN2] the Federal Water Pollution Control Act *(33 U.S.C. § 1251 et seq.)*, commonly known as the Clean Water Act (CWA). [Citation.] The goal of the CWA is to restore and maintain the chemical, [*253] physical, and biological integrity of the Nation's waters.' *(33 U.S.C. § 1251(a);* see *Arkansas v. Oklahoma (1992) 503 U.S. 91, 101 [117 L. Ed. 2d 239, 112 S. Ct. 1046, 1054] (Arkansas).)* [1] Generally, the CWA 'prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions. [Citation.]' [Citation.] The most important of those exceptions is pollution discharge under a valid NPDES 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.]" *(Communities, supra, 109 Cal.App.4th at p. 1092.)*

Initially, the CWA regulated permittees by requiring them to adopt technology-based effluent limitations. *(33 U.S.C. § 1311(b)(1)(A).)* [***8] These are limitations based on the best available or practical technology for the reduction of water pollution.

After July 1, 1977, permittees were required to not only adopt technology-based effluent limitations but more WQBEL's. "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.]" *(Communities, supra, 109 Cal.App.4th at p. 1093.)*

[HN3] (2) In general terms the CWA and governing regulations require that in addition to determining an applicant's obligations by focusing on what technology can be used on the applicant's discharges, the permitting agency must also focus on the quality of the body of water into which the applicant is discharging pollutants. Thus under *40 Code of Federal Regulations part 122.44(d)(1)(i)* (2005), WQBEL's must be imposed on applicants "whenever the permitting agency determines that pollutants 'are or may be discharged [***9] at a level which will cause, or *have the reasonable potential to cause, or contribute* to an excursion above any State water quality standard ... " *(Communities, supra, 109 Cal.App.4th at p. 1094.)* Under *40 Code of Federal Regulations part 122.44(d)(1)(ii)* [**502] in making the determination about whether WQBEL's are required "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." [*254]

[HN4] (3) When, after employing the procedures and analysis required by *40 Code of Federal Regulations part 122.44(d)(1)(ii)*, a permitting agency determines that an applicant's discharge "has the reasonable potential to cause ... an in-stream excursion above ... a State water

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quality standard for an individual pollutant" the permit must contain effluent limits for that pollutant. *(40 C.F.R. § 122.44(d)(1)(iii)* (2005).)

[***10] As we explain more fully below, this appeal rests in large measure on Divers's contention that *40 Code of Federal Regulations part 122.44(d)(1)* mandated a numeric analysis of individual pollutants in the Navy's stormwater and numeric WQBEL's for pollutants which would cause the bay to exceed applicable water quality standards. As we explain, we do not adopt this interpretation of the regulations. Briefly, as we read the regulations, the analysis which is mandatory in all cases is the more general analysis required by *part 122.44(d)(1)(ii);* only if that analysis results in a finding that discharges are likely to exceed state numeric criteria for a particular pollutant are limits for that pollutant required. However, as we believe is the case here, an analysis of stormwater discharges may satisfy the requirements of *part 122.44(d)(1)(ii)* without any numeric analysis of individual pollutants and hence without giving rise to any obligation to impose specific pollutant limitations under *part 122.44(d)(1)(iii).*

III

Stormwater Discharges

Before 1987 the CWA did not expressly regulate stormwater discharges. [3] In 1987 Congress added [***11] subdivision (p) to section 402 of the CWA [*255] *(33 U.S.C. § 1342(p)),* [4] [**503] which expressly requires NPDES permits [**504] for stormwater discharges either associated with industrial activity or from municipal storm sewer systems. *Section 402(p)(4)(A) of the CWA* gave the administrator of the EPA until 1989 to promulgate regulations governing stormwater discharges from industrial polluters and large municipalities; [*256] applicants for stormwater permits were given until 1990 to make applications and the EPA or state was given until 1991 to issue or deny the permit.

3 Shortly after the CWA was enacted in 1972 "the EPA promulgated regulations exempting most municipal storm sewers from the NPDES permit requirements. [Citations.] 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. [Citation.] The *Costle* court *[(Natural Resources Defense Council, Inc. v. Costle (D. C. Cir. 1977) 568 F.2d 1369)]* 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. [Citation.] 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. [Citation.]

"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. [Citations.]

"Eventually, in 1987, Congress amended the Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. [Citations.]" *(Building Industry Assn. of San Diego County v. State Water Resources Control Bd. (2004) 124 Cal.App.4th 866, 873-874 [22 Cal. Rptr. 3d 128] .)*

4 *Section 402(p) of the CWA* states:

[HN5] "(p) Municipal and industrial storm water discharges

"(1) General rule

"Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 1342 of this title) shall not require a permit under this section for discharges composed entirely of storm water.

"(2) Exceptions

"Paragraph (1) shall not apply with respect to the following storm water 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

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the storm water 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-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.

"(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 storm water 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 storm water 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 storm water 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 storm water 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 storm water management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate."

[***13] In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by way of BMP's, rather than by way of imposing either technology-based or water quality-based numerical limitations. "Unlike discharges of process wastewater where numeric effluent limitations (technology-based and/or water-quality-based) are typically used to control the discharge of pollutants from industrial facilit[y's], the primary permit condition used to address discharges of

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pollutants in a facilities stormwater is a pollution prevention plan. The development and implementation of a site-specific stormwater pollution prevention plan is considered to be the most important requirement of the EPA and State issued stormwater general permits. Site-specific stormwater pollution prevention plans allow permittees to develop and implement best management practices', whether structural or non-structural, that are best suited for controlling stormwater discharges from their industrial facility." (U.S. EPA NPDES Permit Writers' Manual (Dec. 1996) pp. 149-150; see also *U.S. E.P.A. Interim Permitting Strategy Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 43761* [***14] *(Aug. 26, 1996);* and *U.S. E.P.A. Questions and Answers, 61 Fed. Reg. 57425 (Nov. 6, 1996).)* In addition to the rationale it has expressed, the EPA also adopted *40 Code of Federal Regulations part 122.44(k)* (2005) [*257] so that the regulation reads, in part, as follows: [HN6] "[E]ach NPDES permit shall include conditions meeting the following requirements when applicable. [lll] **[1]**

"(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 stormwater 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."

As we explain more fully below, essentially *40 Code of Federal Regulations part 122.44(k)(2) (2005)* allows permitting agencies to treat BMP's as the type of WQBEL's appropriate for control of stormwater discharges.

IV

[***15] *Reasonable Potential Analysis*

In its first argument on appeal Divers' contends that because the Regional Board did not identify and analyze the numeric level of particular pollutants in the Navy's stormwater discharges, it did not perform the reasonable potential analysis required by *40 Code of Federal Regulations part 122.44(d)(1) (2005).*

(4) Contrary to Divers's argument, [I-11\17] *40 Code of Federal Regulations part 122.44(d)(1) (2005)* does not require that in all cases a permitting authority analyze the particular pollutants in an applicant's stormwater discharges. As we have seen, [**505] the procedures a permitting agency must engage in in performing the required reasonable potential analysis are set forth in *40 Code of Federal Regulations part 122.44(d)(1)(ii).* By its terms that portion of the regulation does not require any analysis of particular pollutants. Rather, it only requires that the permitting authority use procedures that account for existing controls, the variability of the pollutants in effluent, the sensitivity of [*258] species to toxicity, and the dilution of effluent in receiving waters. *(40 C.F.R. § 122.44(d)(1)(ii).) [***16]* While, as Divers' points out, a numeric analysis of particular pollutants would in most instances be the most effective means of meeting the requirements of *40 Code of Federal Regulations part 122.44(d)(1)(ii),* that is not the only means of meeting the requirements of the regulation. As the trial court noted, the Regional Board performed a water quality analysis and made extensive findings with respect to the toxicity of copper and zinc in the Navy's discharge and established benchmarks for concentrations of those chemicals in the Navy's discharges. The fact the studies the Regional Board performed did not produce numeric analysis of all the potential pollutants in the Navy's stormwater discharges did not prevent the Regional Board from nonetheless concluding, on the basis of the studies it did perform, that the stormwater discharges had a reasonable potential to cause or contribute to pollution in the bay above state water quality standards. As the Regional Board points out and the EPA has repeatedly noted, stormwater consists of a variable stew of pollutants, including toxic pollutants, from a variety of sources which impact a receiving body on a [***17] basis which is only as predictable as the weather. Given these circumstances the Regional Board could reasonably conclude that any attempt to provide a numeric analysis of pollutants in stormwater discharges was not the most effective means of determining whether WQBEL's were nonetheless needed for the Navy's stormwater discharges.

[HN8] (5) Inherent in the flexibility we find in *40 Code of Federal Regulations part 122.44(d)(1)(ii) (2005)* is our conclusion the BMP'S authorized by *40 Code of Federal Regulations section 122.44(k)(2)* are in fact WQBEL's, which a permitting authority may employ when it has found that stormwater discharges may cause a receiving body to exceed state water quality standards. In reaching this conclusion we are persuaded by the reasoning the court adopted in *Communities,* where the opponent of a permit argued that numeric WQBEL's were required by *40 Code of Federal Regulations part 122.44(d)(1).* "Case law is limited. A few cases seem to assume that a WQBEL is always a number, but the cases do not squarely address and decide the issue. [Citations.] But *Natural Resources Defense Council, Inc. v. Costle (D. C. Cir. 1977) 186 U.S. App. D.C. 147 [568 F.2d 1369]* [***18] *(Costle),* suggests that Congress did not intend

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numeric effluent limitations to be the only limitation on pollution discharges under the CWA, but intended a flexible approach including alternative effluent control strategies. [Citation.]

"We find instructive a prior decision of the State Board, of which we have taken judicial notice: *In the Matter of the Petition of Citizens for a Better Environment, Save San Francisco Bay Association, and Santa Clara Valley* [*259] *Audubon Society* (Order No. WQ 91-03, May 16, 1991) 1991 WL 135460 (Cal.St.Wat.Res.Bd.). In that order, the State Board stated: The petitioners contend that the Clean Water Act, and regulations and court decisions interpreting the Act, require the inclusion of numeric effluent limitations in NPDES permits .... We have reviewed these authorities, and also opinions we have received [**506] from EPA, and conclude that numeric effluent limitations are not legally required. Further, we have determined that the program of prohibitions, source control measures and "best management practices" set forth in the permit constitutes effluent limitations as required by law.' [Citation.]

"The State Board noted the EPA's [***19] regulatory definition of 'effluent limitation' was broad, and noted that the *Costle* decision supported the conclusion that numeric limitations were not required--especially since CWA ' "gives EPA considerable flexibility in framing the permit to achieve a desired reduction in pollutant discharges. ..." ' [Citation.]

"Specifically referring to *section 122.44(d)(1),* the State Board noted the regulation did not contain 'the term "numeric" effluent limitation. ... Concededly, in most cases, the easiest and most effective chemical-specific limitation would be numeric. However, there is no legal requirement that effluent limitations be numeric.' [Citation.] " *(Communities, supra, 109 Cal.App.4th at pp. 1104-1105.)*

[HN9] (6) Where, as in the case of stormwater discharges, BMP's will be the WQBEL's employed, the study performed under *40 Code of Federal Regulations part 122.44(d)(1)(ii) (2005)* must at a minimum look to the likely impact of stormwater as a whole on the receiving body; however, as we have seen, the BMP's that may be imposed if there is a determination that state water quality standards will be exceeded are usually systemic procedures [***20] tailored to decrease the overall risk toxic pollutants from the discharger will reach stormwater runoff. Because there is no direct correlation between the type and volume of toxic pollutants in stormwater and the BMP's that will be employed to reduce those volumes, a permitting authority can reasonably conclude that in the case of stormwater discharges such a detailed numeric analysis is not a cost-effective means of performing a "reasonable potential" analysis. In sum, contrary to Divers' contention, the Regional Board was not required to perform a numeric analysis of each pollutant in the Navy's stormwater discharges. [*260]

V

Feasibility Study

Divers' does not accept our conclusion the Regional Board was authorized to employ BMP's in lieu of numeric WQBEL's. Instead, Divers' argues that in the case of industrial permits, such as the one the Navy obtained, BMP's are permissible only upon a finding by the permitting authority that numeric WQBEL's are not feasible. We do not read *40 Code of Federal Regulations part 122.44(k)(2) (2005)* so narrowly.

As we have noted, *40 Code of Federal Regulations part 122.44(k)(2) (2005)* [***21] gives permitting authorities the power to impose BMP's when they are " [a]uthorized under *section 402(p) of the CWA* for the control of storm water discharges." Divers' contends that section 402(p) of the CWA *(33 U.S.C. § 1342(p))* does not authorize BMP's to control *industrial* stormwater discharges and that the only authority for use of BMP's in an industrial setting is provided by *40 Code of Federal Regulations part 122.44(k)(3),* which permits BMP's when numeric effluent limitations are not feasible.

Divers' fundamentally misinterprets *section 402(p) of the CWA.* Before enactment of *section 402(p)* there was considerable controversy over whether and in what manner stormwater discharges were subject to permitting under the CWA. (See *Building Industry Assn. of San Diego County v. State* [**507] *Water Resources Control Bd., supra, 124 Cal.App.4th at pp. 873-874.)* Enactment of *section 402(p)* made it clear that such discharges were subject to the permitting requirements of the CWA and gave the EPA broad discretion in developing and enforcing rules governing stormwater discharges. In this context BMP's are expressly mentioned in [***22] the statute as one of the limitations a permitting authority may impose in municipal stormwater permits. (See 33 *U.S.C.* § *1342(p)(3)(B)(iii).)* However, neither the absence of an express reference to BMP's in industrial settings nor the illustrative reference with respect to municipal stormwater permits, is very persuasive in determining whether, as the Regional Board and the EPA have found, in enacting *section 402(p)* Congress intended to authorize a wide array of controls over all stormwater discharges, including use of BMP's. In this regard we note the final paragraph of *section 402(p)* contains a further reference to BMP'S and gives the EPA the power to use management practices as a means, among others, of controlling stormwater discharges from sources other than industrial activities and municipalities. This reference to management practices, along with the reference to the use of BMP's in municipal

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settings, show that in enacting *section 402(p)* of the CWA, Congress clearly recognized the role of BMP's as a means of controlling pollutants in stormwater discharges. [*261]

In sum, [HN10] there is nothing on the face of the statute that suggests that in making express [***23] reference to BMP's in particular instances Congress intended to limit use of BMP's in controlling stormwater discharges in general. Indeed, we can discern no rationale which would permit BMP's in the case of municipalities and other nonindustrial stormwater discharges but bar them in the case of industrial discharges. Thus the EPA, along with the Regional Board, could reasonably conclude that in enacting *section 402(p) of the CWA.* Congress intended to permit the EPA and permitting authorities wide discretion in regulating stormwater runoff, including the use of BMP's where the agencies believed they were appropriate.

> 5 As we noted in *Building Industry Assn. of San Diego County v. State Water Resources Control Bd., supra, 124 Cal.App.4th at page 874,* under *section 402(p)(3)(B)(iii)* of the CWA municipalities are only required to reduce "pollutants to the maximum extent practicable," whereas stormwater from industrial discharges must be governed by WQBEL's. Nothing in our opinion in *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* addressed the specific question raised here: whether a permitting authority may use BMP's as a means of limiting industrial stormwater waste.

[***24] Because the Regional Board and EPA's interpretation of *section 402(p) of the CWA* is not at odds with either the language or overall purposes of the statute, we must accept it. (See *Communities, supra, 109 Cal.App.4th at p. 1104.)* Accordingly, read in light of that interpretation of the statute, *40 Code of Federal Regulations part 122.44(k)(2) (2005)* fully authorized the Regional Board to use BMP's as the principal means of limiting the Navy's stormwater discharges.

VI

Benchmarks

As we have noted, under the permit the Navy is required to determine whether levels of zinc and copper in its stormwater discharges reach designated benchmarks, and if they do the Navy is then required to review and amend its BMP's. The benchmarks for these chemicals is higher than applicable water quality [**508] standards for San Diego Bay as set forth in the EPA's California toxic rule (CTR). (See *65 Fed. Reg. 31682-31719 (May 18, 2000).)* Contrary to Divers's argument, the discrepancy between the benchmarks and CTR standards does not invalidate the permit.

The CTR was adopted by the EPA because California failed to adopt final water quality standards [***25] as required by the CWA. (See 33 *U.S.C. § 1313(c); 40 C. F.R. §§ 131.6, 131.12 (2005).)* The standards set forth in the CTR are expressed as numeric criteria for specific toxic pollutants and apply to California's inland waters and enclosed bays and estuaries. Following the holding in *Communities,* it is now clear that in implementing numeric [*262] water quality standards, such as those set forth in the CTR, permitting agencies are not required to do so solely by way of corresponding numeric WQBEL's. *(Communities, supra, 109 Cal.App.4th at pp. 1095, 1104-1105.)* In *Communities* the court stated: "[A] water quality *standard* can be numeric; the question before us is whether a *WQBEL,* which implements a ... numeric water quality standard, *must itself* be numeric." *(Id. at p. 1095.)* The court then went on to answer this question in the negative. *(Id. at pp. 1104-1105.)*

We also note that in adopting the CTR, the EPA took note of the use of BMP's as a means of controlling municipal runoff and stated that the EPA "believes that compliance with water quality standards [***26] through the use of Best Management Practices (BMPs) is appropriate." *(65 Fed. Reg. 31703 (May 18, 2000).)* This reference to BMP's, in the context of adopting the CTR, supports the Regional Board's contention that the CTR does not require it to impose the CTR's numeric water quality *standards* as numeric *limits* on toxic substances in the Navy's stormwater discharges.

In sum the Regional Board was empowered to enforce the CTR by way of the BMP's and benchmarks set forth in the permit. Although the CTR governs the entire bay, including the point of any discharge, in employing benchmarks for further action by the Navy, the permit does not in any manner authorize the Navy to violate the CTR. In this context the benchmarks only serve as a means of ensuring that the Navy will monitor toxicity of its stormwater discharges and take appropriate action in the event it discovers toxicity at designated levels. As the Regional Board points out, it is fully capable of taking enforcement action against the Navy in the event a violation of the CTR occurs.

VII

Delegation of Discretion

Finally, we note that Divers' contends that in allowing the Navy to develop a prevention [***27] plan, including BMP's, the permit delegated too much discretion to the Navy. Our review of the record does not support this contention. The requirements of the prevention plan

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the Navy must develop are set forth in an 18-page attachment to the permit. The attachment sets forth in some detail what the plan must include in terms of identifying sources of pollution, monitoring, recordkeeping and reporting. In particular, we note the permit provides that " [u]pon notification by the Regional Board and/or local agency that the [prevention plan] does not meet one or more of the minimum requirements of this Section," the Navy must revise the plan and implement [*263] additional BMP's that are effective in reducing and eliminating pollutants in its discharges. Thus the permit both carefully limits the [**509] Navy's discretion in developing a prevention plan and provides for meaningful regulatory review of the prevention plan. (See *Environmental Defense Center, Inc. v. U.S. E.P.A. (9th Cir. 2003) 344 F.3d 832, 856.)*

Judgment affirmed. [6]

6 Amicus curiae California Coastkeeper Alliance asked that we take judicial notice of data it prepared and filed with the State Board in other proceedings and after the Regional Board issued the Navy's permit. We deny the request for judicial notice. Appellant's objection to respondents' lodgment of exhibits is overruled.

Nares, J., [***28] and Haller, J., concurred.

A petition for a rehearing was denied December 27, 2006.

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TAB "15"

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LEXSEE

Caution
As of: Jun 23, 2010

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 OF CALIFORNIA, THIRD APPELLATE DISTRICT

11 Cal. App. 4th 1564; 15 Cal. Rptr. 2d 547; 1992 Cal. App. LEXIS 1498; 93 Cal. Daily Op. Service 17; 93 Daily Journal DAR 18

December 30, 1992, Decided

SUBSEQUENT HISTORY: [***1] Review Denied April 1, 1993, Reported at 1993 Cal. LEXIS 1988. Lucas, C.J., Kennard, J., and Arabian, J., are of the opinion the petition should be granted.

PRIOR HISTORY: Superior Court of Sacramento County, No. 352795, Eugene T. Gualco, Judge.

DISPOSITION: The judgment is affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant Riverside Schools sought review from a decision of the Superior Court of Sacramento County (California), which set aside an administrative decision that all local special education costs were state mandated and subject to state reimbursement and, denied appellant's writ of mandate that would have ordered respondent controller to issue a warrant in payment of its claim.

OVERVIEW: Appellant Riverside Schools filed claims seeking state reimbursement for alleged state-mandated costs incurred in connection with special education programs. After lengthy proceedings, the administrative agency decided that all local special education costs were state mandated and subject to reimbursement. On appeal, the lower court issued a writ of administrative mandate directing the agency to reconsider the matter and denying appellant's petition for a writ of mandate that would have directed issuance of a warrant in payment of its claim. The court affirmed the lower court decision and clarified the criteria to be applied by the administrative agency. The court concluded that, all financial assistance or funds under the Rehabilitation Education Act, 29 U.S.C.S. § 794 (1973) or, under the Education of the Handicapped Act, 20 U.S.C.S. § 1400 et seq., were federally mandated and thus, appellant was not entitled to reimbursement from the state for these types of programs.

OUTCOME: The court affirmed the judgment of the lower court, which set aside an administrative decision that all local special education costs were state mandated and subject to state reimbursement because the special education costs were federally mandated and thus, appellant Riverside Schools was not entitled to reimbursement from the state for these types of programs.

CORE TERMS: subvention, educational, reimbursement, mandated, special education, Handicapped Act, federal mandate, handicapped children, local agencies, school district's, handicapped, levels of service, local government's, local school districts, state-mandated, federal government, spending, accommodate, taxing, state mandates, funding, local agency, new programs, appropriation, Rehabilitation Act, state subvention, entity, fiscal year, Handicapped Act, public education

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LexisNexis(R) Headnotes

Education Law > Departments of Education > State Departments of Education > Authority
Education Law > Departments of Education > U.S. Department of Education > Authority
[HN1]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.

Education Law > Students > Right to Education
[HN2]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 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.

Education Law > Departments of Education > U.S. Department of Education > Authority
Education Law > Discrimination > Individuals With Disabilities Education Act > Coverage
Governments > Legislation > Statutory Remedies & Rights
[HN3]Since the 1975 amendment, the Education of the Handicapped Act requires recipient states to demonstrate a policy that assures all handicapped children the right to a free appropriate education, 20 U.S.C.S. § 1412(1). The act is not merely a funding statute; rather, it establishes an enforceable substantive right to a free appropriate public education in recipient states.

Civil Rights Law > Protection of Disabled Persons > Rehabilitation Act > Remedies
Constitutional Law > Supremacy Clause > General Overview
Governments > State & Territorial Governments > Relations With Governments
[HN4]Federal financial assistance is not the only incentive for a state to comply with the Education of the Handicapped Act, 20 U.S.C.S. § 1400 et seq. Congress intends the act to serve as a means by which state and local educational agencies can fulfill their obligations under the equal protection and due process provisions of the Constitution and under § 504 of the Rehabilitation Act of 1973, 29 U.S.C.S. § 794. Accordingly, where it is applicable the act supersedes claims under the Civil Rights Act, 42 U.S.C.S. § 1983 and § 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.

Administrative Law > Judicial Review > General Overview
Constitutional Law > Supremacy Clause > General Overview
Education Law > Discrimination > Individuals With Disabilities Education Act > Enforcement
[HN5]As a result of the exclusive nature of the Education of the Handicapped Act, 20 U.S.C.S. § 1415(e)(2), dissatisfied parties in recipient states must exhaust their administrative remedies under the act before resorting to judicial intervention. This gives local agencies the first opportunity and the primary authority to determine appropriate placement and to resolve disputes. 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. 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.

Constitutional Law > State Constitutional Operation
Education Law > Students > Right to Education
[HN6]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.

Constitutional Law > State Constitutional Operation
Governments > Legislation > Interpretation
[HN7]As a general rule and unless the context clearly requires otherwise, reviewing court 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.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS 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

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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

CALIFORNIA OFFICIAL REPORTS 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.

(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

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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 -- Reimbursement to Local Governments -- Federally Mandated Costs -- Subvention. --Subvention prin-

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ciples 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.

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.

Richard J. Chivaro and Patricia A. Cruz for Cross-defendants and Respondents.

JUDGES: Opinion by Sparks, Acting P. J., with Davis and Scotland, JJ., concurring.

OPINION BY: SPARKS, Acting P. J.

OPINION

[*1570] [**550] This appeal involves a decade-long battle over claims for subvention by two county superintendents of schools [***2] 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.

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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 [***3] 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 [***4] 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.

[**551] The Santa Barbara County Superintendent [***5] 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, 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 [***6] 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 [***7] 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

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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 [***8] 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. [**552] (§ 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) 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 [***9] 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 [***10] 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 [***11] 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). [1] Santa [**553] Barbara's initial claim was for $ 10,500 in state-mandated costs for the 1979-1980 fiscal year.

1 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.

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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. 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.

[***12] 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.) [2]

2 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.

[***13] 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 [***14] 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 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. [3]

3 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

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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.

[***15] [**554] 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 [***16] 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 Riverside [*1577] for its 1980-1981 claim also failed to pass. (Sen. Bill No. 238 [***17] (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 [***18] peremptory writ of mandate directing the Commission on State Mandates to set aside [**555] 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.

[HN1]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].) [***19] 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 agen-

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cies. (*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 [***20] 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.) [4] The act provided that the state would pay each county, city and county, city, and special district the sums 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.)

4 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.)

[***21] (2) [**556] (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. [5] (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].) [***22] [6]

5 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 Legislature. (*Id.* at pp. 1523-1524.)

[***23]

6 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*

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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.)

[***24] 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.)

[**557] 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, [***25] 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.) [7] The appropriations subject [***26] 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 provision of existing services more costly." (Cal. Const., art. XIII B, § 9, subd. (b).)

7 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 [***27] 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: [P] (a) Legislative mandates requested by the local agency affected; [P] (b) Legislation defining a new crime or changing an existing definition of a crime; or [P] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or

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regulations initially implementing legislation enacted prior to January 1, 1975."

Although article XIII B of the state Constitution [***28] 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 [**558] 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].) [***29] 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, [8] 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 say: "Given the variety [***30] 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.*)

8 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.)

[***31] 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].) [***32]

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 [**559] 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

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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 [***33] 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.)

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 [***34] 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, [***35] 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.) [9] 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.

9 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].)

[***36] The Department of Health, Education and Welfare (HEW) promulgated regulations to ensure compliance with section 504 [**560] by educational agencies. [10] 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 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 [***37] 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; *Hal-*

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derman v. Pennhurst State School & Hospital, supra, 446 F.Supp. at p. 1323.)

10 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.)

[***38] (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 [***39] 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 [**561] 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].)

[HN2]States typically do purport to guarantee all of their children the opportunity for a basic [***40] education. In fact, in this state basic education is regarded as a fundamental right. (*Serrano v. Priest, supra*, 18 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. [***41] 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], [***42] 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

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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].) " 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.

11 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.

[***43] [*1587] 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 [**562] states to adopt a goal of providing full educational opportunities to all handicapped children. ([73 L.Ed.2d at pp. 695-696].) The following year Congress amended the Education of the Handicapped Act by enacting the Education for All Handicapped Children Act of 1975. ([73 L.Ed.2d at p. 696].)

[HN3]Since the 1975 amendment, the Education [***44] 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 [***45] 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.) [12]

12 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 [***46] 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).) [13]

13 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 231232 [105 L.Ed.2d 181, 189-191, 109 S.Ct. 2397], and 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.)

[***47] It is also apparent that Congress intended the act to achieve nationwide application: "It is the pur-

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pose 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 children, and to assess and assure the effectiveness of efforts to educate handicapped children." (20 U.S.C. former § 1400(c).)

[**563] 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.) [***48] 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, [HN4]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) [***49] 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].) [14]

14 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).)

[HN5]As a result of the exclusive nature of the Education of the Handicapped [***50] 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 [***51] 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 [**564] 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, [***52] 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.) [15] The court then

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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.)

15 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.)

[***53] 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, [***54] 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* [***55] *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 adequately 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 [**565] 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.) [16]

16 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.*)

[***56] 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 [***57] adopt the requirements of the Education of the Handicapped Act as amended in 1975, our [*1592]

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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 [***58] 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 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 [***59] that so far [**566] 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 [***60] 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 [HN6]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 [***61] [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 [***62] without subvention merely because those costs were imposed upon the state by the federal government. In our

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view the determination whether certain costs were imposed upon a local agency by a federal mandate must focus upon the local agency which [*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 [**567] 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 [***63] 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 [***64] 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 [***65] 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 reconsideration.

Riverside asserts that the California Supreme Court opinion in *City of Sacramento* is not [***66] 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 [**568] with respect to state subvention than with respect to taxing and spending limitations. [HN7] **(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 [***67] taxing and spending limitations. If the costs are imposed by the state then the state must provide a sub-

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vention 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 [***68] 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. (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 [***69] 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 [**569] the first instance [***70] 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.

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TAB "16"

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LexisNexis®

Positive
As of: Jun 02, 2011

HOWARD JARVIS TAXPAYERS ASSOCIATION et al., Plaintiffs and Appellants, v. CITY OF SALINAS et al., Defendants and Respondents.

No. H022665.

COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

98 Cal. App. 4th 1351; 121 Cal. Rptr. 2d 228; 2002 Cal. App. LEXIS 4198; 2002 Cal. Daily Op. Service 4853; 2002 Daily Journal DAR 6161

June 3, 2002, Decided

SUBSEQUENT HISTORY: [*1]** Rehearing Denied July 2, 2002.

Review Denied August 28, 2002, Reported at: *2002 Cal. LEXIS 5938.*

PRIOR HISTORY: Superior Court of Monterey County. Super. Ct. No. M45873. Richard M. Silver, Judge.

DISPOSITION: The judgment is reversed. Costs on appeal are awarded to plaintiffs.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff taxpayers filed a complaint under *Cal. Code Civ. Proc. § 863* to determine the validity of a storm drainage fee imposed by defendant city. The Monterey County Superior Court (California) ruled that the fee did not violate Cal. Const. art. XIIID, § 6. The taxpayers appealed.

OVERVIEW: The city adopted ordinances and a resolution imposing a storm water management utility fee that was imposed on the owners of every developed parcel of land within the city. The storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it was discharged into natural bodies of water. The appellate court found that: (1) Cal. Const. art. XIIID, § 6, required the city to subject the proposed storm drainage fee to a vote by the property owners or the voting residents of the affected area because the fee was not exempt as a water service; and (2) the trial court therefore erred in ruling that Salinas, Cal., Ordinance 2350, 2351, and Salinas, Cal., Resolution 17019 were valid exercises of authority by the city council.

OUTCOME: The judgment of the superior court was reversed.

LexisNexis(R) Headnotes

Governments > State & Territorial Governments > Elections
Tax Law > State & Local Taxes > Real Property Tax > General Overview
[I-IN1] The Right to Vote On Taxes Act, Cal. Const. art. XIIID, § 6, requires notice of a proposed property-related fee or charge and a public hearing. If a majority of the affected owners submit written protests, the fee may not be imposed. Cal. Const. art. XIIID, § 6 (a)(2).

Tax Law > State & Local Taxes > Real Property Tax > General Overview
[I-IN2] See Cal. Const. XIIID, § 6(c).

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Communications Law > Ownership > General Overview
Tax Law > State & Local Taxes > Real Property Tax > General Overview
[HN3] Cal. Const. art. XIIID, § 2(e), defines a "fee" under the article as a levy imposed upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.

Communications Law > Ownership > General Overview
Tax Law > State & Local Taxes > Real Property Tax > General Overview
[HN4] A "property-related service" is a public service having a direct relationship to property ownership. Cal. Const. art. XIIID, § 2(h).

Tax Law > State & Local Taxes > Real Property Tax > General Overview
[HN5] Salinas, Cal., Resolution 17019 plainly establishes a property-related fee for a property-related service, the management of storm water runoff from the "impervious" areas of each parcel in the city. The resolution expressly states that each owner and occupier of a developed lot or parcel of real property within the city, is served by the city's storm drainage facilities and burdens the system to a greater extent than if the property were undeveloped. Those owners and occupiers of developed property should therefore pay for the improvement, operation and maintenance of such facilities. Accordingly, the resolution makes the fee applicable to each and every developed parcel of land within the city.

Tax Law > State & Local Taxes > Real Property Tax > General Overview
[HN6] Cal. Proposition 218, § 5, specifically states that the provisions of the Right to Vote On Taxes Act, Cal. Const. art. XIIID, § 6, shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

Governments > Legislation > Interpretation
[HN7] The appellate court is obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers in a manner that effectuates their purpose in adopting the law.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > General Overview
[HN8] The exception in Cal. Const. art. XIIID, § 6(c), applies to fees for sewer, water, and refuse collection services.

Governments > Legislation > Interpretation
[HN9] The popular, nontechnical sense of sewer service, particularly when placed next to "water" and "refuse collection" services, suggests the service familiar to most households and businesses, the sanitary sewerage system.

Governments > Legislation > Interpretation
Tax Law > State & Local Taxes > Real Property Tax > General Overview
[HN10] Exceptions to a general rule of an enactment must be strictly construed, thereby giving "sewer services" its narrower, more common meaning applicable to sanitary sewerage.

Governments > Legislation > Interpretation
[HN11] Cal. Gov't Code § 53750 is enacted to explain some of the terms used in Cal. Const. art. XIIIC, XIIID, and defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." The average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A taxpayers association filed an action against a city alleging that a storm drainage fee, which was imposed by the city for the management of storm water runoff from the impervious areas of each parcel in the city, was a property-related fee that required voter approval under Prop. 218 *(Cal. Const., art. XIII D, § 6, subd. (c))*. The trial court entered judgment for the city, finding that the fee was not property related and that it was exempt from the voter-approval requirement because it was related to sewer and water services. (Superior Court of Monterey County, No. M45873, Richard M. Silver, Judge.)

The Court of Appeal reversed. The court held that the fee was property related and subject to the voter approval requirement. The resolution made the fee applicable to each and every developed parcel of land within the city. It was not a charge directly based on or measured by use so as to be exempt from the voter requirement. A proportional reduction clause did not alter the nature of the fee as

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property-related. (Opinion by Elia, J., with Premo, Acting P. J., and Mihara, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1a) (1b) Drains and Sewers § 3--Fees and Assessments--Storm Drain Fee--Application of Voter Approval Requirement for Property-related Fees: Property Taxes § 7.8--Special Taxes. --A storm water management fee resolution established a property-related fee for a property-related service, the management of storm water runoff from the impervious areas of each parcel in the city, and thus required voter approval under Prop. 218 *(Cal. Const., art. XIII D, § 6, subd. (c))*. The resolution made the fee applicable to each and every developed parcel of land within the city. It was not a charge directly based on or measured by use, comparable to the metered use of water or the operation of a business, so as to be exempt from the voter requirement. A proportional reduction clause did not alter the nature of the fee as property related. The fee did not come within the exception related to sewer and water services. Giving the constitutional provision the required liberal construction, and applying the principle that exceptions to a general rule of an enactment must be strictly construed, "sewer services" must be given its narrower, more common meaning applicable to sanitary sewerage, thus excluding storm drainage. Also, the average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants and discharges it.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 109C.]

(2) Constitutional Law § 12--Construction--Ordinary Language--Amendments. --Courts are obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers in a manner that effectuates their purpose in adopting the law.

COUNSEL: Timothy J. Morgan; Jonathan M. Coupal and Timothy A. Bittle for Plaintiffs and Appellants.

James C. Sanchez, City Attorney; Richards, Watson & Gershon, Mitchell E. Abbott and Patrick K. Bobko for Defendants and Respondents.

JUDGES: Opinion by Elia, J., with Premo, Acting P. J., and Mihara, J., concurring.

OPINION BY: Elia

OPINION

[*1352] [**229] ELIA, J.

In this "reverse validation" action, plaintiff taxpayers challenged a storm drainage fee imposed by the City of Salinas. Plaintiffs contended that the fee was a "property-related" fee requiring voter approval, pursuant to *California Constitution, article XIII D, section 6, subdivision (c)*, which was added by the passage of Proposition 218. The trial court ruled that the fee did not violate this provision because (1) it was not a property-related fee [*1353] and (2) it met the exemption [***2] for fees for sewer and water services. We disagree with the trial court's conclusion and therefore reverse the order.

BACKGROUND

In an effort to comply with the 1987 amendments to the federal Clean Water Act (*33 U.S. C. § 1251 et seq.; 40 C.F.R. § 122.26(a) et seq. (2001)*), the Salinas City Council took measures to reduce or eliminate pollutants contained in storm water, which was channeled in a drainage system separate from the sanitary and industrial waste systems. On June 1, 1999, the city council enacted two ordinances to fund and maintain the compliance program. These measures, ordinance Nos. 2350 and 2351, added former chapters 29 and 29A, respectively, to the Salinas City Code. Former section 29A-3 allowed the city council to adopt a resolution imposing a "Storm Water Management Utility fee" to finance the improvement of storm and surface water management facilities. The fee would be imposed on "users of the storm water drainage system."

On July 20, 1999, the city council adopted resolution No. 17019, which established rates for the storm and surface water management system. The resolution specifically states: "There is hereby imposed on each [***3] and every developed parcel of land within the City, and the owners and occupiers thereof, jointly and severally, a storm drainage fee." The fee was to be paid annually to the City "by the owner or occupier of each and every developed parcel in the City who shall be presumed to be the primary utility rate payer . . . ." The amount of the fee was to be calculated according to the degree to which the property contributed runoff to the City's drainage facilities. That contribution, in turn, would be measured by the amount of "impervious area" [1] on that parcel.

1 "Impervious Area," according to resolution No. 17019, is "any part of any developed parcel of land that has been modified by the action of persons to reduce the land's natural ability to absorb and hold rainfall. This includes any hard surface area which either prevents or retards the entry of water into the soil mantle as it entered under natural condi-

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tions pre-existent to development, and/or a hard surface area which causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions pre-existent to development."

[***4] [**230] Undeveloped parcels--those that had not been altered from their natural state--were not subject to the storm drainage fee. In addition, developed parcels that maintained their own storm water management facilities or only partially contributed storm or surface water to the City's storm drainage facilities were required to pay in proportion to the amount they did contribute runoff or used the City's treatment services.

[*1354] On September 15, 1999, plaintiffs filed a complaint under *Code of Civil Procedure section 863* to determine the validity of the fee. Plaintiffs alleged that this was a property-related fee that violated *article XIII D, section 6, subdivision (c), of the California Constitution* because it had not been approved by a majority vote of the affected property owners or a two-thirds vote of the residents in the affected area. The trial court, however, found this provision to be inapplicable on two grounds: (1) the fee was not "property related" and (2) it was exempt from the voter-approval requirement because it was "related to" sewer and water services.

2 Plaintiffs are the Howard Jarvis Taxpayers Association, the Monterey Peninsula Taxpayers Association, and two resident property owners.

[***5] *DISCUSSION*

Article XIII D was added to the California Constitution in the November 1996 election with the passage of Proposition 218, the Right to Vote on Taxes Act. Section 6 of article XIII D [HN1] requires notice of a proposed property-related fee or charge and a public hearing. If a majority of the affected owners submit written protests, the fee may not be imposed. (§ 6, subd. (a)(2).) The provision at issue is section 6, subdivision (c) (hereafter section 6(c)), [HN2] which states, in relevant part: "Except for fees or charges for sewer, water, and refuse collection services, no property-related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area."

3 All further unspecified section references are to article XIII D of the California Constitution.

[HN3] Section 2 [***6] defines a "fee" under this article as a levy imposed "upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (§ 2, subd. (e).) [11N4] A "property-related service" is "a public service having a direct relationship to property ownership." (§ 2, subd. (h).) (1a) The City maintains that the storm drainage fee is not a property-related fee, but a "user fee" which the property owner can avoid simply by maintaining a storm water management facility on the property. Because it is possible to own property without being subject to the fee, the City argues this is not a fee imposed "as an incident of property ownership" or "for a property-related service" within the meaning of section 2.

We cannot agree with the City's position. Resolution No. 17019 [11N5] plainly established a property-related fee for a property-related service, the management of storm water runoff from the "impervious" areas of each parcel in the [*1355] City. The resolution [**231] expressly stated that "each owner and occupier of a developed lot or parcel of real property within the City, is served by the City's storm drainage facilities" and burdens the [***7] system to a greater extent than if the property were undeveloped. Those owners and occupiers of developed property "should therefore pay for the improvement, operation and maintenance of such facilities." Accordingly, the resolution makes the fee applicable to *"each and every developed parcel* of land within the City." (Italics added.) This is not a charge directly based on or measured by use, comparable to the metered use of water or the operation of a business, as the City suggests. (See *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal. 4th 830, 838 [102 Cal. Rptr. 2d 719, 14 P.3d 930]* [art. XIII D inapplicable to inspection fee imposed on private landlords; *Howard Jarvis Taxpayers Assn. v. City of Los Angeles (2000) 85 Cal. App. 4th 79 [101 Cal. Rptr. 2d 905]* [water usage rates are not within the scope of art. XIII D].)

The "Proportional Reduction" clause on which the City relies does not alter the nature of the fee as property related. A property owner's operation of a private storm drain system reduces the amount owed to the City to the extent that runoff into the City's system is reduced. The fee [***8] nonetheless is a fee for a public service having a direct relationship to the ownership of developed property. The City's characterization of the proportional reduction as a simple "opt-out" arrangement is misleading, as it suggests the property owner can avoid the fee altogether by declining the service. Furthermore, the reduction is not proportional to the amount of services requested or used by the occupant, but on the physical properties of the parcel. Thus, a parcel with a large "impervious area" (driveway, patio, roof) would be charged more than one consisting of mostly rain-absorbing soil. Single-family residences are assumed to contain, on average, a certain amount of impervious area and are charged $ 18.66 based on that assumption.

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4 According to the public works director, proportional reductions were not anticipated to apply to a large number of people.

Proposition 218 [HN6] specifically stated that " [t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local [***9] government revenue and enhancing taxpayer consent." (Prop. 218, § 5; reprinted at Historical Notes, 2A West's Ann. Cal.Const. (2002 supp.) foll. art. XIII C, p. 38 [hereafter Historical Notes].) (2) [HN7] We are obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers--in this case, the voters of California--in a manner that effectuates their purpose in adopting the law. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal. 3d 208, 244-245 [149 Cal. Rptr. 239, 583 P.2d 1281]; Arden Carmichael, Inc. v. County of Sacramento (2000) 93 Cal. App. 4th 507, 514-515 [113 Cal. Rptr. 2d 248]; Board of Supervisors v. Lonergan (1980) 27 Cal. 3d 855, 863 [167 [*1356] Cal. Rptr. 820, 616 P.2d 802] .)* (lb) To interpret the storm drainage fee as a use-based charge would contravene one of the stated objectives of Proposition 218 by "frustrat[ing] the purposes of voter approval for tax increases." (Prop. 218, § 2.) We must conclude, therefore, that the storm drainage fee "burden[s] landowners *as landowners,"* and is therefore subject [***10] to the voter-approval requirements of article XIII D unless an exception applies. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles, supra, 24 Cal. 4th at p. 842.)*

[**232] *EXCEPTION FOR "SEWER" OR "WATER" SERVICE*

As an alternative ground for its decision, the trial court found that the storm drainage fee was "clearly a fee related to 'sewer' and 'water' services." [11N8] The exception in section 6(c) applies to fees "for sewer, water, and refuse collection services." Thus, the question we must next address is whether the storm drainage fee was a charge *for* sewer service or water service.

The parties diverge in their views as to whether the reach of *California Constitution, article XIII D, section 6(c)* extends to a storm drainage system as well as a sanitary or industrial waste sewer system. The City urges that we rely on the "commonly accepted" meaning of "sewer," noting the broad dictionary definition of this word. sThe City also points to *Public Utilities Code section 230.5* and the Salinas City Code, which describe storm drains as a type of sewer.

5 Webster's Third New International Dictionary, for example, defines "sewer" as "1: a ditch or surface drain 2: an artificial usu. subterranean conduit to carry off water and waste matter (as surface water from rainfall, household waste from sinks or baths, or waste water from industrial works)." (Webster's 3d New Internat. Dict. (1993) p. 2081.) The American Heritage Dictionary also denotes the function of "carrying off sewage or rainwater." (American Heritage College Dict. (3d ed. 1997) p. 1248.) On the other hand, the Random House Dictionary of the English Language (2d ed. 1987) page 1754, does not mention storm or rainwater in defining "sewer" as "an artificial conduit, usually underground, for carrying off waste water and refuse, as in a town or city."

[***11]

6 *Public Utilities Code section 230.5* defines "Sewer system" to encompass all property connected with "sewage collection, treatment, or disposition for sanitary or drainage purposes, including . . . all drains, conduits, and outlets for surface or storm waters, and any and all other works, property or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters." Salinas City Code section 36-2, subdivision (31) defines "storm drain" as "a sewer which carries storm and surface waters and drainage, but which excludes sewage and industrial wastes other than runoff water."

Plaintiffs "do not disagree that storm water is carried off in storm sewers," but they argue that we must look beyond mere definitions of "sewer" to examine the legal meaning in context. Plaintiffs note that the storm water management system here is distinct from the sanitary sewer system and the industrial waste management system. Plaintiffs' position echoes that of the [*1357] Attorney General, who observed that several California [***12] statutes differentiate between management of storm drainage and sewerage systems. *(81 Ops.Cal.Atty.Gen. 104, 106 (1998).)* Relying extensively on the Attorney General's opinion, plaintiffs urge application of a different rule of construction than the plain-meaning rule; they invoke the maxim that "if a statute on a particular subject omits a particular provision, inclusion of that provision in another related statute indicates an intent [that] the provision is not applicable to the statute from which it was omitted." (*In re Marquis D. (1995) 38 Cal. App. 4th 1813, 1827 [46 Cal. Rptr. 2d 198] .)* Thus, while section 5, which addresses assessment procedures, refers to exceptions specifically [**233] for *"sewers,* water, flood control, [and] *drainage systems"* (italics added), the exceptions listed in section 6(c) pertain only to "sewer, water, and refuse collection services." Consequently, in plaintiffs' view, the voters must have intended to exclude drainage systems from the list of exceptions to the voter-approval requirement.

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7 For example, *Government Code section 63010* specifies "storm sewers" in delimiting the scope of " '[d]rainage,' " while separately identifying the facilities and equipment used for " '[s]ewage collection and treatment.' " (*Gov. Code, § 63010, subd. (q)(3), (10).) Government Code section 53750,* part of the Proposition 218 Omnibus Implementation Act, explains that for purposes of articles XIII C and article XIII D " '[d]rainage system' " means "any system of public improvements that is intended to provide for erosion control, landslide abatement, or for other types of water drainage." *Health and Safety Code section 5471* sets forth government power to collect fees for "services and facilities . . . in connection with its water, sanitation, storm drainage, or sewerage system."

[***13] The statutory construction principles invoked by both parties do not assist us. The maxim proffered by plaintiffs, "although useful at times, is no more than a rule of reasonable inference" and cannot control over the lawmakers' intent. (*California Fed. Savings & Loan Assn. v. City of Los Angeles (1995) 11 Cal. 4th 342, 350 [45 Cal. Rptr. 2d 279, 902 P.2d 297]; Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal. 4th 985, 991 [73 Cal. Rptr. 2d 682, 953 P.2d 858] .)* On the other hand, invoking the plain-meaning rule only begs the question of whether the term "sewer services" was intended to encompass the more specific sewerage with which most voters would be expected to be familiar, or all types of systems that use sewers, including storm drainage and industrial waste. [HN9] The popular, nontechnical sense of sewer service, particularly when placed next to "water" and "refuse collection" services, suggests the service familiar to most households and businesses, the sanitary sewerage system.

We conclude that the term "sewer services" is ambiguous in the context of both section 6(c) and Proposition 218 as a whole. We must keep in mind, however, the voters' [***14] intent that the constitutional provision be construed liberally to curb the rise in "excessive" taxes, assessments, and fees exacted [*1358] by local governments without taxpayer consent. (Prop. 218, §§ 2, 5; reprinted at Historical Notes, *supra,* p. 38.) Accordingly, we are compelled to resort to the principle that [HN10] exceptions to a general rule of an enactment must be strictly construed, thereby giving "sewer services" its narrower, more common meaning applicable to sanitary sewerage.[8] (Cf. *Estate of Banerjee (1978)21 Cal. 3d 527, 540 [147 Cal. Rptr. 157, 580 P.2d 657]; City of Lafayette v. East Bay Mun. Utility Dist. (1993) 16 Cal. App. 4th 1005 [20 Cal. Rptr. 2d 658] .)*

8 Sanitary sewerage carries "putrescible waste" from residences and businesses and discharges it into the sanitary sewer line for treatment by the Monterey Regional Water Pollution Control Agency. (Salinas City Code, § 36-2, subd. (26).)

The City itself treats storm drainage differently [***15] from its other sewer systems. The stated purpose of ordinance No. 2350 was to comply with federal law by reducing the amount of pollutants discharged into the storm water, and by preventing the discharge of "non-storm water" into the storm drainage system, which channels storm water into state waterways. According to John Fair, the public works director, the City's storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it is discharged into natural bodies of water.[9] The Salinas City Code contains requirements [**234] addressed specifically to the management of storm water runoff. m (See, e.g., Salinas City Code, §§ 31-802.2, 29-15.)

9 Resolution No. 17019 defined "Storm Drainage Facilities" as "the storm and surface water sewer drainage systems comprised *[sic]* of storm water control facilities and any other natural features [that] store, control, treat and/or convey surface and storm water. The Storm Drainage Facilities shall include all natural and man-made elements used to convey storm water from the first point of impact with the surface of the earth to a suitable receiving body of water or location internal or external to the boundaries of the City. . . ." The "storm drainage system" was defined to include pipes, culverts, streets and gutters, "storm water sewers," ditches, streams, and ponds. (See also Salinas City Code, former § 29-3, subd. (1) [defining "storm drainage system"].)

[***16]

10 Storm water under ordinance No. 2350 includes "stormwater runoff, snowmelt runoff, and surface runoff and drainage." (Salinas City Code, former § 29-3, subd. (dd).)

For similar reasons we cannot subscribe to the City's suggestion that the storm drainage fee is "for . . . water services." *Government Code section 53750,* [HN11] enacted to explain some of the terms used in articles XIII C and XIII D, defines " '[w]ater' " as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (*Gov. Code, § 53750, subd. (m).)* The average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.

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We conclude that article XIII D required the City to subject the proposed storm drainage fee to a vote by the property owners or the voting residents of [*13591 the affected area. The trial court therefore [***171 erred in ruling that ordinance Nos. 2350 and 2351 and Resolution No. 17019 were valid exercises of authority by the city council.

DISPOSITION

The judgment is reversed. Costs on appeal are awarded to plaintiffs.

Premo, Acting P. J., and Mihara, J., concurred.

A petition for a rehearing was denied July 2, 2002, and respondents' petition for review by the Supreme Court was denied August 28, 2002.

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TAB "17"

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1 of 1 DOCUMENT

FRANCES KINLAW et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA et al., Defendants and Respondents

No. S014349

Supreme Court of California

54 Cal. 3d 326; 814 P.2d 1308; 285 Cal. Rptr. 66; 1991 Cal. LEXIS 3745; 91 Cal. Daily Op. Service 7086; 91 Daily Journal DAR 10744

August 30, 1991

PRIOR HISTORY: Superior Court of Alameda County, No. 632120-4, Henry Ramsey, Jr., and Demetrios P. Agretelis, Judges.

DISPOSITION: The judgment of the Court of Appeal is reversed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Medically indigent adults and taxpayers brought an action pursuant to *Code Civ. Proc., § 526a*, against the state, alleging that it had violated *Cal. Const., art. XIII B, § 6* (reimbursement of local governments for state-mandated new programs), by shifting its financial responsibility for the funding of health care for the poor onto the county without providing the necessary funding, and that as a result the state had evaded its constitutionally mandated spending limits. The trial court granted summary judgment for the State after concluding plaintiffs lacked standing to prosecute the action. (Superior Court of Alameda County, No. 632120-4, Henry Ramsey, Jr., and Demetrios P. Agretelis, Judges.) The Court of Appeal, First Dist., Div. Two, Nos. A041426 and A043500, reversed.

The Supreme Court reversed the judgment of the Court of Appeal, holding the administrative procedures established by the Legislature (*Gov. Code, § 17500 et seq.*), which are available only to local agencies and school districts directly affected by a state mandate, were the exclusive means by which the state's obligations under *Cal. Const., art. XIII B, § 6*, were to be determined and enforced. Accordingly, the court held plaintiffs lacked standing to prosecute the action. (Opinion by Baxter, J., with Lucas, C. J., Panelli, Kennard, and Arabian, JJ., concurring. Separate dissenting opinion by Broussard, J., with Mosk, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

(1) State of California § 7--Actions--State-mandated Costs--Reimbursement--Exclusive Statutory Remedy. -- *Gov. Code, § 17500 et seq.*, creates an administrative forum for resolution of state mandate claims arising under *Cal. Const., art. XIII B, § 6*, and establishes procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. The statutory scheme also designates the Sacramento County Superior Court as the venue for judicial actions to declare unfunded mandates invalid. In view of the comprehensive nature of the legislative scheme, and from the expressed intent, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce *Cal. Const., art. XIII B, § 6.*

(2) State of California § 7--Actions--State-mandated Costs--Reimbursement--Private Action to Enforce--Standing. --In an action by medically indigent adults and taxpayers seeking to enforce *Cal. Const., art.*

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XIII B, § 6, for declaratory and injunctive relief requiring the state to reimburse the county for the cost of providing health care services to medically indigent adults who, prior to 1983, had been included in the state Medi-Cal program, the Court of Appeal erred in holding that the existence of an administrative remedy (*Gov. Code, § 17500 et seq.*) by which affected local agencies could enforce their constitutional right under art. XIII B, § 6 to reimbursement for the cost of state mandates did not bar the action. Because the right involved was given by the Constitution to local agencies and school districts, not individuals either as taxpayers or recipients of government benefits and services, the administrative remedy was adequate to fully implement the constitutional provision. The Legislature has the authority to establish procedures for the implementation of local agency rights under art. XIII B, § 6; unless the exercise of a constitutional right is unduly restricted, a court must limit enforcement to the procedures established by the Legislature. Plaintiffs' interest, although pressing, was indirect and did not differ from the interest of the public at large in the financial plight of local government. Relief by way of reinstatement to Medi-Cal pending further action by the state was not a remedy available under the statute, and thus was not one which a court may award.

[See 7 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 112.]

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John K. Van de Kamp and Daniel E. Lungren, Attorneys General, N. Eugene Hill, Assistant Attorney General, Richard M. Frank, Asher Rubin and Carol Hunter, Deputy Attorneys General, for Defendants and Respondents.

JUDGES: Opinion by Baxter, J., with Lucas, C. J., Panelli, Kennard, and Arabian, JJ., concurring. Separate dissenting opinion by Broussard, J., with Mosk, J., concurring.

OPINION BY: BAXTER

OPINION

[*328] [**1309] [***67] Plaintiffs, medically indigent adults and taxpayers, seek to enforce section 6 of article XIII B (hereafter, section 6) of the California Constitution through an action for declaratory and injunctive relief. They invoked the jurisdiction of the superior court as taxpayers pursuant to *Code of Civil Procedure section 526a* and as persons affected by the alleged failure of the state to comply with section 6. The superior court granted summary judgment for defendants State of California and Director of the Department of Health Services, after concluding that plaintiffs lacked standing to prosecute the action. On appeal, the Court of Appeal held that plaintiffs have standing and that the action is not barred by the availability of administrative remedies.

[**1310] [***68] We reverse. The administrative procedures established by the Legislature, which are available only to local agencies and school districts directly affected by a state mandate, are the exclusive means by which the state's obligations under section 6 are to be determined and enforced. Plaintiffs therefore lack standing.

I

State Mandates

Section 6, adopted on November 6, 1979, as part of an initiative measure imposing spending limits on state and local government, also imposes on the state an obligation to reimburse local agencies for the cost of most programs and services which they must provide pursuant to a state mandate if the local agencies were not under a preexisting duty to fund the activity. It provides:

[*329] "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 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."

A complementary provision, section 3 of article XIII B, provides for a shift from the state to the local agency of a portion of the spending or "appropriation" limit of the state when responsibility for funding an activity is shifted to a local agency:

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"The appropriations limit for any fiscal year . . . shall be adjusted as follows: [para.] (a) In the event that the financial responsibility of providing services is transferred, in whole or in part, . . . from one entity of government to another, then for the year in which such transfer becomes effective the appropriations limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount."

II

Plaintiffs' Action

The underlying issue in this action is whether the state is obligated to reimburse the County of Alameda, and shift to Alameda County a concomitant portion of the state's spending limit, for the cost of providing health care services to medically indigent adults who prior to 1983 had been included in the state Medi-Cal program. Assembly Bill No. 799 (1981-1982 Reg. Sess.) (AB 799) (Stats. 1982, ch. 328, p. 1568) removed medically indigent adults from Medi-Cal effective January 1, 1983. At the time section 6 was adopted, the state was funding Medi-Cal coverage for these persons without requiring any county financial contribution.

Plaintiffs initiated this action in the Alameda County Superior Court. They sought relief on their own behalf and on behalf of a class of similarly [*330] situated medically indigent adult residents of Alameda County. The only named defendants were the State of California, the Director of the Department of Health Services, and the County of Alameda.

In the complaint for declaratory and injunctive relief, plaintiffs sought an injunction compelling the state to restore Medi-Cal eligibility to medically indigent adults or to reimburse the County of Alameda for the cost of providing health care to those persons. They also prayed for a declaration that the transfer of responsibility from the state-financed Medi-Cal program to the counties without adequate reimbursement violated the California Constitution. [1]

1 The complaint also sought a declaration that the county was obliged to provide health care services to indigents that were equivalent to those available to nonindigents. This issue is not before us. The County of Alameda aligned itself with plaintiffs in the superior court and did not oppose plaintiffs' effort to enforce section 6.

[**1311] [***69] At the time plaintiffs initiated their action neither Alameda County, nor any other county or local agency, had filed a reimbursement claim with the Commission on State Mandates (Commission). [2]

2 On November 23, 1987, the County of Los Angeles filed a test claim with the Commission. San Bernardino County joined as a test claimant. The Commission ruled against the counties, concluding that no state mandate had been created. The Los Angeles County Superior Court subsequently granted the counties' petition for writ of mandate (*Code Civ. Proc., § 1094.5*), reversing the Commission, on April 27, 1989. (No. C-731033.) An appeal from that judgment is presently pending in the Court of Appeal. (*County of Los Angeles* v. *State of California*, No. B049625.)

Whether viewed as an action seeking restoration of Medi-Cal benefits, one to compel state reimbursement of county costs, or one for declaratory relief, therefore, the action required a determination that the enactment of AB 799 created a state mandate within the contemplation of section 6. Only upon resolution of that issue favorably to plaintiffs would the state have an obligation to reimburse the county for its increased expense and shift a portion of its appropriation limit, or to reinstate Medi-Cal benefits for plaintiffs and the class they seek to represent.

The gravamen of the action is, therefore, enforcement of section 6. [3]

3 Plaintiffs argue that they seek only a declaration that AB 799 created a state mandate and an injunction against the shift of costs until the state decides what action to take. This is inconsistent with the prayer of their complaint which sought an injunction requiring defendants to restore Medi-Cal eligibility to all medically indigent adults until the state paid the cost of full health services for them. It is also unavailing.

An injunction against enforcement of a state mandate is available only after the Legislature fails to include funding in a local government claims bill following a determination by the Commission that a state mandate exists. (*Gov. Code, § 17612.*) Whether plaintiffs seek declaratory relief and/or an injunction, therefore, they are seeking to enforce section 6.

All further statutory references are to the Government Code unless otherwise indicated.

[*331] III

Enforcement of Article XIII B, Section 6

In 1984, almost five years after the adoption of article XIII B, the Legislature enacted comprehensive ad-

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ministrative procedures for resolution of claims arising out of section 6. (*§ 17500.*) The Legislature did so because the absence of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process. The necessity for the legislation was explained in *section 17500*:

"The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under *Section 6 of Article XIII B of the California Constitution.* The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary and, therefore, in order to relieve unnecessary congestion of the judicial system, *it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs.*" (Italics added.)

In part 7 of division 4 of title 2 of the Government Code, "State-Mandated Costs," which commences with *section 17500*, the Legislature created the Commission (*§ 17525*), to adjudicate disputes over the existence of a state mandated program (*§§ 17551, 17557*) and to adopt procedures for submission and adjudication of reimbursement claims (*§ 17553*). The five-member Commission includes the Controller, the Treasurer, the Director of Finance, the Director of the Office of Planning and [**1312] [***70] Research, and a public member experienced in public finance. (*§ 17525.*)

The legislation establishes a test-claim procedure to expeditiously resolve disputes affecting multiple agencies (*§ 17554*), [4] establishes the method of [*332] payment of claims (*§§ 17558, 17561*), and creates reporting procedures which enable the Legislature to budget adequate funds to meet the expense of state mandates (*§§ 17562, 17600, 17612, subd. (a).*)

4 The test claim by the County of Los Angeles was filed prior to that proposed by Alameda County. The Alameda County claim was rejected for that reason. (See *§ 17521.*) Los Angeles County permitted San Bernardino County to join in its claim which the Commission accepted as a test claim intended to resolve the issues the majority elects to address instead in this proceeding. Los Angeles County declined a request from Alameda County that it be included in the test claim because the two counties' systems of documentation were so similar that joining Alameda County would not be of any benefit. Alameda County and these plaintiffs were, of course, free to participate in the Commission hearing on the test claim. (*§ 17555.*)

Pursuant to procedures which the Commission was authorized to establish (*§ 17553*), local agencies [5] and school districts [6] are to file claims for reimbursement of state-mandated costs with the Commission (*§§ 17551, 17560*), and reimbursement is to be provided only through this statutory procedure. (*§§ 17550, 17552.*)

5 "'Local agency' means any city, county, special district, authority, or other political subdivision of the state." (*§ 17518.*)

6 "'School district' means any school district, community college district, or county superintendant of schools." (*§ 17519.*)

The first reimbursement claim filed which alleges that a state mandate has been created under a statute or executive order is treated as a "test claim." (*§ 17521.*) A public hearing must be held promptly on any test claim. At the hearing on a test claim or on any other reimbursement claim, evidence may be presented not only by the claimant, but also by the Department of Finance and any other department or agency potentially affected by the claim. (*§ 17553.*) Any interested organization or individual may participate in the hearing. (*§ 17555.*)

A local agency filing a test claim need not first expend sums to comply with the alleged state mandate, but may base its claim on estimated costs. (*§ 17555.*) The Commission must determine both whether a state mandate exists and, if so, the amount to be reimbursed to local agencies and school districts, adopting "parameters and guidelines" for reimbursement of any claims relating to that statute or executive order. (*§ 17557.*) Procedures for determining whether local agencies have achieved statutorily authorized cost savings and for offsetting these savings against reimbursements are also provided. (*§ 17620 et seq.*) Finally, judicial review of the Commission decision is available through petition for writ of mandate filed pursuant to *Code of Civil Procedure section 1094.5.* (*§ 17559.*)

The legislative scheme is not limited to establishing the claims procedure, however. It also contemplates reporting to the Legislature and to departments and agencies of the state which have responsibilities related to funding state mandates, budget planning, and payment. The parameters and guidelines adopted by the Commission must be submitted to the Controller, who is to pay subsequent claims arising out of the mandate. (*§ 17558.*) Executive orders mandating costs are to be ac-

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companied by an appropriations [*333] bill to cover the costs if the costs are not included in the budget bill, and in subsequent years the costs must be included in the budget bill. (*§ 17561, subds. (a) & (b).*) Regular review of the costs is to be made by the Legislative Analyst, who must report to the Legislature and recommend whether the mandate should be continued. (*§ 17562.*) The Commission is also required to make semiannual reports to the Legislature of the number of mandates found and the estimated reimbursement cost to the state. (*§ 17600.*) The Legislature must then adopt a "local government claims bill." If that bill does not include funding for a state mandate, an affected local agency or school district may seek a declaration from the superior court for the County of Sacramento that the mandate is unenforceable, [**1313] [***71] and an injunction against enforcement. (*§ 17612.*)

Additional procedures, enacted in 1985, create a system of state-mandate apportionments to fund reimbursement. (*§ 17615 et seq.*)

(1) It is apparent from the comprehensive nature of this legislative scheme, and from the Legislature's expressed intent, that the exclusive remedy for a claimed violation of section 6 lies in these procedures. The statutes create an administrative forum for resolution of state mandate claims, and establishes procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. The statutory scheme also designates the Sacramento County Superior Court as the venue for judicial actions to declare unfunded mandates invalid (*§ 17612*).

The legislative intent is clearly stated in *section 17500*: "It is the intent of the Legislature in enacting this part to provide for the implementation of *Section 6 of Article XIII B of the California Constitution* and to consolidate the procedures for reimbursement of statutes specified in the Revenue and Taxation Code with those identified in the Constitution. . . ." And *section 17550* states: "Reimbursement of local agencies and school districts for costs mandated by the state shall be provided pursuant to this chapter."

Finally, *section 17552* provides: "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 XIII B of the California Constitution.*" (Italics added.)

In short, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce section 6.

[*334] IV

Exclusivity

(2) Plaintiffs argued, and the Court of Appeal agreed, that the existence of an administrative remedy by which affected local agencies could enforce their right under section 6 to reimbursement for the cost of state mandates did not bar this action because the administrative remedy is available only to local agencies and school districts.

The Court of Appeal recognized that the decision of the County of Alameda, which had not filed a claim for reimbursement at the time the complaint was filed, was a discretionary decision which plaintiffs could not challenge. (*Dunn v. Long Beach L. & W. Co. (1896) 114 Cal. 605, 609, 610-611 [46 P. 607]*; *Silver v. Watson (1972) 26 Cal.App.3d 905, 909 [103 Cal.Rptr. 576]*; *Whitson v. City of Long Beach (1962) 200 Cal.App.2d 486, 506 [19 Cal.Rptr. 668]*; *Elliott v. Superior Court (1960) 180 Cal.App.2d 894, 897 [5 Cal.Rptr. 116].*) The court concluded, however, that public policy and practical necessity required that plaintiffs have a remedy for enforcement of section 6 independent of the statutory procedure.

The right involved, however, is a right given by the Constitution to local agencies, not individuals either as taxpayers or recipients of government benefits and services. Section 6 provides that the "state shall provide a subvention of funds *to reimburse . . . local governments* . . . ." (Italics added.) The administrative remedy created by the Legislature is adequate to fully implement section 6. That Alameda County did not file a reimbursement claim does not establish that the enforcement remedy is inadequate. Any of the 58 counties was free to file a claim, and other counties did so. The test claim is now before the Court of Appeal. The administrative procedure has operated as intended.

The Legislature has the authority to establish procedures for the implementation of local agency rights under section 6. Unless the exercise of a constitutional right is unduly restricted, the court must limit enforcement to the procedures established by the Legislature. (*People v.* [**1314] [***72] *Western Air Lines, Inc. (1954) 42 Cal.2d 621, 637 [268 P.2d 723]*; *Chesney v. Byram (1940) 15 Cal.2d 460, 463 [101 P.2d 1106]*; *County of Contra Costa v. State of California (1986) 177 Cal.App.3d 62, 75 [222 Cal.Rptr. 750].*)

Plaintiffs' argument that they must be permitted to enforce section 6 as individuals because their right to adequate health care services has been compromised by the failure of the state to reimburse the county for the cost [*335] of services to medically indigent adults is unpersuasive. Plaintiffs' interest, although pressing, is indirect and does not differ from the interest of the public at large in the financial plight of local government. Al-

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though the basis for the claim that the state must reimburse the county for its costs of providing the care that was formerly available to plaintiffs under Medi-Cal is that AB 799 created a state mandate, plaintiffs have no right to have any reimbursement expended for health care services of any kind. Nothing in article XIII B or other provision of law controls the county's expenditure of the funds plaintiffs claim must be paid to the county. To the contrary, *section 17563* gives the local agency complete discretion in the expenditure of funds received pursuant to section 6, providing: "Any funds received by a local agency or school district pursuant to the provisions of this chapter may be used for any public purpose."

The relief plaintiffs seek in their prayer for state reimbursement of county expenses is, in the end, a reallocation of general revenues between the state and the county. Neither public policy nor practical necessity compels creation of a judicial remedy by which individuals may enforce the right of the county to such revenues. The Legislature has established a procedure by which the county may claim any revenues to which it believes it is entitled under section 6. That test-claim statute expressly provides that not only the claimant, but also "any other interested organization or individual may participate" in the hearing before the Commission (*§ 17555*) at which the right to reimbursement of the costs of such mandate is to be determined. Procedures for receiving any claims must "provide for presentation of evidence by the claimant, the Department of Finance and any other affected department or agency, *and any other interested person.*" (*§ 17553*. Italics added.) Neither the county nor an interested individual is without an opportunity to be heard on these questions. These procedures are both adequate and exclusive. [7]

> 7 Plaintiffs' argument, that the Legislature's failure to make provision for individual enforcement of section 6 before the Commission demonstrates an intent to permit legal actions, is not persuasive. The legislative statement of intent to relegate all mandate disputes to the Commission is clear. A more likely explanation of the failure to provide for test cases to be initiated by individuals lies in recognition that (1) because section 6 creates rights only in governmental entities, individuals lack sufficient beneficial interest in either the receipt or expenditure of reimbursement funds to accord them standing; and (2) the number of local agencies having a direct interest in obtaining reimbursement is large enough to ensure that citizen interests will be adequately represented.

The alternative relief plaintiffs seek -- reinstatement to Medi-Cal pending further action by the state -- is not a remedy available under the statute, and thus is not one which this court may award. The remedy for the failure to fund a program is a declaration that the mandate is unenforceable. That relief is available only after the Commission has determined that a mandate exists **[*336]** and the Legislature has failed to include the cost in a local government claims bill, and only on petition by the county. (*§ 17612.*) [8]

> 8 Plaintiffs are not without a remedy if the county fails to provide adequate health care, however. They may enforce the obligation imposed on the county by *Welfare and Institutions Code sections 17000* and *17001*, and by judicial action. (See, e.g., *Mooney v. Pickett (1971) 4 Cal.3d 669 [94 Cal.Rptr. 279, 483 P.2d 1231].*)

Moreover, the judicial remedy approved by the Court of Appeal permits resolution of the issues raised in a state mandate claim without the participation of those officers and individuals the Legislature deems necessary to a full and fair exposition and resolution of the issues. Neither the Controller nor the Director of Finance **[**1315]** **[***73]** was named a defendant in this action. The Treasurer and the Director of the Office of Planning and Research did not participate. All of these officers would have been involved in determining the question as members of the Commission, as would the public member of the Commission. The judicial procedures were not equivalent to the public hearing required on test claims before the Commission by *section 17555*. Therefore, other affected departments, organizations, and individuals had no opportunity to be heard. [9]

> 9 For this reason, it would be inappropriate to address the merits of plaintiff's claim in this proceeding. (Cf. *Dix v. Superior Court (1991) 53 Cal.3d 442 [279 Cal.Rptr. 834, 807 P.2d 1063].*) Unlike the dissent, we do not assume that in representing the state in this proceeding, the Attorney General necessarily represented the interests and views of these officials.

Finally, since a determination that a state mandate has been created in a judicial proceeding rather than one before the Commission does not trigger the procedures for creating parameters and guidelines for payment of claims, or for inclusion of estimated costs in the state budget, there is no source of funds available for compliance with the judicial decision other than the appropriations for the Department of Health Services. Payment from those funds can only be at the expense of another program which the department is obligated to fund. No public policy supports, let alone requires, this result.

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The superior court acted properly in dismissing this action.

The judgment of the Court of Appeal is reversed.

DISSENT BY: BROUSSARD

DISSENT

ROUSSARD, J.

I dissent. For nine years the Legislature has defied the mandate of article XIII B of the California Constitution (hereafter article XIII B). Having transferred responsibility for the care of medically indigent adults (MIA's) to county governments, the Legislature has failed to provide the counties with sufficient money to meet this responsibility, yet the [*337] Legislature computes its own appropriations limit as if it fully funded the program. The majority, however, declines to remedy this violation because, it says, the persons most directly harmed by the violation -- the medically indigent who are denied adequate health care -- have no standing to raise the matter. I disagree, and will demonstrate that (1) plaintiffs have standing as citizens to seek a declaratory judgment to determine whether the state is complying with its constitutional duty under article XIII B; (2) the creation of an administrative remedy whereby counties and local districts can enforce article XIII B does not deprive the citizenry of its own independent right to enforce that provision; and (3) even if plaintiffs lacked standing, our recent decision in *Dix v. Superior Court (1991) 53 Cal.3d 442 [279 Cal.Rptr. 834, 807 P.2d 1063]* permits us to reach and resolve any significant issue decided by the Court of Appeal and fully briefed and argued here. I conclude that we should reach the merits of the appeal.

On the merits, I conclude that the state has not complied with its constitutional obligation under article XIII B. To prevent the state from avoiding the spending limits imposed by article XIII B, section 6 of that article prohibits the state from transferring previously state-financed programs to local governments without providing sufficient funds to meet those burdens. In 1982, however, the state excluded the medically indigent from its Medi-Cal program, thus shifting the responsibility for such care to the counties. Subvention funds provided by the state were inadequate to reimburse the counties for this responsibility, and became less adequate every year. At the same time, the state continued to compute its spending limit as if it fully financed the entire program. The result is exactly what article XIII B was intended to prevent: the state enjoys a falsely inflated spending limit; the county is compelled to assume a burden it cannot afford; and the medically indigent receive inadequate health care.

I. Facts and Procedural History

Plaintiffs -- citizens, taxpayers, and persons in need of medical care -- allege that [**1316] [***74] the state has shifted its financial responsibility for the funding of health care for MIA's to the counties without providing the necessary funding and without any agreement transferring appropriation limits, and that as a result the state is violating article XIII B. Plaintiffs further allege they and the class they claim to represent cannot, consequently, obtain adequate health care from the County of Alameda, which lacks the state funding to provide it. The county, although nominally a defendant, aligned [*338] itself with plaintiffs. It admits the inadequacy of its program to provide medical care for MIA's but blames the absence of state subvention funds. [1]

1 The majority states that "Plaintiffs are not without a remedy if the county fails to provide adequate health care . . . . They may enforce the obligation imposed on the county by *Welfare and Institutions Code sections 17000* and *17001*, and by judicial action." (Maj. opn., *ante*, p. 336, fn. 8)

The majority fails to note that plaintiffs have already tried this remedy, and met with the response that, owing to the state's inadequate subvention funds, the county cannot afford to provide adequate health care.

At hearings below, plaintiffs presented uncontradicted evidence regarding the enormous impact of these statutory changes upon the finances and population of Alameda County. That county now spends about $ 40 million annually on health care for MIA's, of which the state reimburses about half. Thus, since article XIII B became effective, Alameda County's obligation for the health care of MIA's has risen from zero to more than $ 20 million per year. The county has inadequate funds to discharge its new obligation for the health care of MIA's; as a result, according to the Court of Appeal, uncontested evidence from medical experts presented below shows that, "The delivery of health care to the indigent in Alameda County is in a state of shambles; the crisis cannot be overstated . . . ." "Because of inadequate state funding, some Alameda County residents are dying, and many others are suffering serious diseases and disabilities, because they cannot obtain adequate access to the medical care they need . . . ." "The system is clogged to the breaking point. . . . All community clinics . . . are turning away patients." "The funding received by the county from the state for MIAs does not approach the actual cost of providing health care to the MIAs. As a consequence, inadequate resources available to county health services jeopardize the lives and health of thousands of people . . . ."

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The trial court acknowledged that plaintiffs had shown irreparable injury, but denied their request for a preliminary injunction on the ground that they could not prevail in the action. It then granted the state's motion for summary judgment. Plaintiffs appealed from both decisions of the trial court.

The Court of Appeal consolidated the two appeals and reversed the rulings below. It concluded that plaintiffs had standing to bring this action to enforce the constitutional spending limit of article XIII B, and that the action is not barred by the existence of administrative remedies available to counties. It then held that the shift of a portion of the cost of medical indigent care by the state to Alameda County constituted a state-mandated new program under the provisions of article XIII B, which triggered that article's provisions requiring a subvention of funds by the state to reimburse Alameda [*339] County for the costs of such program it was required to assume. The judgments denying a preliminary injunction and granting summary judgment for defendants were reversed. We granted review.

II. Standing

A. *Plaintiffs have standing to bring an action for declaratory relief to determine whether the state is complying with article XIII B.*

Plaintiffs first claim standing as taxpayers under *Code of Civil Procedure section 526a*, which provides that: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county . . . , may be maintained [**1317] [***75] against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. . . ." As in *Common Cause v. Board of Supervisors (1989) 49 Cal.3d 432, 439 [261 Cal.Rptr. 574, 777 P.2d 610]*, however, it is "unnecessary to reach the question whether plaintiffs have standing to seek an injunction under *Code of Civil Procedure section 526a*, because there is an independent basis for permitting them to proceed." Plaintiffs here seek a declaratory judgment that the transfer of responsibility for MIA's from the state to the counties without adequate reimbursement violates article XIII B. A declaratory judgment that the state has breached its duty is essentially equivalent to an action in mandate to compel the state to perform its duty. (See *California Assn. of Psychology Providers v. Rank (1990) 51 Cal.3d 1, 9 [270 Cal.Rptr. 796, 793 P.2d 2]*, which said that a declaratory judgment establishing that the state has a duty to act provides relief equivalent to mandamus, and makes issuance of the writ unnecessary.) Plaintiffs further seek a mandatory injunction requiring that the state pay the health costs of MIA's under the Medi-Cal program until the state meets its obligations under article XIII B. The majority similarly characterize plaintiffs' action as one comparable to mandamus brought to enforce section 6 of article XIII B.

We should therefore look for guidance to cases that discuss the standing of a party seeking a writ of mandate to compel a public official to perform his or her duty. [2] Such an action may be brought by any person "beneficially interested" in the issuance of the writ. (*Code Civ. Proc., § 1086.*) In *Carsten* [*340] *v. Psychology Examining Com. (1980) 27 Cal.3d 793, 796 [166 Cal.Rptr. 844, 614 P.2d 276]*, we explained that the "requirement that a petitioner be 'beneficially interested' has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." We quoted from Professor Davis, who said, "One who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable." (Pp. 796-797, quoting 3 Davis, Administrative Law Treatise (1st ed. 1958) p. 291.) Cases applying this standard include *Stocks v. City of Irvine (1981) 114 Cal.App.3d 520 [170 Cal.Rptr. 724]*, which held that low-income residents of Los Angeles had standing to challenge exclusionary zoning laws of suburban communities which prevented the plaintiffs from moving there; *Taschner* v. *City Council, supra*, 31 Cal.App.3d 48, which held that a property owner has standing to challenge an ordinance which may limit development of the owner's property; and *Felt v. Waughop (1924) 193 Cal. 498 [225 P. 862]*, which held that a city voter has standing to compel the city clerk to certify a correct list of candidates for municipal office. Other cases illustrate the limitation on standing: *Carsten v. Psychology Examining Com., supra, 27 Cal.3d 793*, held that a member of the committee who was neither seeking a license nor in danger of losing one had no standing to challenge [**1318] [***76] a change in the method of computing the passing score on the licensing examination; *Parker v. Bowron (1953) 40 Cal.2d 344 [254 P.2d 6]* held that a union official who was neither a city employee nor a city resident had no standing to compel a city to follow a prevailing wage ordinance; and *Dunbar v. Governing Board (1969) 275 Cal.App.2d 14 [79 Cal.Rptr. 662]* held that a member of a student organization had standing to challenge a college district's rule barring a speaker from campus, but persons who merely planned to hear him speak did not.

2 It is of no importance that plaintiffs did not request issuance of a writ of mandate. In *Taschner v. City Council (1973) 31 Cal.App.3d 48, 56 [107 Cal.Rptr. 214]* (overruled on other

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grounds in *Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal.3d 582, 596 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038]*), the court said that "[a]s against a general demurrer, a complaint for declaratory relief may be treated as a petition for mandate [citations], and where a complaint for declaratory relief alleges facts sufficient to entitle plaintiff to mandate, it is error to sustain a general demurrer without leave to amend."

In the present case, the trial court ruled on a motion for summary judgment, but based that ruling not on the evidentiary record (which supported plaintiffs' showing of irreparable injury) but on the issues as framed by the pleadings. This is essentially equivalent to a ruling on demurrer, and a judgment denying standing could not be sustained on the narrow ground that plaintiffs asked for the wrong form of relief without giving them an opportunity to correct the defect. (See *Residents of Beverly Glen, Inc. v. City of Los Angeles (1973) 34 Cal.App.3d 117, 127-128 [109 Cal.Rptr. 724]*.)

No one questions that plaintiffs are affected by the lack of funds to provide care for MIA's. Plaintiffs, except for plaintiff Rabinowitz, are not merely citizens and taxpayers; they are medically indigent persons living in Alameda County who have been and will be deprived of proper medical care if funding of MIA programs is inadequate. Like the other plaintiffs here, [*341] plaintiff Kinlaw, a 60-year-old woman with diabetes and hypertension, has no health insurance. Plaintiff Spier has a chronic back condition; inadequate funding has prevented him from obtaining necessary diagnostic procedures and physiotherapy. Plaintiff Tsosie requires medication for allergies and arthritis, and claims that because of inadequate funding she cannot obtain proper treatment. Plaintiff King, an epileptic, says she was unable to obtain medication from county clinics, suffered seizures, and had to go to a hospital. Plaintiff "Doe" asserts that when he tried to obtain treatment for AIDS-related symptoms, he had to wait four to five hours for an appointment and each time was seen by a different doctor. All of these are people personally dependent upon the quality of care of Alameda County's MIA program; most have experienced inadequate care because the program was underfunded, and all can anticipate future deficiencies in care if the state continues its refusal to fund the program fully.

The majority, however, argues that the county has no duty to use additional subvention funds for the care of MIA's because under *Government Code section 17563* "[a]ny funds received by a local agency . . . pursuant to the provisions of this chapter may be used for any public purpose." Since the county may use the funds for other purposes, it concludes that MIA's have no special interest in the subvention. [3]

3 The majority's argument assumes that the state will comply with a judgment for plaintiffs by providing increased subvention funds. If the state were instead to comply by restoring Medi-Cal coverage for MIA's, or some other method of taking responsibility for their health needs, plaintiffs would benefit directly.

This argument would be sound if the county were already meeting its obligations to MIA's under *Welfare and Institutions Code section 17000*. If that were the case, the county could use the subvention funds as it chose, and plaintiffs would have no more interest in the matter than any other county resident or taxpayer. But such is not the case at bar. Plaintiffs here allege that the county is not complying with its duty, mandated by *Welfare and Institutions Code section 17000*, to provide health care for the medically indigent; the county admits its failure but pleads lack of funds. Once the county receives adequate funds, it must perform its statutory duty under *section 17000 of the Welfare and Institutions Code*. If it refused, an action in mandamus would lie to compel performance. (See *Mooney v. Pickett (1971) 4 Cal.3d 669 [94 Cal.Rptr. 279, 483 P.2d 1231]*.) In fact, the county has made clear throughout this litigation that it would use the subvention funds to provide care for MIA's. The majority's conclusion that plaintiffs lack a special, beneficial interest in the state's compliance with article XIII B ignores the practical realities of health care funding.

Moreover, we have recognized an exception to the rule that a plaintiff must be beneficially interested. "Where the question is one of public right [*342] and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question [**1319] [***77] enforced." (*Bd. of Soc. Welfare v. County of L. A. (1945) 27 Cal.2d 98, 100-101 [162 P.2d 627]*.) We explained in *Green v. Obledo (1981) 29 Cal.3d 126, 144 [172 Cal.Rptr. 206, 624 P.2d 256]*, that this "exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right. . . . It has often been invoked by California courts. [Citations.]"

Green v. *Obledo* presents a close analogy to the present case. Plaintiffs there filed suit to challenge whether a state welfare regulation limiting deductibility of work-related expenses in determining eligibility for

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aid to families with dependent children (AFDC) assistance complied with federal requirements. Defendants claimed that plaintiffs were personally affected only by a portion of the regulation, and had no standing to challenge the balance of the regulation. We replied that "[t]here can be no question that the proper calculation of AFDC benefits is a matter of public right [citation], and plaintiffs herein are certainly citizens seeking to procure the enforcement of a public duty. [Citation.] It follows that plaintiffs have standing to seek a writ of mandate commanding defendants to cease enforcing [the regulation] in its entirety." (*29 Cal.3d at p. 145.*)

We again invoked the exception to the requirement for a beneficial interest in *Common Cause v. Board of Supervisors, supra, 49 Cal.3d 432.* Plaintiffs in that case sought to compel the county to deputize employees to register voters. We quoted *Green v. Obledo, supra, 29 Cal.3d 126, 144*, and concluded that "[t]he question in this case involves a public right to voter outreach programs, and plaintiffs have standing as citizens to seek its vindication." (*49 Cal.3d at p. 439.*) We should reach the same conclusion here.

B. *Government Code sections 17500- 17630 do not create an exclusive remedy which bars citizen-plaintiffs from enforcing article XIII B.*

Four years after the enactment of article XIII B, the Legislature enacted *Government Code sections 17500 through 17630* to implement article XIII B, section 6. These statutes create a quasi-judicial body called the Commission on State Mandates, consisting of the state Controller, state Treasurer, state Director of Finance, state Director of the Office of Planning and Research, and one public member. The commission has authority to "hear and decide upon [any] claim" by a local government that it "is entitled to be reimbursed by the state" for costs under article XIII B. (*Gov. Code, § 17551,* [*343] *subd. (a).*) Its decisions are subject to review by an action for administrative mandamus in the superior court. (See *Gov. Code, § 17559.*)

The majority maintains that a proceeding before the Commission on State Mandates is the exclusive means for enforcement of article XIII B, and since that remedy is expressly limited to claims by local agencies or school districts (*Gov. Code, § 17552*), plaintiffs lack standing to enforce the constitutional provision. [4] I disagree, for two reasons.

4 The majority emphasizes the statement of purpose of *Government Code section 17500*: "The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under *section 6 of article XIII B of the California Constitution.* The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary, and, therefore, in order to relieve unnecessary congestion of the judicial system, it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs."

The "existing system" to which *Government Code section 17500* referred was the Property Tax Relief Act of 1972 (*Rev. & Tax. Code, §§ 2201- 2327*), which authorized local agencies and school boards to request reimbursement from the state Controller. Apparently dissatisfied with this remedy, the agencies and boards were bypassing the Controller and bringing actions directly in the courts. (See, e.g., *County of Contra Costa v. State of California (1986) 177 Cal.App.3d 62 [222 Cal.Rptr. 750].*) The legislative declaration refers to this phenomena. It does not discuss suits by individuals.

[**1320] [***78] First, *Government Code section 17552* expressly addressed the question of exclusivity of remedy, and provided that "[t]his 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 XIII B of the California Constitution.*" (Italics added.) The Legislature was aware that local agencies and school districts were not the only parties concerned with state mandates, for in *Government Code section 17555* it provided that "any other interested organization or individual may participate" in the commission hearing. Under these circumstances the Legislature's choice of words -- "the sole and exclusive procedure by which a local agency or school district may claim reimbursement" -- limits the procedural rights of those claimants only, and does not affect rights of other persons. *Expressio unius est exclusio alterius* -- "the expression of certain things in a statute necessarily involves exclusion of other things not expressed." (*Henderson v. Mann Theatres Corp. (1976) 65 Cal.App.3d 397, 403 [135 Cal.Rptr. 266].*)

The case is similar in this respect to *Common Cause v. Board of Supervisors, supra, 49 Cal.3d 432.* Here defendants contend that the counties' right of action under *Government Code sections 17551- 17552* impliedly ex-

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cludes [*344] any citizen's remedy; in *Common Cause* defendants claimed the Attorney General's right of action under *Elections Code section 304* impliedly excluded any citizen's remedy. We replied that "the plain language of *section 304* contains no limitation on the right of private citizens to sue to enforce the section. To infer such a limitation would contradict our long-standing approval of citizen actions to require governmental officials to follow the law, expressed in our expansive interpretation of taxpayer standing [citations], and our recognition of a 'public interest' exception to the requirement that a petitioner for writ of mandate have a personal beneficial interest in the proceedings [citations]." (*49 Cal.3d at p. 440*, fn. omitted.) Likewise in this case the plain language of *Government Code sections 17551-17552* contain no limitation on the right of private citizens, and to infer such a right would contradict our long-standing approval of citizen actions to enforce public duties.

The United States Supreme Court reached a similar conclusion in *Rosado v. Wyman (1970) 397 U.S. 397 [25 L.Ed.2d 442, 90 S.Ct. 1207]*. In that case New York welfare recipients sought a ruling that New York had violated federal law by failing to make cost-of-living adjustments to welfare grants. The state replied that the statute giving the Department of Health, Education and Welfare authority to cut off federal funds to noncomplying states constituted an exclusive remedy. The court rejected the contention, saying that "[w]e are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." (P. 420 [*25 L.Ed.2d at p. 460*].) The principle is clear: the persons actually harmed by illegal state action, not only some administrator who has no personal stake in the matter, should have standing to challenge that action.

Second, article XIII B was enacted to protect taxpayers, not governments. Section 1 and 2 of article XIII B establish strict limits on state and local expenditures, and require the refund of all taxes collected in excess of those limits. Section 6 of article XIII B prevents the state from evading those limits and burdening county taxpayers by transferring financial responsibility for a program to a county, yet counting the cost of that program toward the limit on state expenditures.

These provisions demonstrate a profound distrust of government and a disdain for excessive government spending. An exclusive remedy under which only governments can enforce article XIII B, and the taxpayer-citizen can appear only if a government [**1321] [***79] has first instituted proceedings, is inconsistent with the ethos that led to article XIII B. The drafters of article XIII B and the voters who enacted it would not accept that the state Legislature -- the principal body regulated by the article -- could establish a procedure [*345] under which the only way the article can be enforced is for local governmental bodies to initiate proceedings before a commission composed largely of state financial officials.

One obvious reason is that in the never-ending attempts of state and local government to obtain a larger proportionate share of available tax revenues, the state has the power to coerce local governments into forgoing their rights to enforce article XIII B. An example is the Brown-Presley Trial Court Funding Act (*Gov. Code, § 77000 et seq.*), which provides that the county's acceptance of funds for court financing may, in the discretion of the Governor, be deemed a waiver of the counties' rights to proceed before the commission on all claims for reimbursement for state-mandated local programs which existed and were not filed prior to passage of the trial funding legislation. [5] The ability of state government by financial threat or inducement to persuade counties to waive their right of action before the commission renders the counties' right of action inadequate to protect the public interest in the enforcement of article XIII B.

5 "(a) The initial decision by a county to opt into the system pursuant to Section 77300 *shall constitute a waiver of all claims for reimbursement for state-mandated local programs not theretofore approved by the State Board of Control, the Commission on State Mandates, or the courts to the extent the Governor, in his discretion, determines that waiver to be appropriate*; provided, that a decision by a county to opt into the system pursuant to Section 77300 beginning with the second half of the 1988-89 fiscal year shall not constitute a waiver of a claim for reimbursement based on a statute chaptered on or before the date the act which added this chapter is chaptered, which is filed in acceptable form on or before the date the act which added this chapter is chaptered. A county may petition the Governor to exempt any such claim from this waiver requirement; and the Governor, in his discretion, may grant the exemption in whole or in part. The waiver shall not apply to or otherwise affect any claims accruing after initial notification. Renewal, renegotiation, or subsequent notification to continue in the program shall not constitute a waiver. [para.] (b) The initial decision by a county to opt into the system pursuant to Section 77300 shall constitute a waiver of any claim, cause of action, or action whenever filed, with respect to the Trial Court Funding Act of 1985, Chapter 1607 of the Statutes of 1985, or Chapter 1211 of the Statutes of 1987." (*Gov. Code, § 77203.5*, italics added.)

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> "As used in this chapter, 'state-mandated local program' *means any and all reimbursements owed or owing by operation of either Section 6 of Article XIII B of the California Constitution*, or *Section 17561 of the Government Code*, or both." (*Gov. Code, § 77005*, italics added.)

The facts of the present litigation also demonstrate the inadequacy of the commission remedy. The state began transferring financial responsibility for MIA's to the counties in 1982. Six years later no county had brought a proceeding before the commission. After the present suit was filed, two counties filed claims for 70 percent reimbursement. Now, nine years after the 1982 legislation, the counties' claims are pending before the Court of Appeal. After that court acts, and we decide whether to review its decision, the matter may still have to go back to the commission for hearings to **[*346]** determine the amount of the mandate -- which is itself an appealable order. When an issue involves the life and health of thousands, a procedure which permits this kind of delay is not an adequate remedy.

In sum, effective, efficient enforcement of article XIII B requires that standing to enforce that measure be given to those harmed by its violation -- in this case, the medically indigent -- and not be vested exclusively in local officials who have no personal interest at stake and are subject to financial and political pressure to overlook violations.

C. Even if plaintiffs lack standing this court should nevertheless address and resolve the merits of the appeal.

Although ordinarily a court will not decide the merits of a controversy if the plaintiffs lack standing (see *McKinny v. Board of Trustees (1982) 31 Cal.3d 79, 90 [181 Cal.Rptr. 549, 642 P.2d 460]*), we recognized **[**1322]** **[***80]** an exception to this rule in our recent decision in *Dix v. Superior Court, supra, 53 Cal.3d 442* (hereafter *Dix*). In *Dix*, the victim of a crime sought to challenge the trial court's decision to recall a sentence under *Penal Code section 1170*. We held that only the prosecutor, not the victim of the crime, had standing to raise that issue. We nevertheless went on to consider and decide questions raised by the victim concerning the trial court's authority to recall a sentence under *Penal Code section 1170, subdivision (d)*. We explained that the sentencing issues "are significant. The case is fully briefed and all parties apparently seek a decision on the merits. Under such circumstances, we deem it appropriate to address [the victim's] sentencing arguments for the guidance of the lower courts. Our discretion to do so under analogous circumstances is well settled. [Citing cases explaining when an appellate court can decide an issue despite mootness.]" (*53 Cal.3d at p. 454*.) In footnote we added that "Under *article VI, section 12, subdivision (b) of the California Constitution* . . . , we have jurisdiction to 'review the *decision of a Court of Appeal* in any cause.' (Italics added.) Here the Court of Appeal's decision addressed two issues -- standing and merits. Nothing in *article VI, section 12(b)* suggests that, having rejected the Court of Appeal's conclusion on the preliminary issue of standing, we are foreclosed from 'review[ing]' the second subject addressed and resolved in its decision." (Pp. 454-455, fn. 8.)

I see no grounds on which to distinguish *Dix*. The present case is also one in which the Court of Appeal decision addressed both standing and merits. It is fully briefed. Plaintiffs and the county seek a decision on the merits. While the state does not seek a decision on the merits in this proceeding, its appeal of the superior court decision in the mandamus proceeding brought by the County of Los Angeles (see maj. opn., *ante*, p. 330, fn. 2) shows that it is not opposed to an appellate decision on the merits.

[*347] The majority, however, notes that various state officials -- the Controller, the Director of Finance, the Treasurer, and the Director of the Office of Planning and Research -- did not participate in this litigation. Then in a footnote, the majority suggests that this is the reason they do not follow the *Dix* decision. (Maj. opn., *ante*, p. 336, fn. 9.) In my view, this explanation is insufficient. The present action is one for declaratory relief against the state. It is not necessary that plaintiffs also sue particular state officials. (The state has never claimed that such officials were necessary parties.) I do not believe we should refuse to reach the merits of this appeal because of the nonparticipation of persons who, if they sought to participate, would be here merely as amici curiae. [6]

> 6 It is true that these officials would participate in a proceeding before the Commission on State Mandates, but they would do so as members of an administrative tribunal. On appellate review of a commission decision, its members, like the members of the Public Utilities Commission or the Workers' Compensation Appeals Board, are not respondents and do not appear to present their individual views and positions. For example, in *Lucia Mar Unified School Dist. v. Honig (1988) 44 Cal.3d 830 [244 Cal.Rptr. 677, 750 P.2d 318]*, in which we reviewed a commission ruling relating to subvention payments for education of handicapped children, the named respondents were the state Superintendent of Public Instruction, the Department of Education, and the Commission on State Mandates. The individual

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members of the commission were not respondents and did not participate.

The case before us raises no issues of departmental policy. It presents solely an issue of law which this court is competent to decide on the briefs and arguments presented. That issue is one of great significance, far more significant than any raised in *Dix*. Judges rarely recall sentencing under *Penal Code section 1170, subdivision (d)*; when they do, it generally affects only the individual defendant. In contrast, the legal issue here involves immense sums of money and affect budgetary planning for both the state and counties. State and county governments need to know, as soon as possible, what their **[**1323]** **[***81]** rights and obligations are; legislators considering proposals to deal with the current state and county budget crisis need to know how to frame legislation so it does not violate article XIII B. The practical impact of a decision on the people of this state is also of great importance. The failure of the state to provide full subvention funds and the difficulty of the county in filling the gap translate into inadequate staffing and facilities for treatment of thousands of persons. Until the constitutional issues are resolved the legal uncertainties may inhibit both levels of government from taking the steps needed to address this problem. A delay of several years until the Los Angeles case is resolved could result in pain, hardship, or even death for many people. I conclude that, whether or not plaintiffs have standing, this court should address and resolve the merits of the appeal.

D. *Conclusion as to standing.*

As I have just explained, it is not necessary for plaintiffs to have standing for us to be able to decide the merits of the appeal. Nevertheless, I conclude **[*348]** that plaintiffs have standing both as persons "beneficially interested" under *Code of Civil Procedure section 1086* and under the doctrine of *Green v. Obledo, supra, 29 Cal.3d 126*, to bring an action to determine whether the state has violated its duties under article XIII B. The remedy given local agencies and school districts by *Government Code sections 17500- 17630* is, as *Government Code section 17552* states, the exclusive remedy by which those bodies can challenge the state's refusal to provide subvention funds, but the statute does not limit the remedies available to individual citizens.

III. Merits of the Appeal

A. *State funding of care for MIA's.*

Welfare and Institutions Code section 17000 requires every county to "relieve and support" all indigent or incapacitated residents, except to the extent that such persons are supported or relieved by other sources. [7] From 1971 until 1982, and thus at the time article XIII B became effective, counties were not required to pay for the provision of health services to MIA's, whose health needs were met through the state-funded Medi-Cal program. Since the medical needs of MIA's were fully met through other sources, the counties had no duty under *Welfare and Institutions Code section 17000* to meet those needs. While the counties did make general contributions to the Medi-Cal program (which covered persons other than MIA's) from 1971 until 1978, at the time article XIII B became effective in 1980 the counties were not required to make any financial contributions to Medi-Cal. It is therefore undisputed that the counties were not required to provide financially for the health needs of MIA's when article XIII B became effective. The state funded all such needs of MIA's.

7 *Welfare and Institutions Code section 17000* provides that "[e]very county . . . shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions."

In 1982, the Legislature passed Assembly Bill No. 799 (1981-1982 Reg. Sess.; Stats. 1982, ch. 328, pp. 1568-1609) (hereafter AB No. 799), which removed MIA's from the state-funded Medi-Cal program as of January 1, 1983, and thereby transferred to the counties, through the County Medical Services Plan which AB No. 799 created, the financial responsibility to provide health services to approximately 270,000 MIA's. AB No. 799 required that the counties provide health care for MIA's, yet appropriated only 70 percent of what the state would have spent on MIA's had those persons remained a state responsibility under the Medi-Cal program.

Since 1983, the state has only partially defrayed the costs to the counties of providing health care to MIA's. Such state funding to counties was **[*349]** initially relatively constant, generally more than $ 400 million per year. By 1990, however, state **[***82]** funding **[**1324]** had decreased to less than $ 250 million. The state, however, has always included the full amount of its former obligation to provide for MIA's under the Medi-Cal program in the year preceding July 1, 1980, as part of its article XIII B "appropriations limit," i.e., as part of the base amount of appropriations on which subsequent annual adjustments for cost-of-living and population changes would be calculated. About $ 1 billion has been added to the state's adjusted spending limit for population growth and inflation *solely* because of the state's inclusion of all MIA expenditures in the appropriation limit established for its base year, 1979-1980. The state has not made proportional increases in the sums

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provided to counties to pay for the MIA services funded by the counties since January 1, 1983.

B. *The function of article XIII B.*

Our recent decision in *County of Fresno v. State of California (1991) 53 Cal.3d 482, 486-487 [280 Cal.Rptr. 92, 808 P.2d 235]* (hereafter *County of Fresno*), explained the function of article XIII B and its relationship to article XIII A, enacted one year earlier:

"At the June 6, 1978, Primary Election, article XIII A was added to the Constitution through the adoption of Proposition 13, an initiative measure aimed at controlling ad valorem property taxes and the imposition of new 'special taxes.' (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 231-232 [149 Cal.Rptr. 239, 583 P.2d 1281].*) The constitutional provision imposes a limit on the power of state and local governments to adopt and levy taxes. (*City of Sacramento v. State of California (1990) 50 Cal.3d 51, 59, fn. 1 [266 Cal.Rptr. 139, 785 P.2d 522]* (*City of Sacramento*).)

"At the November 6, 1979, Special Statewide Election, article XIII B was added to the Constitution through the adoption of Proposition 4, another initiative measure. That measure places limitations on the ability of both state and local governments to appropriate funds for expenditures.

"'Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend [taxes] for public purposes.' (*City of Sacramento, supra, 50 Cal.3d at p. 59, fn. 1.*)

"Article XIII B of the Constitution was intended . . . to provide 'permanent protection for taxpayers from excessive taxation' and 'a reasonable way to provide discipline in tax spending at state and local levels.' (See *County of Placer v. Corin (1980) 113 Cal.App.3d 443, 446 [170 Cal.Rptr. 232]*, quoting and following Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), argument [*350] in favor of Prop. 4, p. 18.) To this end, it establishes an 'appropriations limit' for both state and local governments (*Cal. Const., art. XIII B, § 8, subd. (h)*) and allows no 'appropriations subject to limitation' in excess thereof (*id.*, § 2). [8] (See *County of Placer v. Corin, supra, 113 Cal.App.3d at p. 446.*) It defines the relevant 'appropriations subject to limitation' as 'any authorization to expend during a fiscal year the proceeds of taxes . . . .' (*Cal. Const., art. XIII B, § 8, subd. (b).*)" (*County of Fresno, supra, 53 Cal.3d at p. 486.*)

8 Article XIII B, section 1 provides: "The total annual appropriations subject to limitation of the state and of each local government shall not exceed the appropriations limit of such entity of government for the prior year adjusted for changes in the cost of living and population except as otherwise provided in this Article."

Under section 3 of article XIII B the state may transfer financial responsibility for a program to a county if the state and county mutually agree that the appropriation limit of the state will be decreased and that of the county increased by the same amount. [9] [**1325] [***83] Absent such an agreement, however, section 6 of article XIII B generally precludes the state from avoiding the spending limits it must observe by shifting to local governments programs and their attendant financial burdens which were a state responsibility prior to the effective date of article XIII B. It does so by requiring that "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 cost of such program or increased level of service . . . ." [10]

9 Section 3 of article XIII B reads in relevant part: "The appropriations limit for any fiscal year . . . shall be adjusted as follows:

"(a) In the event that the financial responsibility of providing services is transferred, in whole or in part . . . from one entity of government to another, then for the year in which such transfer becomes effective the appropriation limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount. . . ."

10 Section 6 of article XIII B further provides 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." None of these exceptions apply in the present case.

"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 [v. State of California* (1987)] *43 Cal.3d 46, 61 [233 Cal.Rptr. 38, 729 P.2d 202].*) 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*

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Dist. v. Honig, supra, 44 Cal.3d 830, 836, fn. 6.) Specifically, it was designed to protect the tax [*351] revenues of local governments from state mandates that would require expenditure of such revenues." (*County of Fresno, supra, 53 Cal.3d at p. 487.*)

C. *Applicability of article XIII B to health care for MIA's.*

The state argues that care of the indigent, including medical care, has long been a county responsibility. It claims that although the state undertook to fund this responsibility from 1979 through 1982, it was merely temporarily (as it turned out) helping the counties meet their responsibilities, and that the subsequent reduction in state funding did not impose any "new program" or "higher level of service" on the counties within the meaning of section 6 of article XIII B. Plaintiffs respond that the critical question is not the traditional roles of the county and state, but who had the fiscal responsibility on November 6, 1979, when article XIII B took effect. The purpose of article XIII B supports the plaintiffs' position.

As we have noted, article XIII A of the Constitution (Proposition 13) and article XIII B are complementary measures. The former radically reduced county revenues, which led the state to assume responsibility for programs previously financed by the counties. Article XIII B, enacted one year later, froze both state and county appropriations at the level of the 1978-1979 budgets -- a year when the budgets included state financing for the prior county programs, but not county financing for these programs. Article XIII B further limited the state's authority to transfer obligations to the counties. Reading the two together, it seems clear that article XIII B was intended to limit the power of the Legislature to retransfer to the counties those obligations which the state had assumed in the wake of Proposition 13.

Under article XIII B, both state and county appropriations limits are set on the basis of a calculation that begins with the budgets in effect when article XIII B was enacted. If the state could transfer to the county a program for which the state at that time had full financial responsibility, the county could be forced to assume additional financial obligations without the right to appropriate additional moneys. The state, at the same time, would get credit toward its appropriations limit for expenditures it did not pay. County taxpayers [**1326] [***84] would be forced to accept new taxes or see the county forced to cut existing programs further; state taxpayers would discover that the state, by counting expenditures it did not pay, had acquired an actual revenue surplus while avoiding its obligation to refund revenues in excess of the appropriations limit. Such consequences are inconsistent with the purpose of article XIII B.

Our decisions interpreting article XIII B demonstrate that the state's subvention requirement under section 6 is not vitiated simply because the [*352] "program" existed before the effective date of article XIII B. The alternate phrase of section 6 of article XIII B, "'higher level of service[,]' . . . 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.'*" (*County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56 [233 Cal.Rptr. 38, 729 P.2d 202]*, italics added.)

Lucia Mar Unified School Dist. v. Honig, supra, 44 Cal.3d 830, presents a close analogy to the present case. The state Department of Education operated schools for severely handicapped students, but prior to 1979 *school districts were required by statute to contribute* to education of those students from the district at the state schools. In 1979, in response to the restrictions on school district revenues imposed by Proposition 13, the statutes requiring such district contributions were repealed and the state assumed full responsibility for funding. The state funding responsibility continued until June 28, 1981, when *Education Code section 59300* (hereafter *section 59300*), requiring school districts to share in these costs, became effective.

The plaintiff districts filed a test claim before the commission, contending they were entitled to state reimbursement under section 6 of article XIII B. The commission found the plaintiffs were not entitled to state reimbursement, on the rationale that the increase in costs to the districts compelled by *section 59300* imposed no new program or higher level of services. The trial and intermediate appellate courts affirmed on the ground that *section 59300* called for only an "'adjustment of costs'" of educating the severely handicapped, and that "*a shift in the funding of an existing program is not a new program or a higher level of service*" within the meaning of article XIII B. (*Lucia Mar Unified School Dist. v. Honig, supra, 44 Cal.3d at p. 834*, italics added.)

We reversed, rejecting the state's theories that the funding shift to the county of the subject program's costs does not constitute a new program. "[There can be no] 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 concerned, since *at the time section 59300 became effective* they were not required to contribute to the education of students from their districts at such schools. [para.] . . . To hold, under the circumstances of this case, that a shift in funding of

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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 XIIIB. That article imposed spending limits on state and local governments, and it followed by one year the adoption by initiative of article XIIIA, which severely limited the taxing [*353] power of local governments. . . . [para.] The intent of the section would plainly be violated if the state could, while retaining administrative control [11] of programs it has supported with state [***85] tax money, [**1327] simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 of article XIIIB because the programs are not 'new.' Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, *or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIIIB, the result seems equally violative of the fundamental purpose underlying section 6 of that article.*" (*Lucia Mar Unified School Dist. v. Honig, supra, 44 Cal.3d at pp. 835-836*, fn. omitted, italics added.)

11 The state notes that, in contrast to the program at issue in *Lucia Mar*, it has not retained administrative control over aid to MIA's. But the quoted language from *Lucia Mar*, while appropriate to the facts of that case, was not intended to establish a rule limiting article XIII B, section 6, to instances in which the state retains administrative control over the program that it requires the counties to fund. The constitutional language admits of no such limitation, and its recognition would permit the Legislature to evade the constitutional requirement.

The state seeks to distinguish *Lucia Mar* on the ground that the education of handicapped children in state schools had never been the responsibility of the local school district, but overlooks that the local district had previously been required to contribute to the cost. Indeed the similarities between *Lucia Mar* and the present case are striking. In *Lucia Mar*, prior to 1979 the state and county shared the cost of educating handicapped children in state schools; in the present case from 1971-1979 the state and county shared the cost of caring for MIA's under the Medi-Cal program. In 1979, following enactment of Proposition 13, the state took full responsibility for both programs. Then in 1981 (for handicapped children) and 1982 (for MIA's), the state sought to shift some of the burden back to the counties. To distinguish these cases on the ground that care for MIA's is a county program but education of handicapped children a state program is to rely on arbitrary labels in place of financial realities.

The state presents a similar argument when it points to the following emphasized language from *Lucia Mar Unified School Dist. v. Honig, supra, 44 Cal.3d 830*: "[B]ecause *section 59300* shifts partial financial responsibility for the support of students in the state-operated schools from the state to school districts -- *an obligation the school districts did not have at the time article XIII B was adopted* -- it calls for plaintiffs to support a 'new program' within the meaning of section 6." (P. 836, fn. omitted, italics added.) It urges *Lucia Mar* reached its result *only* because the "program" requiring school district funding in that case *was not required by statute* at the effective date of [*354] article XIII B. The state then argues that the case at bench is distinguishable because it contends Alameda County had a continuing obligation *required by statute* antedating that effective date, which had only been "temporarily" [12] suspended when article XIII B became effective. I fail to see the distinction between a case -- *Lucia Mar* -- in which no existing statute as of 1979 imposed an obligation on the local government and one -- this case -- in which the statute existing in 1979 imposed no obligation on local government.

12 The state's repeated emphasis on the "temporary" nature of its funding is a form of post hoc reasoning. At the time article XIII B was enacted, the voters did not know which programs would be temporary and which permanent.

The state's argument misses the salient point. As I have explained, the application of section 6 of article XIII B does not depend upon when the program was created, but upon who had the burden of funding it when article XIII B went into effect. Our conclusion in *Lucia Mar* that the educational program there in issue was a "new" program as to the school districts was not based on the presence or absence of any antecedent statutory obligation therefor. *Lucia Mar* determined that whether the program was new *as to the districts* depended on *when* they were compelled to assume the obligation to partially fund an existing program which they had not funded at the time article XIII B became effective.

The state further relies on two decisions, *Madera Community Hospital v. County of Madera (1984) 155 Cal.App.3d 136 [201 Cal.Rptr. 768]* and *Cooke v. Superior Court (1989) 213 Cal.App.3d 401 [261 Cal.Rptr. 706]*, which hold that the county has a statutory obligation to provide medical care for indigents, but that it need not provide precisely [**1328] [***86] the same level of services as the state provided under Medi-Cal. [13] Both are correct, but irrelevant to this case. [14] The county's obligation to MIA's is defined by *Welfare and Institutions Code section 17000*, not by the former Medi-Cal program. [15] If the [*355] state, in transferring an

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obligation to the counties, permits them to provide less services than the state provided, the state need only pay for the lower level of services. But it cannot escape its responsibility entirely, leaving the counties with a state-mandated obligation and no money to pay for it.

13 It must, however, provide a *comparable* level of services. (See *Board of Supervisors v. Superior Court (1989) 207 Cal.App.3d 552, 564 [254 Cal.Rptr. 905].*)

14 Certain language in *Madera Community Hospital v. County of Madera, supra, 155 Cal.App.3d 136*, however, is questionable. That opinion states that the "Legislature intended that County bear an obligation to its poor and indigent residents, *to be satisfied from county funds*, notwithstanding federal or state programs which exist concurrently with County's obligation and alleviate, to a greater or lesser extent, County's burden." (P. 151.) *Welfare and Institutions Code section 17000* by its terms, however, requires the county to provide support to residents only "when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." Consequently, to the extent that the state or federal governments provide care for MIA's, the county's obligation to do so is reduced pro tanto.

15 The county's right to subvention funds under article XIII B arises because its duty to care for MIA's is a state-mandated responsibility; if the county had no duty, it would have no right to funds. No claim is made here that the funding of medical services for the indigent shifted to Alameda County is not a program "'mandated'" by the state; i.e., that Alameda County has any option other than to pay these costs. (*Lucia Mar Unified School Dist. v. Honig, supra, 44 Cal.3d at pp. 836-837.*)

The state's arguments are also undercut by the fact that it continues to use the approximately $ 1 billion in spending authority, generated by its previous total funding of the health care program in question, as a portion of its initial *base spending limit* calculated pursuant to sections 1 and 3 of article XIII B. In short, the state may maintain here that care for MIA's is a county obligation, but when it computes its appropriation limit it treats the entire cost of such care as a state program.

IV. Conclusion

This is a time when both state and county governments face great financial difficulties. The counties, however, labor under a disability not imposed on the state, for article XIII A of the Constitution severely restricts their ability to raise additional revenue. It is, therefore, particularly important to enforce the provisions of article XIII B which prevent the state from imposing additional obligations upon the counties without providing the means to comply with these obligations.

The present majority opinion disserves the public interest. It denies standing to enforce article XIII B both to those persons whom it was designed to protect -- the citizens and taxpayers -- and to those harmed by its violation -- the medically indigent adults. And by its reliance on technical grounds to avoid coming to grips with the merits of plaintiffs' appeal, it permits the state to continue to violate article XIII B and postpones the day when the medically indigent will receive adequate health care.

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TAB "18"

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LEXSEE

Caution
As of: Jun 25, 2010

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 of California, Second Appellate District, Division Five

225 Cal. App. 3d 155; 275 Cal. Rptr. 449; 1990 Cal. App. LEXIS 1198

November 15, 1990

SUBSEQUENT HISTORY: [***1] Appellants' petitions for review by the Supreme Court were denied February 28, 1991. Lucas, C. J., did not participate therein.

PRIOR HISTORY: Superior Court of Los Angeles County, No. C606020, Robert I. Weil, Judge.

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. 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 [***2] 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. The judgment is affirmed as modified. Each party is to bear its own costs on appeal.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant state challenged an order from the Superior Court of Los Angeles County (California) stating that it was required to reimburse cross-appellant school district for mandated expenditures to integrate the schools, and cross-appellant challenged that part of the order stating that certain funds were not available for this reimbursement.

OVERVIEW: The California Department of Education issued an executive order mandating expenditures to integrate the schools, and when the legislature deleted the requested funding from its budget, cross-appellant school district filed a petition to compel reimbursement after the Board of Control approved the claim. The trial court stated that appellant state was required to make these reimbursements and designated specific funds as reasonably available for the payments, but also ruled that certain funds were not available for these payments. On appeal, the court affirmed the decision as modified, holding that the doctrines of collateral estoppel and waiver were inapplicable and that the trial court should have allowed appellant to challenge the initial decisions of Board of Control in this matter. However, the court concluded that as a matter of law the executive order was a reimbursable state mandate pursuant to Cal. Const. art. XIII B, § 6, not pursuant to former Cal. Rev. & Tax.

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Code § 2234. The court modified the decision by striking certain funds as sources of reimbursement and affirmed that portion of the order stating that certain funds were not available for the payments.

OUTCOME: The court affirmed the order stating that appellant state was required to reimburse cross-appellant school district for mandated expenditures to integrate the schools because the executive order was a reimbursable state mandate under the California constitution and modified the designated funds for payment. The case was remanded to determine if unexpended, unencumbered funds existed in the approved budget line item account numbers.

CORE TERMS: reimbursement, executive order, school district, expenditure, mandated, reimburse, state-mandated, appropriation, state mandate, local governments, reasonably available, reimbursable, budget, levels of service, line item, segregation, funding, appropriated, alleviate, local agencies, ethnic, collateral estoppel, fiscal years, estoppel, guidelines, entity, desegregation, special fund, controller, budgets acts

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > General Overview
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
[HN1]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."

Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN2]Finality for the purposes of administrative collateral estoppel may be understood as a two-step process: (1) the decision must be final with respect to action by the administrative agency (Cal. Civ. Proc. Code § 1094.5(a)); and (2) 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. Next, the decision must have conclusive effect. In other words, the decision must be free from direct attack. A direct attack on an administrative decision may be made by appeal to the superior court for review by petition for administrative mandamus. Cal. Civ. Proc. Code § 1094.5. 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.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Waiver & Preservation
Civil Procedure > Appeals > Standards of Review
[HN3]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 which 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.

Governments > State & Territorial Governments > Relations With Governments
[HN4]See Cal. Const. art. XIII B. § 6.

Constitutional Law > State Constitutional Operation
[HN5]In construing the meaning of the Cal. Const. art. VIIIB, § 6, the court must determine the intent of the voters by first looking to the language itself that should be construed in accordance with the natural and ordinary meaning of its words.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus
[HN6]Lack of subject matter jurisdiction may be raised at any time.

Governments > Legislation > Interpretation
[HN7]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 a statute may be considered in ascertaining legislative design.

Constitutional Law > Separation of Powers
Governments > Courts > Authority to Adjudicate

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[HN8]A trial court cannot compel the legislature either to appropriate funds or to pay funds not yet appropriated. Cal. Const. art. III, § 3; art. XVI, § 7. However, no violation of the separation of powers doctrine occurs when a trial 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 when the purposes for which those funds were appropriated are generally related to the nature of costs incurred. There is no requirement that the appropriations specifically refer to the particular expenditure or must past administrative practice sanction coverage from a particular fund.

SUMMARY:

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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 statemandated 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

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(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 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

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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 racial 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 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 123.]

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(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 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

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available for reimbursement. However, remand to the trial court was necessary to determine whether these sources contained sufficient 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 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.

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JUDGES: Opinion by Lucas, P. J., with Ashby and Boren, JJ., concurring.

OPINION BY: LUCAS

OPINION

[*163] [**454] Introduction

Long Beach Unified School District (LBUSD) filed a claim with the Board of Control of the State of California [***3] (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 [***4] 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 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.

[**455] Background and Procedural History

The California Property [***5] 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 [***6] 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) [1] 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. [2]

1 Former Revenue and Taxation Code section 2218 defines "test claim" as "the first claim filed

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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.)

2 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.)

[***7] 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. [3] 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, [**456] available pursuant to former section 633.6 of the California Administrative Code, [4] or petitioned for judicial review. [5]

3 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."

[***8]

4 Former section 633.6 of the California Administrative Code (now renamed California Code of Regulations) provided in relevant part: "(b) Request for Reconsideration. [para.] (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)

5 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. [***9] 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. [6] On September 28, 1985, the Governor approved the bill as amended.

6 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) In-

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clude a finding that the legislation or regulation does not contain a mandate . . . ." (Stats. 1982, ch. 1638, § 7, p. 6662.)

[***10] 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*) [7] and, in an amended petition, its successor, Government Code section 17565, and with California Constitution, article XIII B, section 6. [8] 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.

7 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.)

[***11]

8 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 [**457] 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 [***12] 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. [9]

9 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 [***13] 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 Forfeiture 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) [HN1]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 [***14] that the prior judgment be "final." (*Ibid.*)

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(3a) [HN2]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 [***15] 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 [**458] 27, 1984, and May 7, 1984, respectively [10] (*Ziganto* v. *Taylor* (1961) 198 Cal.App.2d 603, 607 [18 Cal.Rptr. 229]).

10 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 [***16] 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 [***17] adverse 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. [11] 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. [12] 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. [13]

11 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.

[***18]

12 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.

13 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

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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].)

[***19] [**459] *B. Waiver*

(5a) State also asserts that the doctrine of waiver is not applicable.

(6) [HN3]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 [***20] 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) (See fn. 14.)

(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. [14]

14 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.

[***21] *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. [15]

15 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.

[***22] [*172] *A. Recovery Under Article XIII B, Section 6*

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(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: [HN4]"Whenever the Legislature or any state agency mandates a new program or higher level of service on any [**460] 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 . . . ."

(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].) [***23] "[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]; [***24] *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 *National Assn. for Advancement of Colored People* v. *San Bernardino* [*173] *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]). [***25] 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 [***26] 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 [**461] 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

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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 [***27] 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: [para.] (a) Legislative mandates requested by the local agency affected; [para.] (b) Legislation defining a new crime or changing an existing definition of a crime; or [para.] *(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 [***28] 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) [HN5]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 [***29] 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.'" [**462] The term "state mandates" was [***30] 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 [***31] 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

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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 [***32] 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 [***33] 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 [**463] 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 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 [***34] 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 [***35] 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, [HN6]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.* [para.] 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].)

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[***36] **(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 [**464] local agency or school district for such costs incurred after the operative [***37] 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.

(16) It is a fundamental rule of statutory construction that [HN7]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 [***38] 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* [***39] *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. [***40] 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

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give school districts the right to recover costs mandated by executive orders; and when this option was made available, the [**465] 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] 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 [***41] 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 [***42] 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) [HN8]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 [***43] 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* [**466] *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].) [***44] 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 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 sec-

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tions 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 [***45] 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 [***46] 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 [***47] 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 [**467] 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 which also support the reserve (9840-001-494, 9840-001-988, 9840-011-001) are generally related to the costs. [16]

16 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.)

[***48] 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.

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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 [***49] satisfied from specific line item accounts in these later budgets and from the Special Fund for Economic Uncertainties. [17]

17 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 [***50] 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 [**468] 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 [***51] 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, [***52] 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 [***53] 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

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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 [***54] 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 [**469] for state mandated expenditures. In *Carmel 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. [18]

> 18 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."

[***55] 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, [***56] 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.

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 [***57] 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.

The judgment is affirmed as modified. Each party is to bear its own costs on appeal.

[*188] [**470] 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

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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 [***58] 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 [***59] 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 [***60] 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 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 [**471] 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 [***61] 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 [***62] payment of said reimbursement amount. Said

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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 [***63] 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"

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TAB "19"

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LEXSEE

Positive
As of: Jun 23, 2010

REDEVELOPMENT AGENCY OF THE CITY OF SAN MARCOS, Plaintiff and Appellant, v. CALIFORNIA COMMISSION ON STATE MANDATES, Defendant and Respondent; CALIFORNIA DEPARTMENT OF FINANCE, Intervener and Respondent.

No. D026195.

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

55 Cal. App. 4th 976; 64 Cal. Rptr. 2d 270; 1997 Cal. App. LEXIS 474; 97 Cal. Daily Op. Service 4510; 97 Daily Journal DAR 7464

May 30, 1997, Decided

SUBSEQUENT HISTORY: [***1] The Publication Status of this Document has been Changed by the Court from Unpublished to Published June 12, 1997. Review Denied September 3, 1997, Reported at: 1997 Cal. LEXIS 5622.

PRIOR HISTORY: Superior Court of San Diego County, Super. Ct. No. 686818. Sheridan Reed and Herbert Hoffman, Judges.

DISPOSITION: The judgment is affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant redevelopment agency sought review of a judgment by the Superior Court of San Diego County (California), which denied appellant's petition for writ of administrative mandamus as to a decision of respondent commission on state mandates. Appellant claimed that the state should have reimbursed appellant for tax increment financing under Cal. Const. art. XIII B, § 6.

OVERVIEW: Appellant redevelopment agency challenged the decision of respondent commission on state mandates. Respondent denied appellant's test claim, which sought reimbursement of tax increment financing through a petition for writ of administrative mandamus. The trial court denied the petition. On appeal, appellant contended that reimbursement for tax increment financing was required under Cal. Const. art. XIII B, §6. The court rejected this contention, finding that the 20 percent housing fund set-aside requirement of appellant's tax increment financing did not qualify under Cal. Const. art XIII, § 6 as a "cost" of a program because tax increment financing was not within the scope of this portion of the state constitution. The court reasoned that the same policies that supported exempting tax increment revenues from Cal. Const. art. XIII B appropriations limits also supported denying reimbursement under Cal. Const. art. XIII B, § 6 for this particular allocation of revenues. Accordingly, the court affirmed the judgment denying the petition for writ of administrative mandamus.

OUTCOME: The court affirmed the trial court's judgment denying appellant redevelopment agency's petition for writ of administrative mandamus as to the decision of respondent commission on state mandates that denied appellant's reimbursement of tax increment financing. The court found that appellant's tax increment financing did not qualify as a cost of a program under the state constitution and therefore was not reimbursable.

CORE TERMS: tax increment financing, subvention, redevelopment agency, proceeds of taxes, housing, appropriation, redevelopment, entity, reimbursement, local government, local agency, tax revenues, spending, italics, level of service, financing, expend, state mandates, state subvention, tax revenues, increment, taxation, fis-

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cal, subvention of funds, new program, state-mandated, levied, user, Community Redevelopment Law, constitutional provision

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Remedies > Mandamus
Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Civil Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview
[HN1]Under Cal. Gov't Code § 17559, review by administrative mandamus is the exclusive method of challenging the California Commission on State Mandates' decision denying a subvention claim. On appellate review, the reviewing court applies these standards: if Cal. Gov't Code § 17559 governs the proceeding below, then the trial court must review the decision of the commission under the substantial evidence standard. Where the substantial evidence test is applied by the trial court, the reviewing court is generally confined to inquiring whether substantial evidence supports the court's findings and judgment. However, the reviewing court independently reviews the superior court's legal conclusions about the meaning and effect of constitutional and statutory provisions.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN2]Cal. Const. art. XIII A imposes a limit on the power of state and local governments to adopt and levy taxes. Cal. Const. art. XIII B imposes a complementary limit on the rate of growth in governmental spending. These two constitutional articles work in tandem, together restricting the state governments' power both to levy and to spend for public purposes.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN3]Cal. Const. art. XIII B, § 6 requires that whenever the California 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.

Governments > State & Territorial Governments > Finance
[HN4]The funds a redevelopment agency receives from tax increment financing do not constitute "proceeds of taxes" subject to Cal Const. art. XIII B, § 6 appropriations limits.

Governments > State & Territorial Governments > Finance
[HN5]See Cal. Const. art. XIII B, § 8(c).

Constitutional Law > State Constitutional Operation
[HN6]The rules of constitutional interpretation require a strict construction of Cal. Const. art. XIII, § 6, because constitutional limitations and restrictions on legislative powers are not to be extended to include matters not covered by the language used.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN7]Cal. Const. art. XIII B does not limit the ability to expend government funds collected from all sources. Rather, the appropriations limit is based on "appropriations subject to limitation," which consists primarily of the authorization to expend during a fiscal year the "proceeds of taxes." Cal. Const. art. XIII B, § 8(a).

Governments > State & Territorial Governments > Finance
[HN8]See Cal. Const. art. XIII B, § 8(P)(b).

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court denied a petition for a writ of administrative mandate brought by a city's redevelopment agency that challenged the California Commission on State Mandates' denial of the agency's test claim under Gov. Code, § 17550 et seq. (reimbursement of costs mandated by the state). In its claim, the agency sought a determination that the State of California should reimburse the agency for moneys transferred into its low- and moderate-income housing fund pursuant to Health & Saf. Code, §§ 33334.2 and 33334.3, of the Community Redevelopment Law. Those statutes require a 20 percent deposit of the particular form of financing received by the agency (tax increment financing generated from its project areas) for purposes of improving the supply of affordable housing. The agency claimed that this tax increment financing should not be subject to state control

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of the allocations made to various funds and that such control constituted a statemandated new program or higher level of service for which reimbursement or subvention was required under Cal. Const., art. XIII B, § 6. The trial court found that the source of funds used by the agency was exempt, under Health & Saf. Code, § 33678, from the scope of Cal. Const., art. XIII B, § 6. (Superior Court of San Diego County, No. 686818, Sheridan E. Reed and Herbert B. Hoffman, Judges.)

The Court of Appeal affirmed. It held that under Health & Saf. Code, § 33678, which provides that tax increment financing is not deemed to be the "proceeds of taxes," the source of funds used by the agency was exempt from the scope of Cal. Const., art. XIII B, § 6. Although Cal. Const., art. XIII B, § 6, does not expressly discuss the source of funds used by an agency to fund a program, the historical and contextual context of this provision demonstrates that it applies only to costs recovered solely from tax revenues. Because of the nature of the financing they receive (i.e., tax increment financing), redevelopment agencies are not subject to appropriations limitations or spending caps, they do not expend any proceeds of taxes, and they do not raise general revenues for the local entity. Also, the state is not transferring any program for which it was formerly responsible. Therefore, the purposes of state subvention laws are not furthered by requiring reimbursement when redevelopment agencies are required to allocate their tax increment financing in a particular manner, as in the operation of Health & Saf. Code, §§ 33334.2 and 33334.3. (Opinion by Huffman, J., with Work, Acting P. J., and McIntyre, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) State of California § 11--Fiscal Matters--Subvention: Words, Phrases, and Maxims--Subvention. --"Subvention" generally means a grant of financial aid or assistance, or a subsidy.

(2) State of California § 11--Fiscal Matters--Subvention--Judicial Rules. --Under Gov. Code, § 17559, review by administrative mandamus is the exclusive method of challenging a decision of the California Commission on State Mandates to deny a subvention claim. The determination whether the statutes at issue established a mandate under Cal. Const., art. XIII B, § 6, is a question of law. On appellate review, the following standards apply: Gov. Code, § 17559, governs the proceeding below and requires that the trial court review the decision of the commission under the substantial evidence standard. Where the substantial evidence test is applied by the trial court, the appellate court is generally confined to inquiring whether substantial evidence supports the trial court's findings and judgment. However, the appellate court independently reviews the trial court's legal conclusions about the meaning and effect of constitutional and statutory provisions.

(3a) (3b) State of California § 11--Fiscal Matters--Subvention--Statemandated Costs--Statutory Set-aside Requirement for Local Redevelopment Agency's Tax Increment Financing. --The California Commission on State Mandates properly denied a test claim brought by a city's redevelopment agency seeking a determination that the state should reimburse the agency for moneys transferred into its low- and moderate-income housing fund pursuant to Health & Saf. Code, §§ 33334.2 and 33334.3, which require a 20 percent deposit of the particular form of financing received by the agency, i.e., tax increment financing generated from its project areas. Under Health & Saf. Code, § 33678, which provides that tax increment financing is not deemed to be the "proceeds of taxes," the source of funds used by the agency was exempt from the scope of Cal. Const., art. XIII B, § 6 (subvention). Although Cal. Const., art. XIII B, § 6, does not expressly discuss the source of funds used by an agency to fund a program, the historical and contextual context of this provision demonstrates that it applies only to costs recovered solely from tax revenues. Because of the nature of the financing they receive (i.e., tax increment financing), redevelopment agencies are not subject to appropriations limitations or spending caps, they do not expend any proceeds of taxes, and they do not raise general revenues for the local entity. Also, the state is not transferring any program for which it was formerly responsible. Therefore, the purposes of state subvention laws are not furthered by requiring reimbursement when redevelopment agencies are required to allocate their tax increment financing in a particular manner, as in the operation of Health & Saf. Code, §§ 33334.2 and 33334.3.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 123.]

(4) Constitutional Law § 10--Construction of Constitutional Provisions--Limitations on Legislative Powers. --The rules of constitutional interpretation require a strict construction of a constitutional provision that contains limitations and restrictions on legislative powers, because such limitations and restrictions are not to be extended to include matters not covered by the language used.

(5) State of California § 11--Fiscal Matters--Subvention--Purpose of Constitutional Provi-

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sions. --The goal of Cal. Const., arts. XIII A and XIII B, is to protect California residents from excessive taxation and government spending. A central purpose of Cal. Const., art. XIII B, § 6 (reimbursement to local government of state-mandated costs), is to prevent the state's transfer of the cost of government from itself to the local level.

COUNSEL: Higgs, Fletcher & Mack and John Morris for Plaintiff and Appellant.

Gary D. Hori for Defendant and Respondent.

Daniel E. Lungren, Attorney General, Robert L. Mukai, Chief Assistant Attorney General, Linda A. Cabatic and Daniel G. Stone, Deputy Attorneys General, for Intervener and Respondent.

JUDGES: Opinion by Huffman, J., with Work, Acting P. J., and McIntyre, J., concurring.

OPINION BY: HUFFMAN

OPINION

[*979] [**271] **HUFFMAN, J.**

The California Commission on State Mandates (the Commission) denied a test claim by the Redevelopment Agency of the City of San Marcos (the Agency) (Gov. Code, § 17550 et seq.), which sought a determination that the State of California should reimburse the Agency for moneys transferred into its Low and Moderate Income Housing Fund (the Housing Fund) pursuant to Health and Safety Code [1] sections 33334.2 and 33334.3. Those sections [***2] require a 20 percent deposit of the particular form of financing received by the Agency, tax increment financing generated from its project areas, for purposes of improving the supply of affordable housing. (1) (See fn. 2.) The Agency claimed that this tax increment financing should not be subject to state control of the allocations made to various funds and that such control constituted a state-mandated new program or higher level of service for which reimbursement or subvention was required under article XIII B of the California Constitution, section 6 (hereafter section 6; all further references to articles are to the California Constitution). [2] (Cal. Const., art. XVI, § 16; § 33670.)

1 All further statutory references are to the Health and Safety Code unless otherwise noted.

2 " 'Subvention' generally means a grant of financial aid or assistance, or a subsidy. [Citation.]" (*Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1577 [15 Cal. Rptr. 2d 547].)

The Agency brought a petition [***3] for writ of administrative mandamus to challenge the decision of the Commission. (Code Civ. Proc., § 1094.5; Gov. Code, § 17559.) The superior court denied the petition, ruling that the source of funds used by the Agency for redevelopment, tax increment financing, was exempt pursuant to section 33678 from the scope of section 6, as not constituting "proceeds of taxes" which are governed by that section. The superior court did not rule upon the alternative grounds of decision stated by the Commission, i.e., the 20 percent set-aside requirement for lowand moderate-income housing did not impose a new program or higher level of service in an existing program within the meaning of section 6, and, further, there were no costs subject to reimbursement related to the Housing Fund because there was no net increase in the aggregate program responsibilities of the Agency.

[**272] The Agency appeals the judgment denying its petition for writ of mandate. For the reasons set forth below, we affirm.

[*980] I.

PROCEDURAL CONTEXT

This test claim was litigated before the Commission pursuant to statutory procedures for determining whether a statute imposes state-mandated costs upon a local agency [***4] which must be reimbursed, through a subvention of funds, under section 6. (Gov. Code, § 17500 et seq.) [3] The Commission hearing consisted of oral argument on the points and authorities presented.

3 In our prior opinion issued in this case, we determined the trial court erred when it denied the California Department of Finance (DOF) leave to intervene as an indispensable party and a real party in interest in the mandamus proceeding. (*Redevelopment Agency v. Commission on State Mandates* (1996) 43 Cal. App. 4th 1188, 1194-1199 [51 Cal. Rptr. 2d 100].) Thus, DOF is now a respondent on this appeal, as is the Commission (sometimes collectively referred to as respondents). However, our decision in that case was a collateral matter and does not assist us on the merits of this proceeding.

(2) [HN1]Under Government Code section 17559, review by administrative mandamus is the exclusive method of challenging a Commission decision denying a subvention claim. "The determination whether the statutes here at issue established [***5] a mandate under section 6 is a question of law. [Citation.]" (*County of San Diego v. State of California* (1997) 15 Cal. 4th 68, 109 [61 Cal. Rptr. 2d 134, 931 P.2d 312].) On appellate review, we apply these standards: " Government Code

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section 17559 governs the proceeding below and requires that the trial court review the decision of the Commission under the substantial evidence standard. Where the substantial evidence test is applied by the trial court, we are generally confined to inquiring whether substantial evidence supports the court's findings and judgment. [Citation.] However, we independently review the superior court's legal conclusions about the meaning and effect of constitutional and statutory provisions. [Citation.]" (*City of San Jose v. State of California* (1996) 45 Cal. App. 4th 1802, 1810 [53 Cal. Rptr. 2d 521].)

II.

STATUTORY SCHEMES

Before we outline the statutory provisions setting up tax increment financing for redevelopment agencies, we first set forth the Supreme Court's recent summary of the history and substance of the law applicable to state mandates, such as the Agency claims exist here: "Through adoption of Proposition 13 in 1978, [***6] the voters added [HN2]article XIII A to the California Constitution, which 'imposes a limit on the power of state and local governments to [*981] adopt and levy taxes. [Citation.]' [Citation.] The next year, the voters added article XIII B to the Constitution, which 'impose[s] a complementary limit on the rate of growth in governmental spending.' [Citation.] These two constitutional articles 'work in tandem, together restricting California governments' power both to levy and to spend for public purposes.' [Citation.] Their goals are 'to protect residents from excessive taxation and government spending. [Citation.]' [Citation.]" (*County of San Diego v. State of California, supra*, 15 Cal. 4th at pp. 80-81.)

[HN3]Section 6, part of article XIII B and the provision here at issue, requires that 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 . . . .' " (*County of San Diego v. State of California, supra*, 15 Cal. 4th at p. 81, italics added.) Certain [***7] exceptions are then stated, none of which is relevant here. [4]

4 Section 6 lists the following exclusions to the requirement for subvention of funds: "(a) Legislative mandates requested by the local agency affected; [P] (b) Legislation defining a new crime or changing an existing definition of a crime; or [P] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." In *City of Sacramento v. State of California* (1990) 50 Cal. 3d 51, 69 [266 Cal. Rptr. 139, 785 P.2d 522], the Supreme Court identified these items as exclusions of otherwise reimbursable programs from the scope of section 6. (See also Gov. Code, § 17514, definition of "costs mandated by the state," using the same "new program or higher level of service" language of section 6.)

[**273] In *County of San Diego v. State of California, supra*, 15 Cal. 4th at page 81, the Supreme Court explained that section 6 represents a recognition [***8] that together articles XIII A and XIII B severely restrict the taxing and spending powers of local agencies. The purpose of the section is to preclude the state from shifting financial responsibility for governmental functions to local agencies, which are ill equipped to undertake increased financial responsibilities because they are subject to taxing and spending limitations under articles XIII A and XIII B. (*County of San Diego v. State of California, supra*, at p. 81.)

To evaluate the Agency's argument that the provisions of sections 33334.2 and 33334.3, requiring a deposit into the housing fund of 20 percent of the tax increment financing received by the Agency, impose this type of reimbursable governmental program or a higher level of service under an existing program, we first review the provisions establishing financing for redevelopment agencies. Such agencies have no independent powers of taxation (*Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal. 3d [*982] 100, 106 [211 Cal. Rptr. 133, 695 P.2d 220]), but receive a portion of tax revenues collected by other local agencies from property within a redevelopment project area, which may result from [***9] the following scheme: "Redevelopment agencies finance real property improvements in blighted areas. Pursuant to article XVI, section 16 of the Constitution, these agencies are authorized to use tax increment revenues for redevelopment projects. The constitutional mandate has been implemented through the Community Redevelopment Law (Health & Saf. Code, § 33000 et seq.). [P] The Community Redevelopment Law authorizes several methods of financing; one is the issuance of tax allocation bonds. Tax increment revenue, the increase in annual property taxes attributable to redevelopment improvements, provides the security for tax allocation bonds. Tax increment revenues are computed as follows: The real property within a redevelopment project area is assessed in the year the redevelopment plan is adopted. Typically, after redevelopment, property values in the project area increase. The taxing agencies (e.g., city, county, school or special district) keep the tax revenues attributable to the original assessed value and pass the portion of the assessed property value which exceeds the original assessment on to the redevelopment agency. (Health & Saf. Code, § 33640, 33641, 33670, 33675). In

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[***10] short, tax increment financing permits a redevelopment agency to take advantage of increased property tax revenues in the project areas without an increase in the tax rate. This scheme for redevelopment financing has been a part of the California Constitution since 1952. (Cal. Const., art. XVI, § 16.)" (*Brown v. Community Redevelopment Agency* (1985) 168 Cal. App. 3d 1014, 1016-1017 [214 Cal. Rptr. 626].) [5]

5 Section 33071 in the Community Redevelopment Law provides that a fundamental purpose of redevelopment is to expand the supply of lowand moderate-income housing, as well as expanding employment opportunities and improving the social environment.

In *Brown v. Community Redevelopment Agency, supra*, 168 Cal. App. 3d at pages 1016-1018, the court determined that by enacting section 33678, the Legislature interpreted article XIII B of the Constitution as not broad enough in reach to cover the raising or spending of tax increment revenues by redevelopment agencies. Specifically, the court decided [***11] [HN4]the funds a redevelopment agency receives from tax increment financing do not constitute "proceeds of taxes" subject to article XIII B appropriations limits. (*Brown v. Community Redevelopment Agency, supra*, at p. 1019). [6] [**274] This ruling was based on section 33678, providing in pertinent part: "This section implements and fulfills the intent . . . of Article XIII B and Section 16 of Article [*983] XVI of the California Constitution. *The allocation and payment to an agency of the portion of taxes specified in subdivision (b) of Section 33670 for the purpose of paying principal of, or interest on . . . indebtedness incurred for redevelopment activity . . . shall not be deemed the receipt by an agency of proceeds of taxes levied by or on behalf of the agency within the meaning of or for the purposes of Article XIII B . . . nor shall such portion of taxes be deemed receipt of proceeds of taxes by, or an appropriation subject to limitation of, any other public body within the meaning or for purposes of Article XIII B . . .* or any statutory provision enacted in implementation of Article XIII B. *The allocation and payment to an agency of this portion of taxes* [***12] *shall not be deemed the appropriation by a redevelopment agency of proceeds of taxes levied by or on behalf of a redevelopment agency within the meaning or for purposes of Article XIII B of the California Constitution.*" (Italics added.)

6 The term of art, "proceeds of taxes," is defined in [HN5]article XIII B, section 8, as follows: (c) " *'Proceeds of taxes' shall include, but not be restricted to, all tax revenues* and the proceeds to an entity of government, from (1) regulatory licenses, user charges, and user fees to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service, and (2) the investment of tax revenues. With respect to any local government, 'proceeds of taxes' shall include subventions received from the state, other than pursuant to Section 6, and, with respect to the state, proceeds of taxes shall exclude such subventions." (Italics added.)

In *County of Placer v. Corin* (1980) 113 Cal. App. 3d 443, 451 [170 Cal. Rptr. [***13] 232], the court defined "proceeds of taxes" IN THIS WAY: "Under article XIII B, with the exception of state subventions, the items that make up the scope of ' "proceeds of taxes" ' concern charges levied to raise *general revenues* for the local entity. ' "Proceeds of taxes," ' in addition to 'all tax revenues' includes 'proceeds . . . from . . . regulatory licenses, user charges, and user fees [*only*] *to the extent that such proceeds exceed the costs reasonably borne by such entity in providing the regulation, product or service. . . .*' (§ 8, subd. (c).) (Italics added.) Such 'excess' regulatory or user fees are but *taxes* for the raising of general revenue for the entity. [Citations.] Moreover, to the extent that an assessment results in revenue above the cost of the improvement or is of general public benefit, it is no longer a special assessment but a tax. [Citation.] *We conclude 'proceeds of taxes' generally contemplates only those impositions which raise general tax revenues for the entity.*" (Italics added.) [7]

7 The issues before the court in *County of Placer v. Corin, supra*, 113 Cal. App. 3d 443 were whether special assessments and federal grants should be considered proceeds of taxes; the court held they should not. Section 6 is not discussed; the court's analysis of other concepts found in article XIII B is nevertheless instructive.

[***14] **(3a)** In light of these interrelated sections and concepts, our task is to determine whether the 20 percent Housing Fund set-aside requirement of a redevelopment agency's tax increment financing qualifies under section 6 as a "cost" of a program. As will be explained, we agree with the trial court that the resolution of this issue is sufficient to dispose of the entire matter, and [*984] accordingly we need not discuss the alternate grounds of decision stated by the Commission. [8]

8 The alternate grounds of the Commission's decision were that there were no costs subject to reimbursement related to the Housing Fund because there was no net increase in the aggregate program responsibilities of the Agency, and that the set-aside requirement did not constitute a

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mandated "new program or higher level of service" under this section.

III.

HOUSING FUND ALLOCATIONS: REIMBURSABLE COSTS?

1. *Arguments*

The Agency takes the position that the language of section 33678 is simply inapplicable [**275] to its claim for [***15] subvention of funds required to be deposited into the Housing Fund. It points out that section 6 expressly lists three exceptions to the requirement for subvention of funds to cover the costs of state-mandated programs: (a) Legislative mandates requested by the local agency affected; (b) legislation defining or changing a definition of a crime; or (c) pre-1975 legislative mandates or implementing regulations or orders. (See fn. 4, *ante*.) None of these exceptions refers to the source of the funding originally used by the agency to pay the costs incurred for which reimbursement is now being sought. Thus, the agency argues it is immaterial that under section 33678, *for purposes of appropriations limitations*, tax increment financing is not deemed to be the "proceeds of taxes." (*Brown v. Community Redevelopment Agency, supra*, 168 Cal. App. 3d at pp. 1017-1020.) The Agency would apply a "plain meaning" rule to section 6 (see, e.g., *Davis v. City of* Berkeley (1990) 51 Cal. 3d 227, 234 [272 Cal. Rptr. 139, 794 P.2d 897]) and conclude that the source of the funds used to pay the program costs up front, before any subvention, is not stated in the section and thus is not [***16] relevant.

As an illustration of its argument that the source of its funds is irrelevant under section 6, the Agency cites to Government Code section 17556. That section is a legislative interpretation of section 6, creating several classes of state-mandated programs for which no state reimbursement of local agencies for costs incurred is required. In *County of Fresno v. State of California* (1991) 53 Cal. 3d 482, 487 [280 Cal. Rptr. 92, 808 P.2d 235], the Supreme Court upheld the facial constitutionality of Government Code section 17556, subdivision (d), which disallows state subvention of funds where the local government is authorized to collect service charges or fees in connection with a mandated program. The court explained that section 6 "was designed to protect the tax revenues of local governments from state mandates that [*985] would require expenditure of such revenues." (*County of Fresno v. State of California, supra*, at p. 487.) Based on the language and history of the measure, the court stated, "Article XIII B of the Constitution, however, was not intended to reach beyond taxation." (*Ibid.*) The court therefore concluded that in view of its textual [***17] and historical context, section 6 "requires subvention only when the costs in question can be recovered *solely from tax revenues*." (*Ibid.*, original italics.) Interpreting section 6, the court stated: "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." (*Ibid.*) No subvention was required where the local authority could recover its expenses through fees or assessments, not taxes.

2. *Interpretation of Section 6*

Here, the Agency contends the authority of *County of Fresno v. State of California, supra*, 53 Cal. 3d 482, should be narrowly read to cover only self-financing programs, and the Supreme Court's broad statements defining "costs" in this context read as mere dicta. It also continues to argue for a "plain meaning" reading of section 6, which it reiterates does not expressly discuss the source of funds used by an agency to pay the costs of a program before any reimbursement is sought. We disagree with both of these arguments. The correct approach is to read section 6 in light of its historical and textual context. **(4)** [HN6]The [***18] rules of constitutional interpretation require a strict construction of section 6, because constitutional limitations and restrictions on legislative powers are not to be extended to include matters not covered by the language used. (*City of San Jose v. State of California, supra*, 45 Cal. App. 4th at pp. 1816-1817.)

(5) The goals of articles XIII A and XIII B are to protect California residents from excessive taxation and government spending. (*County of Los Angeles v. State of California, supra*, 15 Cal. 4th at p. 81.) A central purpose of section 6 is to prevent the state's transfer of the cost of government from itself to the local level. (*City of Sacramento v. State of California, supra*, 50 Cal. 3d at p. 68.) **(3b)** The related goals of these enactments require us to [**276] read the term "costs" in section 6 in light of the enactment as a whole. The "costs" for which the Agency is seeking reimbursement are its deposits of tax increment financing proceeds into the Housing Fund. Those tax increment financing proceeds are normally received pursuant to the Community Redevelopment Law (§ 33000 et seq.) when, after redevelopment, the taxing agencies collect and keep the tax revenues [***19] attributable to the original assessed value and pass on to the redevelopment agency the portion of the [*986] assessed property value which exceeds the original assessment. (*Brown v. Community Redevelopment Agency, supra*, 168 Cal. App. 3d at pp. 1016-1017.) Is this the type of expenditure of tax revenues of local governments, upon state mandates which require use of such revenues, against which section 6 was designed to pro-

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tect? (*County of Fresno v. State of California, supra,* 53 Cal. 3d at p. 487.)

3. *Relationship of Appropriations Limitations and Subvention*

We may find assistance in answering this question by looking to the type of appropriations limitations imposed by article XIII B. In *County of Placer v. Corin, supra,* 113 Cal. App. 3d at page 447, the court described the discipline imposed by article XIII B in this way: [HN7]"[A]rticle XIIIB does not limit the ability to expend government funds collected from all sources. Rather, the appropriations limit is based on 'appropriations subject to limitation,' which consists primarily of the authorization to expend during a fiscal year the 'proceeds of taxes.' (§ 8, subd. (a).) As to local governments, [***20] limits are placed only on the authorization to expend the proceeds of taxes levied by that entity, in addition to proceeds of state subventions (§ 8, subd. (c)); no limitation is placed on the expenditure of those revenues that do not constitute 'proceeds of taxes.' " [9]

> 9 The term of art, "appropriations subject to limitation," is defined in [HN8]article XIII B, section 8, as follows: [P] (b) " 'Appropriations subject to limitation' of an entity of local government means any authorization to expend during a fiscal year *the proceeds of taxes levied by or for that entity* and the proceeds of state subventions to that entity (other than subventions made pursuant to Section 6) exclusive of refunds of taxes." (Italics added.)

Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any "proceeds of taxes." Nor do they raise, through tax increment financing, "*general* [***21] *revenues* for the local entity." (*County of Placer v. Corin, supra,* 113 Cal. App. 3d at p. 451, original italics.) The purpose for which state subvention of funds was created, to protect local agencies from having the state transfer its cost of government from itself to the local level, is therefore not brought into play when redevelopment agencies are required to allocate their tax increment financing in a particular manner, as in the operation of sections 33334.2 and 33334.3. (See *City of Sacramento v. State of California, supra,* 50 Cal. 3d at p. 68.) The state is not transferring to the Agency the operation and administration of a program for which it was formerly legally and financially [*987] responsible. (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal. App. 4th 805, 817 [38 Cal. Rptr. 2d 304].) [10]

> 10 We disagree with respondents that the legislative history of sections 33334.2 and 33334.3 is of assistance here, specifically, that section 23 of the bill creating these sections provided that no appropriations were made by the act, nor was any obligation for reimbursements of local agencies created for any costs incurred in carrying out the programs created by the act. (Stats. 1976, ch. 1337, § 23, pp. 6070-6071.) As stated in *City of San Jose v. State of California, supra,* 45 Cal. App. 4th at pages 1817-1818, legislative findings regarding mandate are irrelevant to the issue to be decided by the Commission, whether a state mandate exists.

[***22] For all these reasons, we conclude the same policies which support exempting tax increment revenues from article XIII B appropriations limits also support denying reimbursement under section 6 for this particular allocation of those revenues to the Housing Fund. Tax increment financing is not within the scope of article XIII B. (*Brown v. Community Redevelopment Agency,* [**277] *supra,* 168 Cal. App. 3d at pp. 1016-1020.) Section 6 "requires subvention only when the costs in question can be recovered *solely from tax revenues.*" (*County of Fresno v. State of California, supra,* 53 Cal. 3d at p. 487, original italics.) No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes. Here, these costs of depositing tax increment revenues in the Housing Fund are attributable not directly to tax revenues, but to the benefit received by the Agency from the tax increment financing scheme, which is one step removed from other local agencies' collection of tax revenues. (§ 33000 et seq.) Therefore, in light of the above authorities, this use of tax increment financing is not a reimbursable "cost" under section 6. We therefore need not [***23] interpret any remaining portions of section 6.

DISPOSITION

The judgment is affirmed.

Work, Acting P. J., and McIntyre, J., concurred.

Appellant's petition for review by the Supreme Court was denied September 3, 1997.

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TAB "20"

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CITY OF RANCHO CUCAMONGA, Plaintiff and Appellant, v. REGIONAL WATER QUALITY CONTROL BOARD-SANTA ANA REGION et al., Defendants and Respondents; COUNTY OF SAN BERNARDINO et al., Real Parties in Interest and Respondents.

E037079

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

135 Cal. App. 4th 1377*; *38 Cal. Rptr. 3d 450*; *2006 Cal. App. LEXIS 86*; *2006 Cal. Daily Op. Service 845*; *2006 Daily Journal DAR 1126*; *36 ELR 20026

January 26, 2006, Filed

NOTICE:

As modified Feb. 27, 2006.

SUBSEQUENT HISTORY: Modified by *City of Rancho Cucamonga v. Reg'l Water Quality, 2006 Cal. App. LEXIS 246 (Cal. App. 4th Dist., Feb. 27, 2006)*

PRIOR HISTORY: [***1] APPEAL from the Superior Court of San Bernardino County, No. RCV 071613, Shahla Sabet, Judge.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A city's action challenged the procedure by which a federal regulatory permit was adopted and also challenged the permit's conditions limiting the quantity and quality of water runoff that could be discharged from storm sewer systems. The trial court sustained demurrers by the State Water Resources Control Board and a regional water quality control board. The regional board had issued a municipal storm sewer permit governing 18 local public entities. (Superior Court of San Bernardino County, No. RCV071613, Shahla Sabet, Judge.)

The Court of Appeal affirmed the judgment. The court held that the trial court properly sustained without leave to amend the state board's demurrer. Even if the city had identified any cognizable claim against the state board, the claim would have been barred by the 30-day statute of limitations for challenging an improperly-adopted state board policy or regulation. Because the city was given notice that the hearing on the permit would proceed as an informal administrative adjudication, it could not successfully argue it was relieved of the obligation to object to the administrative record at the time of the hearing. The court agreed with the regional board that the permit properly allocated some inspection duties to the permittees. Federal law, either expressly or by implication, requires permittees under the National Pollutant Discharge Elimination System to perform inspections for illicit discharge prevention and detection; landfills and other waste facilities; industrial facilities; construction sites; certifications of no discharge; non-stormwater discharges; permit compliance; and local ordinance compliance. (Opinion by Gaut J., with Hollenhorst, Acting P. J., and Richl, J., concurring.) [*1378]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Pollution and Conservation Laws § 5--Water--National Pollutant Discharge Elimination System--Issuance of Permits.--*Gov. Code, § 11352, subd. (b)*, makes the issuance of a permit under the National Pollutant Discharge Elimination System exempt from the rulemaking procedures of the Administrative Procedure Act. Permit issuance is a quasi-judicial, not a quasi-legislative, rulemaking proceeding. The exercise of discretion to grant or deny a license, permit or other type of application is a quasi-judicial function.

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135 Cal. App. 4th 1377, *; 38 Cal. Rptr. 3d 450, **;
2006 Cal. App. LEXIS 86, ***; 2006 Cal. Daily Op. Service 845

(2) **Pleading § 90--Motions to Strike.**--A court may strike all or part of a pleading under *Code Civ. Proc., §§ 431.10* and *436.*

(3) **Pollution and Conservation Laws § 5--Water--National Pollutant Discharge Elimination System--Issuance of Permits--Storm Sewer Discharge.**--*33 U.S.C. § 1342* of the Clean Water Act requires a permit under the National Pollutant Discharge Elimination System to be issued for any storm sewer discharge, whether there is any actual impairment in a particular region.

(4) **Administrative Law § 131--Judicial Review--Scope--Substantial Evidence Rule.**--An agency may rely upon the opinion of its staff in reaching decisions, and the opinion of staff has been recognized as constituting substantial evidence.

(5) **Pollution and Conservation Laws § 5--Water--National Pollutant Discharge Elimination System--Issuance of Permits.**--*33 U.S.C. § 1342(p)(3)(B)(iii)* of the Clean Water Act authorizes the imposition of permit conditions, including management practices, control techniques and system, design and engineering methods, and such other provisions as the administrator of the state determines appropriate for the control of such pollutants. The act authorizes states to issue permits with conditions necessary to carry out its provisions, as provided by *33 U.S.C. § 1342(a)(1).* The permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants.

(6) **Pollution and Conservation Laws § 5--Water--National Pollutant Discharge Elimination System--Issuance of Permits.**--A municipal storm sewer permit properly allocated some inspection duties to the permittees. *Wat. Code, § 13383,* provides that as part of compliance with [*1379] the Clean Water Act, the regional board may establish inspection requirements for any pollutant discharger. Federal law, either expressly or by implication, requires permittees under the National Pollutant Discharge Elimination System to perform inspections for illicit discharge prevention and detection; landfills and other waste facilities; industrial facilities; construction sites; certifications of no discharge; nonstormwater discharges; permit compliance; and local ordinance compliance, as provided by *40 C.F.R. 122.26(d)* and *(g) (2005);33 U.S.C. § 1342(p)(3)(B)(ii).* Under *40 C.F.R. § 122.42(c)(6) (2005),* permittees must report annually on their inspection activities.

[9 Witkin, Cal. Procedure (4th ed. 1997) Administrative Proceedings, § 63; 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, §§ 893, 896.]

COUNSEL: James L. Markman; Richards, Watson & Gershon, John J. Harris and Evan J. McGinley for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Mary E. Hackenbracht, Assistant Attorney General, Richard Magasin and Jennifer F. Novak, Deputy Attorneys General, for Defendants and Respondents.

JUDGES: Gaut J., with Hollenhorst, Acting P. J. and Richli J., concurring.

OPINION BY: GAUT

OPINION

[**452] **GAUT, J.--**

1. Introduction

This case involves environmental regulation of municipal storm sewers that carry excess water runoff to the Santa Ana River as it passes through San Bernardino County on its way to the Pacific Ocean. Federal and state laws impose regulatory controls on storm sewer discharges. Municipalities are required to obtain and comply with a federal regulatory permit limiting the quantity and quality of water runoff that can be discharged from these storm sewer systems.

In this instance, the Regional Water Quality Control Board for the Santa Ana Region (the Regional Board) conducted public hearings and then issued a comprehensive 66-page [***2] municipal storm sewer permit governing 18 local [*1380] public entities. Two permittees, the City of Rancho Cucamonga and the City of Upland, among others, filed an administrative appeal with the State Water Resources Control Board (the State Board.) The State Board summarily dismissed the appeal. The Cities of Rancho Cucamonga and Upland [1] then filed a petition for writ of mandate and complaint against the State Board and the Regional Board.

1 Upland is not a party to this appeal.

The trial court sustained without leave to amend the demurrer of the State Board to the entire action. It sustained the demurrer as to four causes of action and granted the motion to strike of the Regional Board. After a hearing, the trial court denied the petition for writ of mandate.

Both procedurally and substantively, the City of Rancho Cucamonga challenges the conditions imposed

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by the NPDES [2] permit and waste discharge requirements (the 2002 permit). It contends the procedure by which the 2002 permit was adopted was not legal, that [***3] the 2002 permit's conditions are not appropriate for the area, and that the permit's requirements are too expensive. Because we conclude the permit was properly adopted and its conditions and requirements are appropriate, we reject these contentions.

2 The National Pollutant Discharge Elimination System.

2. The National Pollutant Discharge Elimination System

California cases have repeatedly explained the complicated web of federal and state laws and regulations concerning water pollution, especially storm sewer discharge into the public waterways. (*City of Burbank v. State Water Resources Control Bd. (2005) 35 Cal.4th 613, 619-621 [26 Cal. Rptr. 3d 304, 108 P.3d 862]* (*Burbank*); *Building Industry Assn. of San Diego County v. State Water Resources Control Board (2004) 124 Cal.App.4th 866, 872-875 [22 Cal. Rptr. 3d 128]* (*Building Industry*); *Communities for a Better Environment v. State Water Resources Control Bd. (2003) 109 Cal.App.4th 1089, 1092-1094 [1 Cal. Rptr. 3d 76]* (*Communities*); *WaterKeepers Northern California v. State Water Resources Control Bd. (2002) 102 Cal.App.4th 1448, 1451-1453* [**453] *[126 Cal. Rptr. 2d 389]*).

[***4] For purposes of this case, the important point is described by the California Supreme Court in *Burbank*: "Part of the Federal Clean Water Act [*33 U.S.C. § 1251 et seq.*] 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.* [*1381] *91, 101 [117 L. Ed. 2d 239, 112 S. Ct. 1046]]*.) The NPDES sets out the conditions under which the federal [Environmental Protection Agency] 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*.)" (*Burbank, supra, 35 Cal.4th at p. 621*.)

California's Porter-Cologne Act (*Wat. Code, § 13000 et seq.*) establishes a statewide program for water quality control. Nine regional boards, overseen by the State Board, administer the program in their respective regions. (*Wat. Code, §§ 13140,* [***5] *13200 et seq., 13240,* and *13301*.) *Water Code sections 13374* and *13377* authorize the Regional Board to issue federal NPDES permits for five-year periods. (*33 U.S.C. § 1342, subd.(b)(1)(B)*.)

As discussed more fully in part 6 *post*, the state-issued NPDES permits are subject to the informal hearing procedures set forth for administrative adjudications. (*Gov. Code, § 11445.10 et seq.*; *Cal. Code Regs., tit. 23, § 647 et seq.*) The issuance of permits is specifically excluded from the procedures for administrative regulations and rulemaking. (*Gov. Code, §§ 11340 et seq., 11352.*)

3. Factual and Procedural Background

The Regional Board issued the first NPDES permit for San Bernardino County in 1990. The principal permittee was the San Bernardino Flood Control District (the District). The 1990 permit required the permittees to develop and implement pollution control measures, using "best management practices" and monitoring programs, to eliminate illegal discharges [***6] and connections, and to obtain any necessary legal authority to do so. The management programs could be existing or new.

In 1993, the District developed the NPDES drain area management program (DAMP).

The second NPDES permit was issued in 1996 and was based on the report of waste discharge (ROWD) prepared by the principal permittee and copermittees, including Rancho Cucamonga. The 1996 permit proposed extending the existing program, which included inspections of industrial and commercial sources; policies for development and redevelopment; better public education; and implementation of a monitoring program. It offered a commitment to reduce pollutants to the "maximum extent practicable."

In 2000, the permittees submitted another ROWD to renew their NPDES permit. The 2000 ROWD proposed continuing to implement and develop water quality management and monitoring programs.

[*1382] Based on the 2000 ROWD, the Regional Board staff created five successive drafts of the 2002 permit, incorporating written comments by Rancho Cucamonga and others and comments made during two public workshops. Some of the comments addressed the economic considerations of anticipated prohibitive compliance costs.

[***7] The notice of the public hearing to consider adoption of the 2002 permit hearing [**454] announced: "relevant Regional Board files are incorporated into the record;" the governing procedures were those for an informal hearing procedure as set forth in "*Title 23, California Code of Regulations, Section 647 et seq.*;" and "Hearings before the Regional Water Board are not conducted pursuant to *Government Code section 11500 et*

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seq.," the alternative formal hearing procedure for administrative adjudication. The notice was mailed to all permittees. The accompanying "fact sheet," which was publicly circulated, offered further information about the conduct and nature of the hearing and the legal and factual grounds for the Regional Board's recommendation to adopt the 2002 permit.

The informal public hearing was conducted on April 26, 2002. Neither Rancho Cucamonga nor any of the permittees objected to the form or substance of the hearing. Ultimately, after a staff presentation and testimony, including a statement from Rancho Cucamonga's counsel, the Regional Board adopted the 2002 permit. After the State Board dismissed their administrative appeal, [***8] Rancho Cucamonga and Upland filed the instant action.

The operative pleading is the second amended petition for writ of mandate and complaint. The petition alleges that the State Board and the Regional Board acted illegally and in excess of their jurisdiction in developing, adopting and implementing the 2002 permit. Based on 26 pages of general allegations, the petition asserts eight causes of action, alleging the State Board and the Regional Board violated *sections 13241*, *13263*, and *13360 of the Water Code* (the Porter-Cologne Act); the California Environmental Quality Act (*Pub. Resources Code, § 21000 et seq.*); the California Administrative Procedure Act (*Gov. Code, §§ 11340-11529*); the California Constitution; and the federal Clean Water Act; and seeking declaratory and injunctive relief.

The State Board successfully opposed the action on demurrer. The Regional Board eliminated four causes of action, the fourth, fifth, seventh, and eighth by demurrer and motion to strike. On the remaining four causes of action, the trial court found in favor of the Regional Board.

[*1383] 4. State Board's Demurrer

Rancho Cucamonga maintains the [***9] trial court should not have sustained the demurrer of the State Board without leave to amend because the State Board is the ultimate authority on state-issued NPDES permits, and, therefore, was properly joined as a party: "Because the State Board has for all intents and purposes adopted the rules and policies of general application upon which the Permit is based, it is clearly a proper party to this action."

The difficulty with Rancho Cucamonga's theory of liability against the State Board is, to quote Gertrude Stein about the City of Oakland, "There is no there there." (Stein, Everybody's Autobiography (1937).) In other words, Rancho Cucamonga's allegations against the State Board lack any substance. Instead, Rancho Cucamonga launches an unspecific attack on the State Board without identifying any particular problems. The petition makes the unexceptional allegation that the State Board formulates general water control policy which it implements and enforces through regional boards. It also alleges the State Board has not complied with the Administrative Procedure Act but it does not identify any objectionable policies or how there is no compliance. Instead the petition complains [***10] about a State Board letter directing that all NPDES permits follow consistent principles regarding standard urban storm water mitigation plans. [**455] Additionally, the petition maintains the 2002 permit included new reporting requirements and increased costs of compliance.

But the foregoing allegations did not articulate any improper State Board conduct. The 2002 permit, issued by the Regional Board and not by the State Board, is not subject to formal rulemaking procedures. (*Gov. Code, § 11352, subd. (b).*) The State Board's letter, explaining a precedential decision concerning mitigation plans, is not an example of formal rulemaking. (*Gov. Code, § 11425.60, subd. (b).*) By dismissing Rancho Cucamonga's administrative appeal concerning the 2002 permit, the State Board declined to become involved and the Regional Board's decision to issue the permit became final and subject to judicial review. (*People ex rel Cal. Regional Wat. Quality Control Bd. v. Barry (1987) 194 Cal.App.3d 158, 177 [239 Cal. Rptr. 349].*) But the State Board was not made a proper party by reason of its dismissal of the administrative appeal.

[***11] Furthermore, even if Rancho Cucamonga had identified any cognizable claim against the State Board, it would have been barred by the 30-day statute of limitations for challenging an improperly adopted State Board regulation or order. (*Wat. Code, § 13330*; *Gov. Code, § 11350.*)

[*1384] We hold the trial court properly sustained without leave to amend the State Board's demurrer to the second amended petition for writ of mandate and complaint.

5. Standard of Review for Petition for Writ of Mandate

In deciding a petition for writ of mandate, the trial court exercises its independent judgment. (*Code Civ. Proc., § 1094.5, subd. (c)*; *Wat. Code, § 13330, subd. (d)*; *Building Industry, supra, 124 Cal.App.4th at p. 879.*) But, "[i]n exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings ... . [¶] ... [¶] ... Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings." (*Fukuda v. City of Angels (1999) 20 Cal.4th*

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805, 817-818 [85 Cal. Rptr. 2d 696, 977 P.2d 693] (*Fukuda*).)

[***12] On appeal, the reviewing court determines whether substantial evidence supports the trial court's factual determinations. (*Fukuda, supra, 20 Cal.4th at p. 824*; *Building Industry, supra, 124 Cal.App.4th at p. 879*.) The trial court's legal determinations receive a de novo review with consideration being given to the agency's interpretations of its own statutes and regulations. (*Building Industry, supra, at p. 879*; *Nasha v. City of Los Angeles (2004) 125 Cal.App.4th 470, 482 [22 Cal. Rptr. 3d 772]*.)

6. Rancho Cucamonga's Objections to the Administrative Record and Lack of Notice

The notice of the administrative hearing for adoption of the 2002 permit included the statement that the Regional Board's files would be incorporated as part of the record. Before trial on the writ petition, Rancho Cucamonga attempted to raise an omnibus objection to the entire administrative record and a specific objection to four documents, three studies about marine pollution and one economic study. The trial court ruled the objections had been waived by not making them before or at the time of the hearing. Applying the presumption of administrative [***13] regularity, we affirm the trial court's evidentiary ruling. (*Mason v. Office of Admin.* [**456] *Hearings (2001) 89 Cal.App.4th 1119, 1131 [108 Cal. Rptr. 2d 102]*.)

The reasons given by Rancho Cucamonga as to why the trial court should have sustained its objections to all or part of the administrative record are that it did not waive its objections to the record because Rancho Cucamonga did not know the hearing was adjudicative; the Regional Board did not provide [*1385] notice of an informal hearing (*Gov. Code, § 11445.30*); and Rancho Cucamonga never had an opportunity to object to the administrative record.

(1) As noted previously, *Government Code section 11352, subdivision (b)*, makes the issuance of an NPDES permit exempt from the rulemaking procedures of the Administrative Procedure Act. Permit issuance is a quasi-judicial, not a quasi-legislative, rulemaking proceeding: "The exercise of discretion to grant or deny a license, permit or other type of application is a quasi-judicial function." (*Sommerfield v. Helmick (1997) 57 Cal.App.4th 315, 320 [67 Cal. Rptr. 2d 51]*; see *City of Santee v. Superior Court (1991) 228 Cal.App.3d 713, 718 [279 Cal. Rptr. 22]*.)

[***14] Instead, the Regional Board correctly followed the administrative adjudication procedures (*Gov. Code, § 11445.10 et seq.*) and the companion regulations at *California Code of Regulations, title 23, sections 647-648.8* for informal adjudicative public hearings. These procedures were announced in the notice of hearing which also stated that *Government Code section 11500 et seq.*, governing formal administrative adjudication hearings, would not apply, thus satisfying *Government Code section 11445.30* requiring notice of an informal hearing procedure. At the time of the hearing, Rancho Cucamonga did not object to the informal procedure. Rancho Cucamonga's effort to argue that federal notice requirements (*40 C.F.R. § 124.8, subd. (b)(6)(ii)* (2005)) should also have been followed fails because this involved a state-issued NPDES permit adopted according to California procedures.

Because Rancho Cucamonga was given notice that the hearing on the permit would proceed as an informal administrative adjudication, it cannot successfully argue it was relieved of the obligation to object to the administrative record [***15] at the time of the hearing. An informal administrative adjudication contemplates liberality in the introduction of evidence. (*23 Cal. Code Regs., tit. 23, §§ 648, subd. (d), 648.5.1.*) If Rancho Cucamonga wished to object to the informal hearing procedures, including the liberal introduction of evidence, it should have raised its objections as provided by statute and regulation before or at the time of the hearing (*Gov. Code, §§ 11445.30, 11445.40, 11445.50*; *23 Cal. Code Regs., tit. 23, § 648.7*), not a year later in the subsequent civil proceeding.

7. Economic Considerations for Issuance of NPDES Permit

Rancho Cucamonga's next assignment of error is that the Regional Board failed to consider the economic impact of the requirements of the 2002 permit by not conducting a cost-benefit analysis. Rancho Cucamonga relies on the California Supreme Court's *Burbank* opinion, in which the court held: "When ... a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit *more stringent* than federal [***16] law [*1386] requires, California law allows the board to take into account economic factors, including the wastewater discharger's cost of compliance." (*Burbank, supra, 35 Cal.4th at p. 618.*) Rancho Cucamonga contends that the 2002 permit exceeds federal requirements and that, therefore, this case should be remanded for a consideration of [**457] economic factors. (See *ibid.*; *Wat. Code, § 13241, subd. (d).*)

The two problems with this argument are the trial court found there was no evidence that the 2002 permit exceeded federal requirements and Rancho Cucamonga does not explain now how it does so. There was also evidence that the 2002 permit was based on a fiscal analysis and a cost-benefit analysis. In the absence of the foundational predicate and in view of evidence that cost

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was considered, Rancho Cucamonga's contention on this point fails.

(2) We also reject Rancho Cucamonga's related procedural argument that the Regional Board's motion to strike was impermissible as piecemeal adjudication. (*Regan Roofing v. Superior Court (1994) 24 Cal.App.4th 425, 432-436*; *Lilienthal & Fowler v. Superior Court (1993) 12 Cal.App.4th 1848, 1851-1855 [16 Cal. Rptr. 2d 458]*.) [***17] It is well recognized a court may strike all or part of a pleading as it did in this instance. (*Code Civ. Proc., §§ 431.10, 436*; *PH II, Inc. v. Superior Court (1995) 33 Cal.App.4th 1680, 1682-1683 [40 Cal. Rptr. 2d 169]*.)

8. Substantial Evidence

Rancho Cucamonga also challenges the trial court's independent factual determination that sufficient evidence supports the findings of the Regional Board. Rancho Cucamonga's main contention is that the 2002 permit was not distinctively crafted for San Bernardino County but, instead, copied a similar permit for other counties without identifying any particular water quality impairment in San Bernardino County caused by the permittees. In other words, no evidence in the record supports issuance of the 2002 permit and the trial court did not identify any such evidence in its statement of decision.

(3) One problem with Rancho Cucamonga's foregoing argument is that the Clean Water Act requires an NPDES permit to be issued for *any* storm sewer discharge, whether there is any actual impairment in a particular region. (*33 U.S.C. § 1342*; *Communities, supra, 109 Cal.App.4th at pp. 1092-1093*.) [***18] Therefore, Rancho Cucamonga's contention that the permit fails to identify impaired water bodies in the region is beside the point.

In its statement of decision, the trial court discussed the inadequacy of the arguments and evidence cited by Rancho Cucamonga and concluded: "The San Bernardino Permit is based in part on the Basin Plan for this region. It is [*1387] also based on the permittees' own reports and monitoring within this region ... . It incorporates the permittees' management program, which is unique to these cities and county." The trial court included a citation to the 1993 DAMP report's "Geographic Description of the Drainage Area," which discusses the specific conditions present in San Bernardino County.

On appeal, Rancho Cucamonga faults the trial court for not presenting a more detailed description of the evidence supporting the issuance of the permit. We do not think the trial court, or this court, must bear that burden.

(4) First, "[a]n agency may ... rely upon the opinion of its staff in reaching decisions, and the opinion of staff has been recognized as constituting substantial evidence. (*Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Com. (1976) 55 Cal.App.3d 525, 535-536 [127 Cal. Rptr. 775]*.)" [***19] (*Browning-Ferris Industries v. City Council (1986) 181 Cal.App.3d 852, 866 [226 Cal. Rptr. 575]*.) Here the Regional Board adopted the recommendation of its staff in issuing the permit. And, as the record shows, the staff's recommendation was based on the previous 1990 and 1996 permits, the 1993 DAMP [**458] report and the 2000 ROWD, the permittees' application for renewal of the 1996 permit, as well as more general water quality factors. The evidence contradicts Rancho Cucamonga's assertion, that "the Regional Board simply copied verbatim the NPDES Permit for North Orange County, a coastal region with markedly different water quality conditions and problems."

As part of the trial court's consideration of the petition for writ of mandate, Rancho Cucamonga and the Regional Board directed the court to review specific items of evidence contained in the administrative record. In its opposing brief, the Regional Board offered a detailed account of the evidence supporting the issuance of the permit. The trial court indicated it had reviewed the parties' submissions before ruling. It discussed the evidence at the hearing on the petition and referred to it in its statement of decision. [***20] (*Lala v. Maiorana (1959) 166 Cal.App.2d 724, 731 [333 P.2d 862]*.) Rancho Cucamonga had the burden of showing the Board abused its discretion or its findings were not supported by the facts. (*Building Industry, supra, 124 Cal.App.4th at pp. 887-888*.) To the extent it attempted to do so at the trial court level, it was not successful.

This court has independently reviewed the record with particular attention to the evidence as emphasized by the parties. We do not, however, find it incumbent upon us or the trial court to review the many thousands of pages submitted on appeal and identify the particular evidence that constitutes substantial evidence. Instead, we deem the trial court's findings sufficient and not affording any grounds for reversal. (*Building Industry, supra, 124 Cal.App.4th at p. 888*; see *Weisz Trucking Co., Inc. v. Emil R. Wohl* [*1388] *Construction (1970) 13 Cal.App.3d 256, 264 [91 Cal. Rptr. 489]*, citing *Perry v. Jacobsen (1960) 184 Cal.App.2d 43, 50 [7 Cal. Rptr. 177]*.)

9. Safe Harbor Provision

As it did repeatedly below, Rancho Cucamonga maintains the 2002 permit violates section 402(k) of the Clean [***21] Water Act (*33 U.S.C. § 1342(k)*), because the permit does not include "safe harbor" language, providing that, if a permittee is in full compliance with the terms and conditions of its permit, it cannot be found

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in violation of the Clean Water Act. (*U.S. Public Interest v. Atlantic Salmon (1st Cir. 2003) 339 F.3d 23, 26*; *EPA v. State Water Resources Control Board (1976) 426 U.S. 200, 205 [48 L.Ed.2d 578, 96 S.Ct. 2022].*) The trial court found there was no statutory right to a "safe harbor" provision to be included as the term of the permit. We agree.

This seems like much ado about nothing because *33 United States Code section 1342 (k)*, already affords Rancho Cucamonga the protection it seeks: "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." Rancho Cucamonga does not cite any persuasive authority as to why this statutory protection had to [***22] be duplicated as a provision in the 2002 permit.

Furthermore, the 2002 permit complied with the State Board's water quality order No. 99-05, a precedential decision requiring NPDES permits to omit "safe harbor" language used in earlier permits. A permit without "safe harbor" language was upheld in *Building Industry, supra, 124* [**459] *Cal.App.4th at page 877.* The trial court did not err.

10. Maximum Extent Practicable

Rancho Cucamonga protests that the 2002 permit's discharge limitations/prohibitions exceed the federal requirement that storm water dischargers should "reduce the discharge of pollutants to the maximum extent practicable." (*33 U.S.C. § 1342(p)(3)(B)(iii).*) The trial court, however, found there was no evidence presented that the 2002 permit exceeded federal requirements. Because there is no evidence, the issue presented is hypothetical and, therefore, premature. (*Building Industry, supra, 124 Cal.App.4th at p. 890.*)

Additionally, as Rancho Cucamonga recognizes, *Building Industry* rejected the contention that a "regulatory permit violates federal law because it allows the Water Boards to impose municipal [***23] storm sewer control measures more [*1389] stringent than a federal standard known as 'maximum extent practicable.' [Citation.] [Fn. omitted.] ... [W]e ... conclude the Water Boards had the authority to include a permit provision requiring compliance with state water quality standards." (*Building Industry, supra, 124 Cal.App.4th at p. 871.*) The *Burbank* case, allowing for consideration of economic factors when federal standards are exceeded, does not alter the analysis in this case where there was no showing that federal standards were exceeded and where there was evidence that economic factors were considered. Furthermore, like the permit in *Building Industries*, the 2002 permit contemplates controlling discharge of pollutants to the maximum extent practicable through a "cooperative iterative process where the Regional Water Board and Municipality work together to identify violations of water quality standards." (*Building Industry, supra, at p. 890.*) The 2002 permit does not exceed the maximum extent practicable standard.

11. The Requirements of the 2002 Permit

Rancho Cucamonga lastly complains the requirements of the 2002 permit are "overly prescriptive," [***24] illegally dictating the manner of compliance and improperly delegating to the permittees the inspection duties of the State Board and the Regional Board. Rancho Cucamonga's arguments contradict the meaning and spirit of the Clean Water Act.

(5) In creating a permit system for dischargers from municipal storm sewers, Congress intended to implement actual programs. (*National Resources Defense Council, Inc. v. Costle (D.C. Cir. 1977) 186 U.S. App.D.C. 147 [568 F.2d 1369, 1375].*) The Clean Water Act authorizes the imposition of permit conditions, including: "management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (*33 U.S.C. § 1342(p)(3)(B)(iii).*) The act authorizes states to issue permits with conditions necessary to carry out its provisions. (*33 U.S.C. § 1342(a)(1).*) The permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants. (*National Resources Defense Council v. U.S. EPA (1992) 966 F.2d 1292, 1308.*) [***25] That is what the Regional Board has created in the 2002 permit.

Rancho Cucamonga's reliance on *Water Code section 13360* is misplaced because that code section involves enforcement and implementation of state water quality law, (*Wat. Code, § 13300 et seq.*) not compliance with the Clean Water Act (*Wat. Code, § 13370 et seq.*) The federal law [**460] preempts the state law. (*Burbank, supra, 35 Cal.4th at p. 618.*) The Regional Board must comply with federal law requiring detailed conditions for NPDES permits.

[*1390] Furthermore, the 2002 permit does afford the permittees discretion in the manner of compliance. It is the permittees who design programs for compliance, implementing best management practices selected by the permittees in the DAMP report and approved by the Regional Board. Throughout the permit, the permittees are granted considerable autonomy and responsibility in maintaining and enforcing the appropriate legal authori-

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ty; inspecting and maintaining their storm drain systems according to criteria they develop; establishing the priorities for their own inspection requirements; and establishing programs [***26] for new development. The development and implementation of programs to control the discharge of pollutants is left largely to the permittees.

More particularly, we agree with the Regional Board that the permit properly allocated some inspection duties to the permittees. As part of their ROWD application for a permit, the permittees proposed to "Conduct Inspection, Surveillance, and Monitoring. Carry out all inspections, surveillance, and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal storm drain system." The ROWD also discussed continuing existing inspection programs.

(6) *Water Code section 13383* provides that as part of compliance with the Clean Water Act, the Regional Board may establish inspection requirements for any pollutant discharger. Federal law, either expressly or by implication, requires NPDES permittees to perform inspections for illicit discharge prevention and detection; landfills and other waste facilities; industrial facilities; construction sites; certifications of no discharge; non-stormwater discharges; permit compliance; and local [***27] ordinance compliance. (*40 C.F.R. 122.26(d), (g)* (2005); *33 U.S.C. § 1342(p)(3)(B)(ii).*) Permittees must report annually on their inspection activities. (*40 C.F.R. § 122.42(c)(6)* (2005).)

Rancho Cucamonga claims it is being required to conduct inspections for facilities covered by other state-issued general permits. 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(d)(2)* (2005).)

[*1391] 12. Disposition

Rancho Cucamonga is the only of the original 18 permittees still objecting to the 2002 NPDES permit. It has not successfully demonstrated that substantial evidence does not support the trial court's factual determinations or the [***28] trial court erred in its interpretation and application of state and federal law.

We affirm the judgment and order the prevailing parties to recover their costs on appeal.

Hollenhorst, Acting P. J., and Richli, J., concurred.

On February 27, 2006, the opinion was modified to read as printed above.

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TAB "21"

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LEXSEE

Positive
As of: Jun 25, 2010

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.

S109125

SUPREME COURT OF CALIFORNIA

33 Cal. 4th 859; 94 P.3d 589; 16 Cal. Rptr. 3d 466; 2004 Cal. LEXIS 7079; 2004 Daily Journal DAR 9404

August 2, 2004, Filed

PRIOR HISTORY: Superior Court of San Diego County, No. GIC737638, Linda B. Quinn, Judge. Court of Appeal, Fourth Dist., Div. One, No. D038027.
San Diego Unified School Dist. v. Commission on State Mandates, 99 Cal. App. 4th 1270, 122 Cal. Rptr. 2d 614, 2002 Cal. App. LEXIS 4369 (Cal. App. 4th Dist., 2002)

DISPOSITION: Judgment of the Court of Appeal affirmed in part and reversed in part.

CASE SUMMARY:

PROCEDURAL POSTURE: The Court of Appeal of California, Fourth Appellate District, Division One, affirmed a judgment providing that plaintiff San Diego Unified School District was entitled to full reimbursement of costs related to hearings triggered by mandatory expulsion recommendations and hearings resulting from discretionary expulsion recommendations. Defendant Commission on State Mandates and real party in interest California Department of Finance appealed.

OVERVIEW: The court granted review to consider whether the hearing costs incurred as a result of the mandatory actions related to expulsions that were compelled by Cal. Educ. Code § 48915 were fully reimbursable. The court also considered whether any hearing costs incurred in carrying out expulsions that were discretionary under § 48915 were reimbursable. The court concluded that § 48915, insofar as it compelled suspension and mandated a recommendation of expulsion for certain offenses, constituted a "higher level of service" under Cal. Const. art. XIII B, § 6, and imposed a reimbursable state mandate for all resulting hearing costs, even those costs attributable to procedures required by federal law. The court also concluded that no hearing costs incurred in carrying out expulsions that were discretionary under § 48915 were reimbursable. To the extent that § 48915 made expulsions discretionary, it did not reflect a new program or a higher level of service. Moreover, Cal. Educ. Code § 48918 did not trigger any right to reimbursement because the hearing provisions that assertedly exceeded federal requirements were merely incidental to fundamental federal due process requirements.

OUTCOME: The court affirmed the judgment insofar as it provided for full reimbursement of all costs related to hearings triggered by the mandatory expulsion recommendations. The court reversed the judgment insofar as it provided for reimbursement of any costs related to hearings triggered by the discretionary expulsion recommendations.

CORE TERMS: expulsion, pupil, mandatory, school districts, reimbursement, reimbursable, level of service, state mandate, discretionary, firearm, suspension, federal law, recommendation, mandated, new program, local agencies, triggered, local governments, federal mandate, nonreimbursable, notice, incur, governing board, executive order, expelled, expel, hearing procedures, existing program, time relevant, fiscal

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LexisNexis(R) Headnotes

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN1]See Cal. Const. art. XIII B, § 6.

Education Law > Students > Disciplinary Proceedings > Notice
Education Law > Students > Disciplinary Proceedings > Right to Counsel
Education Law > Students > Discipline Methods > Expulsions
[HN2]Public school districts in California are governed by statutes that regulate the expulsion of students. Cal. Educ. Code § 48900 et seq. Whenever an expulsion recommendation is made (and before a student may be expelled), the district is required by Cal. Educ. Code § 48918 to afford the student a hearing with various procedural protections -- including notice of the hearing and the right to representation by 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 Cal. Const. art. XIII B, § 6, and implementing legislation, Cal. Gov't Code § 17500 et seq.

Education Law > Students > Discipline Methods > Expulsions
Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN3]Cal. Educ. Code § 48915, insofar as it compels suspension and mandates a recommendation of expulsion for certain offenses, constitutes a "higher level of service" under Cal. Const. art. XIII B, § 6, and imposes a reimbursable state mandate for all resulting hearing costs -- even those costs attributable to procedures required by federal law.

Education Law > Students > Discipline Methods > Expulsions
Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN4]No hearing costs incurred in carrying out those expulsions that are discretionary under Cal. Educ. Code § 48915 -- including costs related to hearing procedures claimed to exceed the requirements of federal law -- are reimbursable. 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.

Education Law > Students > Disciplinary Proceedings > Due Process
Education Law > Students > Discipline Methods > Expulsions
Governments > Local Governments > Finance
[HN5]Cal. Educ. Code § 48918 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. 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.

Education Law > Students > Discipline Methods > Expulsions
[HN6]Cal. Educ. Code § 48918 specifies the right of a student to an expulsion hearing and sets forth procedures that a school district must follow when conducting such a hearing.

Education Law > Students > Disciplinary Proceedings > Time Limitations
Education Law > Students > Discipline Methods > Expulsions
[HN7]In identifying the right to a hearing, Cal. Educ. Code § 48918(a) 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. 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.

Education Law > Students > Disciplinary Proceedings > Time Limitations
Education Law > Students > Discipline Methods > Expulsions
[HN8]See Cal. Educ. Code § 48918(a).

Education Law > Students > Disciplinary Proceedings > General Overview
Education Law > Students > Discipline Methods > Expulsions

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Education Law > Students > Discipline Methods > Suspensions
[HN9]Former Cal. Educ. Code § 48915(b) compelled a school principal to immediately suspend any student found to be in possession of a firearm at school or at a school activity off school grounds and 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.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview
Criminal Law & Procedure > Criminal Offenses > Property Crimes > Receiving Stolen Property > General Overview
Education Law > Students > Discipline Methods > Expulsions
[HN10]Former Cal. Educ. Code § 48915(c) (subsequently § 48915(d), currently § 48915(e)) 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 student, while at school or at a school activity off school grounds, engaged in such conduct.

Education Law > Students > Discipline Methods > Expulsions
[HN11]See former Cal. Educ. Code § 48915(c).

Education Law > Students > Discipline Methods > Expulsions
Education Law > Students > Discipline Methods > Suspensions
[HN12]See Cal. Educ. Code § 48900(f) through (l).

Education Law > Discrimination > Gender & Sex Discrimination > Sexual Harassment
Education Law > Students > Discipline Methods > Expulsions
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Employment Practices > Discharges & Failures to Hire
[HN13]See Cal. Educ. Code § 48900.2.

Education Law > Students > Discipline Methods > Expulsions
Education Law > Students > Discipline Methods > Suspensions
[HN14]See Cal. Educ. Code § 48900.3.

Education Law > Students > Discipline Methods > Expulsions
Education Law > Students > Discipline Methods > Suspensions
[HN15]See Cal. Educ. Code § 48900.4.

Administrative Law > Judicial Review > General Overview
Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus
Governments > Local Governments > Claims By & Against
[HN16]Procedures governing the constitutional requirement of reimbursement under Cal. Const. art. XIII B, § 6, are set forth in Cal. Gov't Code § 17500 et seq. The Commission on State Mandates (Commission), Cal. Gov't 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. Cal. Gov't Code § 17551. Cal. Gov't Code § 17561(a) provides that the state shall reimburse each school district for all costs mandated by the state, as defined in Cal. Gov't Code § 17514. Section 17514, in turn, defines "costs mandated by the state" to mean, in 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 Cal. Const. art. XIII B, § 6. Finally, Cal. Gov't Code § 17556 sets forth circumstances in which there shall be no reimbursement, including, under § 17556(c), circumstances in which 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.

Governments > Local Governments > Elections
Governments > Local Governments > Finance

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Governments > State & Territorial Governments > Finance
[HN17]The intent underlying Cal. Const. art. XIII B, § 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.

Governments > Local Governments > Finance
Governments > Public Improvements > General Overview
Governments > State & Territorial Governments > Finance
[HN18]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 Cal. Const. art. XIII B, § 6, and Cal. Gov't Code § 17514.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN19]California 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.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN20]See Cal. Gov't Code § 17556.

Education Law > Funding > Allocation
Education Law > Students > Discipline Methods > Expulsions
[HN21]See 20 U.S.C.S. § 7151.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN22]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.

Education Law > Students > Discipline Methods > Expulsions
Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN23]All hearing costs incurred under Cal. Educ. Code § 48918, triggered by a school 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 Cal. Gov't Code § 17556(c).

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A school district filed a test claim with the Commission on State Mandates, asserting entitlement to reimbursement for the costs of hearings triggered by mandatory expulsion recommendations, and those hearings resulting from discretionary expulsion recommendations. After holding hearings on the district's claim, the commission determined that Ed. Code, § 48915's requirement of suspension and a 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 Ed. Code, § 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. As to the vast majority of the remaining hearing procedures triggered by Ed. Code, § 48915's requirement of suspension and a mandatory recommendation of expulsion for firearm possession--for example, procedures governing 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 Gov. Code, § 17556, subd. (c), and did not impose a reimbursable state mandate. The commission further found that with respect to Ed. Code, § 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. The district then brought a proceeding for an administrative writ of mandate, challenging the commission's decision. The trial court issued a writ commanding the com-

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mission 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 [*860] the limited extent that required hearing procedures exceed federal due process mandates. (Superior Court of San Diego County, No. GIC737638, Linda B. Quinn, Judge.) The Court of Appeal, Fourth Dist., Div. One, No. D038027, affirmed the judgment rendered by the trial court.

The Supreme Court affirmed the judgment of the Court of Appeal insofar as it provided for full reimbursement of all costs related to hearings triggered by the mandatory expulsion provision of Ed. Code, § 48915, but reversed the judgment insofar as it provided for reimbursement of any costs related to hearings triggered by the discretionary provision of § 48915. The court held that to the extent that § 48915 compels suspension and mandates a recommendation of expulsion for certain offenses, it constitutes a higher level of service under Cal. Const., art. XIII B, § 6, and imposes a reimbursable state mandate for all resulting hearing costs--even those costs attributable to procedures required by federal law. The immediate suspension and mandatory expulsion of a student who possesses a firearm on school property provides a higher level of service to the public in that it enhances the safety of those who attend public schools. The court held, however, that to the extent Ed. Code, § 48915, makes expulsions discretionary, it does not constitute a higher level of service related to an existing program, because provisions recognizing discretion to suspend or expel students were set forth in statutes predating 1975, when § 48915 was first enacted. Even if any of the hearing procedures set forth in Ed. Code, § 48918, and applicable to mandatory and discretionary and mandatory expulsions under Ed. Code, § 48915, constitute a higher level of service, the statute does not trigger any right to reimbursement. The hearing procedures of Ed. Code, § 48918, should be considered to have been adopted to implement a federal due process mandate and hence are nonreimbursable under Cal. Const., art. XIII B, § 6, and Gov. Code, § 17556, subd. (c). (Opinion by George, C. J., expressing the unanimous view of the court.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) **State of California § 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension or Expulsion of Student.**--Ed. Code, § 48915, insofar as it compels suspension and mandates a recommendation of expulsion for certain offenses, constitutes a higher level of service under Cal. Const., art. XIII B, § 6, and imposes a reimbursable state mandate for all resulting hearing costs--even those costs attributable to procedures required by federal law. [*861]

(2) **State of California § 11--Fiscal Matters--Nonreimbursable State Mandate--No Higher Level of Service--Discretionary Suspension or Expulsion of Student--Hearing Procedures Excepted From Reimbursement as Federal Mandate.**--No hearing costs incurred in carrying out expulsions that are discretionary under Ed. Code, § 48915--including costs related to hearing procedures claimed to exceed the requirements of federal law--are reimbursable. 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 Ed. Code, § 48918, constitute a new program or higher level of service, the 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. 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.

[7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 549; 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 123A.]

(3) **Schools § 61--Students--Suspension or Expulsion--Expulsion Hearing Mandated.**--In identifying the right to a hearing, Ed. Code, § 48918, subd. (a), 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. 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.

(4) **Schools § 61--Parents and Students--Suspension or Expulsion--Mandatory and Discretionary Expulsion.**--Discrete subdivisions of Ed. Code, § 48915, 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.

(5) **State of California § 11--Fiscal Matters--Reimbursable State Mandate.**--Procedures governing the constitutional requirement of reimbursement

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under Cal. Const., art. XIII B, § 6, are set forth in Gov. Code, § 17500 et seq. The Commission on State Mandates (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. [*862] Code, § 17551.) Gov. Code, § 17561, subd. (a), provides that the state shall reimburse each school district for all costs mandated by the state, as defined in Gov. Code, § 17514. 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 Cal. Const., art. XIII B, § 6. Finally, Gov. Code, § 17556, sets forth circumstances in which there shall be no reimbursement, including, under Gov. Code, § 17556, subd. (c), circumstances in which 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.

(6) State of California § 11--Fiscal Matters--Reimbursable State Mandate--New Program or Higher Level of Service--Alternative Tests.--The requirement for increased or higher level of service under Cal. Const., art. XIII B, § 6, is directed to state mandated increases in the services provided by local agencies in existing programs. The Constitution's phrase "new program or higher level of service" refers to either of two alternatives--(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 and entities in the state.

(7) State of California § 11--Fiscal Matters--Reimbursable State Mandate--Increase in Costs.--Simply because a state law or order may increase the costs borne by local government in providing services does not necessarily establish that the law or order constitutes an increased or higher level of the resulting service to the public under Cal. Const., art. XIII B, § 6, and Gov. Code, § 17514.

(8) State of California § 11--Fiscal Matters--Reimbursable State Mandate--Increase in Level or Quality of Governmental Services Provided.--A reimbursable higher level of service concerning an existing program exists 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.

(9) State of California § 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension and Expulsion for Student Firearm Possession.--The statutory requirements of Ed. Code, § 48915--immediate suspension and mandatory recommendation of expulsion for students who possess a firearm, and the limitation [*863] upon the ensuing options of the school board (expulsion or referral)--provide 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; and (ii) the requirements were intended to provide an enhanced service to the public--safer schools for the vast majority of students.

(10) State of California § 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension and Expulsion for Student Firearm Possession.--Providing public schooling clearly constitutes a governmental function, and enhancing the safety of those who attend such schools constitutes a service to the public. The mandatory suspension and expulsion recommendation requirements of Ed. Code, § 48915, 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 Cal. Const., art. XIII B, § 6, and the implementing statutes.

(11) State of California § 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension and Expulsion of Student--State Requires School District to Incur Costs of an Expulsion Hearing.--In the absence of the operation of Ed. Code, § 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 and codified in Ed. Code, § 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, Ed. Code, § 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.

(12) Schools § 61--Parents and Students--Suspension or Expulsion--Expulsion Hearings--Not Federal Mandate.--Ed. Code, § 48918, sets out requirements for expulsion hearings that must be held when a district seeks to expel a student--but neither § 48918 nor federal law requires that any such expulsion recommendation be made in the first place. Section 48918 does not imple-

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ment any federal mandate that school districts hold such hearings and incur such costs whenever a student is found in possession of a firearm. Accordingly, the so-called exception to reimbursement described in Gov. Code, § 17556, subd. (c), is inapplicable in this context of a mandatory hearing. [*864]

(13) State of California § 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension and Expulsion of Student--Hearing Costs Triggered by Mandatory Expulsion.--When it is state law (Ed. Code, § 48915's mandatory expulsion provision), and not federal due process law, that requires a school district to take steps that in turn require it to incur hearing costs, the hearing costs incurred by a school district, triggered by the mandatory provision of Ed. Code, § 48915, do not constitute a nonreimbursable federal mandate. Under the statutes in effect through mid-1994, all such hearing costs--those designed to satisfy the minimum requirements of federal due process, and those that may exceed those requirements--were, with respect to the mandatory expulsion provision of § 48915, state mandated costs, fully reimbursable by the state.

(14) State of California § 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension or Expulsion of Student.--All hearing costs triggered by Ed. Code, § 48915's mandatory expulsion provision constitute reimbursable state mandated expenses under the statutes in effect through mid-1994. 20 U.S.C. § 7151, or its predecessor, 20 U.S.C. § 8921, may lead to a different conclusion when applied to versions of Ed. Code, § 48915, effective in years 1995 and thereafter.

(15) State of California § 11--Fiscal Matters--Reimbursable State Mandate--New Program or Higher Level of Service--Discretionary Suspension or Expulsion of Student: Schools § 61--Parents and Students--Discretionary Suspension or Expulsion--Cost of Proceedings Not Reimbursable.--The discretionary expulsion provision of Ed. Code, § 48915, does not constitute a new program or higher level of service related to an existing program, under Cal. Const., art. XIII B, § 6, because provisions recognizing discretion to suspend or expel students were set forth in statutes predating 1975, when the provision was first enacted.

(16) Schools § 61--Parents and Students--Suspension or Expulsion--Hearing Procedures--Federal Due Process Mandate--Nonreimbursable State Mandate.--All hearing procedures set forth in Ed. Code, § 48918, properly should be considered to have been adopted to implement a federal due process mandate, and hence all such hearing costs are nonreimbursable under Cal. Const., art. XIII B, § 6, and Government Code § 17557, subd. (c).

(17) State of California § 11--Fiscal Matters--Reimbursable State Mandate--Implementation of Federal Law--Discretionary Suspension or [*865] Expulsion of a Student: Schools § 61--Parents and Students--Discretionary Suspension or Expulsion--Federal Mandate to Provide a Hearing.--An initial discretionary decision to seek expulsion of a student in turn triggers a federal constitutional mandate to provide an expulsion hearing. The Legislature, in adopting specific statutory procedures under Ed. Code, § 48918, 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. 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 Gov. Code, § 17556, subd. (c).

(18) Schools § 61--Parents and Students--Discretionary Suspension or Expulsion--Federal Due Process Requirements--Not Reimbursable As State Mandate.--All hearing costs incurred under Ed. Code, § 48918, triggered by a school 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 Gov. Code, § 17556, subd. (c).

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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.

JUDGES: George, C. J., expressing the unanimous view of the court.

OPINION BY: GEORGE [***467]

OPINION

[**591] **GEORGE, C. J.**--Article XIII B, section 6, of the California Constitution provides: [HN1]"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 ... ." [1] (Hereafter article XIII B, section 6.)

> 1 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 [HN2]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 reimbursable 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, on the present case.

(1) We conclude that Education Code section 48915, [HN3]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.

(2) We also conclude that [HN4]*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 [HN5]*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

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48915--pertaining to the expulsion of students from public schools.

Education Code section 48918 [HN6]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.) [2]

2 For purposes of our present inquiry, Education Code, 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 [42 L. Ed. 2d 725, 95 S. Ct. 729] (*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.

[HN7](3) In identifying the right to a hearing, subdivision (a) of Education Code, section 48918, 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. [3] *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.* [4]

3 The provision reads: [HN8]"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 section 48900 presently includes--as it did at the time relevant here--the offense of possession of a firearm.)

4 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. [5] 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).)

5 See *Goss, supra*, 419 U.S. 565, 581; *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, section 549, page 754 (noting that Education Code section 48918 and related legislation were enacted in response to the decision in *Goss*).

[*869] (4) 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), [HN9]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. [6] (Compare this former provision with *current* Ed. Code, § 48915, subds. (c), (d).) [7]

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6 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."

7 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.)

[*870] [***471] This provision, as it read at the time relevant here, did not mandate expulsion per se [8]--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."

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8 As the Department of Finance observed in an August 22, 1994, communication to the Commission on State Mandates 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), [HN10]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. [9]

9 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: [HN11]"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 correction 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 Education Code section 48900 (as amended Stats. 1992, ch. 909, § 1, pp. 4224-4225; Stats. 1994, ch. 1198, § 5, pp. 7269-7270) provided: [HN12]"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, Education Code, section 48900.2 (Stats. 1992, ch. 909, § 2, p. 4225) provided: [HN13]"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."

Education Code, section 48900.3 (Stats. 1994, ch. 1198, § 6, p. 7270), at the time relevant here, provided: [HN14]"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,

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hate violence, as defined in subdivision (e) of [former] Section 33032.5 [current section 233]."

In addition, Education Code, section 48900.4 (Stats. 1994, ch. 1017, § 1, p. 6196) provided, at the time relevant here: [HN15]"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.)

[*872] [**595]

[***472] B. *Proceedings Under Government Code section 17500 et seq.*

[HN16](5) 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 XIIIB 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].) [10] The District sought reimbursement for costs incurred between July 1, 1993, and June 30, 1994, under statutes effective through the latter date.

10 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. [11] 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 governing 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 in-

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stead represent a choice by the principal and the school board.

> 11 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:

(6) "Looking at the language of [article XIIIB, 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 XIIIB. 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.)

[*875] We continued in *County of Los Angeles*: "The concern which prompted the inclusion of section 6 in article XIIIB 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 XIIIB explained section 6 to the

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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 [HN17]*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, italics added.)

It was clear in *County of Los Angeles, supra,* 43 Cal.3d 46, 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.) 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, 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 handicapped--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.) 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 state's 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 XIIIB. ... Section 6 was intended to preclude the state from shifting to local agencies the [***476] 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; see also *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 98 [61 Cal. Rptr. 2d [**598] 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, 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.)

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, and *City of Sacramento, supra,* 50 Cal.3d 51, concluded that requiring local governments to provide death benefits to local safety officers, under both the Public Employees' Retirement System (PERS) 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.)

(7) Viewed together, these cases (*County of Los Angeles, supra,* 43 Cal.3d 46, *City of Sacramento, supra,* 50 Cal.3d 51, and *City of Richmond, supra,* 64 Cal.App.4th 1190) illustrate the circumstance that [HN18]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 [*877]

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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. [12]

> 12 Indeed, as the court in *City of Richmond, supra*, 64 Cal.App.4th 1190, 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; 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] (8) By contrast, [HN19]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. Similarly, in *Long Beach Unified School District v. State of California* (1990) 225 Cal. App. 3d 155, 173 [**599] [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.

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. They argue, in essence, that the present matter is more analogous to the latter cases (*Carmel Valley, supra*, 190 [*878] Cal. App. 3d 521, and *Long Beach, supra*, 225 Cal. App. 3d 155)--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, *City of Sacramento, supra*, 50 Cal.3d 51, and *City of Richmond, supra*, 64 Cal.App.4th 1190)--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.

(9) 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 referral)--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 Education (Apr. 28, 1993), Analysis of Assem. Bill No. 342, p. 2 [noting legislative purpose to enhance public safety]; see also Assem. Com. on Education (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

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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. 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.) 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.

(10) The Department asserts that *Department of Industrial Relations, supra,* 214 Cal. App. 3d 1538, 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, article XIIIB, 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?

(11) 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, 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 Government Code section 17556, [**601] which--in setting forth circumstances in which the Commission shall *not* find costs to be mandated by the state--provides that [HN20]"[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." [13]

13 Government Code section 17556 reads in full: "The commission shall not find costs mandated by the state, as defined in Section 17514, in

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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 statute 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."

[*881] [***480] (12) 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. [14] 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.

14 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*, pages 882-883.

(13) 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 reimbursable by the state. [15]

15 In exhibit No. 1 to its claim, the District presented the declaration of a 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

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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: [HN21]"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." [16]

16 "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 2003-2004 state budget. (Cal. State Budget, 2003-2004, 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, Education Code section [*883] 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 Gov. Code, § 17556, subd. (c); see also *Kern High School Dist., supra*, 30 Cal.4th 727, 749-751; *City of Sacramento, supra*, 50 Cal.3d 51, 70-76.) 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.)

[**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)) [17]--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.

17 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.

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103-382, § 14601(b)(1) (Oct. 20, 1994) 108 Stat. 3518.)

(14) 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. [18]

18 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*

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?

(15) 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 § 10601, Stats. 1959, ch. 2, § 3, p. 860 [**604] [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"].) [19] 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.)

19 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. [20]

20 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--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 re-

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quirements. (See Gov. 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, 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, 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.) 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. (*Id.*, [**605] at p. 745.) [21]

> 21 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.)

In reaching that conclusion in *Kern High School Dist., supra*, 30 Cal.4th 727, we discussed *City of Merced, supra*, 153 Cal. App. 3d 777. 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.) 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.) 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, italics added.)

Summarizing this aspect of *City of Merced, supra*, 153 Cal. App. 3d 777, in *Kern High School Dist., supra*, 30 Cal.4th 727, 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, 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, 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. 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. [22]

> 22 Indeed, the Court of Appeal below suggested that the present case is distinguishable from *City of Merced, supra*, 153 Cal. App. 3d 777, 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),

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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 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 [*888] 6 of the state Constitution and Government Code section 17514 [23] 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, 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.) 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, 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.

23 As we observed in *Kern High School Dist., supra*, 30 Cal.4th 727, 751-752, "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.' "

(16) 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, 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 constitu-

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tional law, and that "even in the [*889] absence of [Penal Code] section 987.9, ... [***487] 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.) 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.) 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.

(17) 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, 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: [HN22]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.

(18) 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, [HN23]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). [24]

24 We do not foreclose the possibility that a local government might, under appropriate facts,

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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.

Kennard, J., Baxter, J., Werdegar, J., Chin, J., Brown, J., and Moreno, J., concurred.

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TAB "22"

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TUALATIN RIVERKEEPERS, an Oregon non-profit corporation; WILLAMETTE RIVERKEEPER, an Oregon non-profit corporation; COLUMBIA RIVERKEEPER, an Oregon non-profit corporation; and LIZ CALLISON, Petitioners-Appellants, v. OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, an Agency of the State of Oregon; and OREGON ENVIRONMENTAL QUALITY COMMISSION, a Commission of the State of Oregon, Respondents-Respondents, and CLEAN WATER SERVICES, CITY OF PORTLAND, PORT OF PORTLAND, COUNTY OF MULTNOMAH, COUNTY OF CLACKAMAS, CLACKAMAS COUNTY SERVICE DISTRICT NUMBER ONE, SURFACE WATER MANAGEMENT AGENCY OF CLACKAMAS COUNTY, CITY OF GLADSTONE, CITY OF HAPPY VALLEY, CITY OF LAKE OSWEGO, CITY OF MILWAUKIE, CITY OF OREGON CITY, CITY OF RIVER GROVE, CITY OF WEST LINN, CITY OF WILSONVILLE, OAK LODGE SANITARY DISTRICT, CITY OF GRESHAM, and CITY OF FAIRVIEW, Intervenors-Respondents.

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COURT OF APPEALS OF OREGON

235 Ore. App. 132*; *2010 Ore. App. LEXIS 465

May 11, 2009, Argued and Submitted
April 28, 2010, Filed

PRIOR HISTORY: [**1]
Multnomah County Circuit Court 060100752, Christopher J. Marshall, Judge.

DISPOSITION: Affirmed.

COUNSEL: Christopher Winter argued the cause for appellants. With him on the joint briefs were Crag Law Center and Brent Foster.

Erin C. Lagesen, Assistant Attorney General, argued the cause for respondents. With her on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Jay T. Waldron argued the cause for intervenors-respondents. With him on the joint brief were Laura Maffei, Andrew J. Lee and Schwabe, Williamson & Wyatt, P.C.; G. Kevin Kiely, James Kincaid, Carla Scott, and Cable Huston Benedict Haagensen & Lloyd LLP; David Doughman and Beery Elsner & Hammond LLP; and David Ris and Gresham City Attorney's Office.

James J. Nicita filed the brief *amicus curiae* for Northwest Environmental Defense Center, Northwest Environmental Advocates, Native Fish Society, Friends of the Clackamas River, and Barbara Kemper.

JUDGES: Before Wollheim, Presiding Judge, and Brewer, Chief Judge, and Sercombe, Judge. *

* Brewer, C. J., *vice* Edmonds, P. J.

OPINION BY: SERCOMBE

OPINION

[*135] SERCOMBE, J.

Petitioners sought judicial review of several municipal storm water permits issued by respondent [1] pursuant to *ORS 468B.050* and the federal [**2] Clean Water Act, *see 33 USC § 1342*. [2] They appeal following the trial court's grant of summary judgment in favor of respondent, contending that, in issuing the permits, respondent acted inconsistently with the requirements of *ORS*

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468B.025(1)(b) and *OAR 340-045-0015(5)(c)*, as well as *ORS 468B.050* and *OAR 340-042-0080*. We affirm.

1 For ease of reference, we refer to Oregon Department of Environmental Quality (DEQ) and Oregon Environmental Quality Commission (EQC), collectively, as "respondent."

2 The Federal Water Pollution Control Act, *33 USC §§ 1251 - 1376*, is generally referred to as the Clean Water Act. National Pollutant Discharge Elimination System permits are issued pursuant to the Clean Water Act. They are specifically provided for in *33 USC section 1342*.

The storm water permits at issue are all National Pollutant Discharge Elimination System (NPDES) permits, issued by respondent as part of the state's implementation of the Clean Water Act. *See ORS 468B.035* (EQC "may perform or cause to be performed any acts necessary to be performed by the state to implement" the provisions of the Clean Water Act). Although municipal storm water was not initially regulated pursuant to the NPDES program, [**3] [3] eventually, the Clean Water Act was amended to explicitly require regulation of certain storm water discharges. *See American Min. Congress v. U.S.E.P.A., 965 F2d 759, 763 (9th Cir 1992)* (discussing amendments to Clean Water Act requiring that regulation). After those amendments but prior to 1994, most discharges composed entirely of storm water did not require an NPDES permit. *33 USC § 1342(p)(1)*. However, discharges from municipal separate storm sewer systems [4] serving populations of more than 100,000 people were subject to a permit [*136] requirement. *33 USC § 1342(p)(2)(C) - (D)*. The permit requirement now applies to an even larger range of municipal storm water dischargers: OAR 340-045-015(2) provides that, "[w]ithout first obtaining an NPDES permit, a person may not discharge into navigable waters * * * storm water subject to permit requirements in *40 CFR § 122.26* or *§ 122.33*, including storm water from large, medium, and regulated small municipal separate storm sewer systems[.]"

3 For example, 40 CFR section 125.4(f) (1975) provided that, generally, no NPDES permit was required for "uncontrolled discharges composed entirely of storm runoff when these discharges are uncontaminated by [**4] any industrial or commercial activity[.]"

4 A municipal separate storm sewer is

> "a conveyance or system of conveyances including roads with drainage systems, municipal streets, catch basins, curbs, gutter[s], ditches, manmade channels, or storm drains that is owned or operated by a state, city, county, district, association, or other public body; is designed or used for collecting or conveying storm water; and is not a combined sewer or part of a Publicly Owned Treatment Works as defined in *40 CFR § 122.2*."

OAR 340-045-0010(10); *see also OAR 340-045-0010(11)* ("'Municipal Separate Storm Sewer System or MS4' means all municipal separate storm sewers that are defined as 'large,' 'medium,' or 'small' municipal separate storm sewers systems in *40 CFR § 122.26(b)*.").

The NPDES permits at issue in this case were issued by respondent and authorize the municipal permittees, who are intervenors in this judicial review proceeding, to

> "implement a storm water management program to reduce the contribution of pollutants in storm water to the maximum extent practicable (MEP), to address where applicable TMDL [total maximum daily load] wasteload allocations, and to discharge storm water to waters of the [**5] State, in conformance with all the requirements and conditions set forth in the attached schedules * * *." [5]

5 The permit issued to Clean Water Services contains slightly different language.

The permits mandate that the permittees "implement all applicable provisions in the Storm Water Management Plan (SWMP) as the associated Monitoring Program" and incorporate the SWMP by reference.

> "The SWMP and associated Monitoring Program include best management practices (BMPs), monitoring triggers, narrative conditions, adaptive management and other elements designed to reduce the introduction of pollutions into the waters of the State from [municipal separate storm sewer systems] to the maximum extent practicable (MEP). The SWMP also includes evaluation and reporting requirements designed to measure

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the effectiveness of BMPs and other programs."

[*137] Pursuant to those permits, the municipal permittees discharge storm water into a number of rivers and streams, including the Columbia, Willamette, and Tualatin Rivers.

Although the permits are extensive, it is undisputed that that they do not contain conditions stating that the storm water discharges must comply with state water quality standards. In addition, [**6] the permits do not specify wasteload allocations [6] in the form of numeric effluent limits; they instead incorporate benchmarks. They also require compliance with the SWMP, which, in turn, incorporates best management practices. It is the permits' lack of numeric limits and conditions requiring compliance with state water quality standards that gave rise to this case.

6 "Wasteload Allocation" refers to the portion of receiving water's loading capacity that is allocated to a particular source of pollution. *See OAR 340-042-0040(4)(g)* (a wasteload allocation "determines the portions of the receiving water's loading capacity that are allocated to existing point sources of pollution, including all point source discharges regulated under the Federal Water Pollution Control Act *Section 402 (33 USC Section 1342)*" (emphasis omitted)); *OAR 340-041-0002(67)* (defining wasteload allocation).

On summary judgment, the trial court concluded that "the agency did not erroneously interpret a provision of law in issuing the final orders before the Court, that the agency's exercise of discretion was not inconsistent with an agency rule, and the agency's discretion was not outside the range of discretion delegated [**7] to the agency by law[.]" Accordingly, it entered a general judgment affirming the permits and dismissing the judicial review proceeding with prejudice. Petitioners seek review of that dismissal.

ORS 183.484(5) provides the criteria for judicial review of orders in other than contested cases: [7]

"(a) The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:

"(A) Set aside or modify the order; or

"(B) Remand the case to the agency for further action under a correct interpretation of the provision of law.

[*138] "(b) The court shall remand the order to the agency if it finds the agency's exercise of discretion to be:

"(A) Outside the range of discretion delegated to the agency by law;

"(B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or

"(C) Otherwise in violation of a constitutional or statutory provision.

"(c) The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial [**8] evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding."

7 The storm water permits at issue are orders in other than a contested case. *See Wilbur Residents v. DEQ, 176 Ore. App. 353, 354, 30 P3d 1228, rev den, 333 Ore. 73, 36 P.3d 974 (2001).*

We review the trial court's judgment to determine whether it correctly assessed respondent's actions under the standards set forth in *ORS 183.484(5). See G.A.S.P. v. Environmental Quality Commission, 198 Ore. App. 182, 187, 108 P.3d 95, rev den, 339 Ore. 230, 119 P.3d 790 (2005)* (we review to determine compliance with the standards set forth in *ORS 183.484(5)*). The issues presented in this case are purely legal in nature. Thus, we review to determine whether, in issuing the permits, respondent "erroneously interpreted a provision of law" and whether respondent exercised its discretion "outside the range of discretion delegated" by law, or acted "inconsistent[ly] with an agency rule" or "otherwise in violation of * * * a statutory provision." *ORS 183.484(5)*. Specifically, we examine the requirements of the statutory and regulatory provisions that petitioners contend respondent violated in issuing [**9] the permits.

In their first assignment of error, petitioners assert that, because the permits "do not ensure that the [allowed] discharges will comply with and protect Water Quality Standards," respondent's issuance of those permits violated the requirements of *ORS 468B.025(1)(b)*

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and *OAR 340-045-0015(5)(c)*. [8] In essence, petitioners contend that, in light of [*139] *ORS 468B.025*, respondent was required to impose stricter permit requirements on municipal storm water discharges than are required pursuant to the federal scheme. We look first at the statute, which we construe by examining its text, context, and any legislative history submitted by the parties, giving the legislative history the weight, if any, that we conclude it merits. *State v. Gaines, 346 Ore. 160, 171-72, 206 P3d 1042 (2009)*.

8 Petitioners do not contend that the municipal storm water permits violate the requirements of federal law. In *Defenders of Wildlife v. Browner, 191 F3d 1159, 1163 (9th Cir 1999)*, the court explained the background of the regulation of municipal storm water and explained the requirements of federal law with respect to such storm water and state water quality standards. The court held that permits providing [**10] for discharges of municipal storm water need not require strict compliance with state water quality standards under the federal law. Although the Environmental Protection Agency (EPA) has discretion to require such compliance as it determines appropriate, the federal statutory scheme requires only that municipal storm water dischargers "'reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design and engineering methods, and other such provisions as the Administrator * * * determines appropriate for the control of such pollutants.'" *Id. at 1165* (quoting *33 USC § 1342(p)(3)(B)(iii)* (omission in original)).

ORS 468B.025 provides:

> "(1) Except as provided in *ORS 468B.050* or *468B.053*, no person shall:
>
> "(a) Cause pollution of any waters of the state or place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means.
>
> "(b) Discharge any wastes into the waters of the state if the discharge reduces the quality of such waters below the water quality standards established by rule for such waters by the Environmental Quality Commission.
>
> "(2) [**11] No person shall violate the conditions of any waste discharge permit issued under *ORS 468B.050*.
>
> "(3) Violation of subsection (1) or (2) of this section is a public nuisance."

ORS 468B.050, in turn, authorizes DEQ to issue permits and sets out circumstances in which a permit is required. *See also EQC v. City of Coos Bay, 171 Ore. App. 106, 110, 14 P3d 649 (2000)* ("*ORS 468B.050(1)(a)* specifies when it is necessary to obtain a permit[.]").

On its face, *ORS 468B.025* does not set forth standards for the issuance of permits or describe what conditions a permit must contain. Instead, it lists several activities that [*140] "no person shall" engage in. Those are (1) violating the conditions of a permit issued pursuant to *ORS 468B.050*; (2) except as provided in *ORS 468B.050* or *ORS 468B.053*, causing pollution of the waters of the state, or causing waste to be placed in a location where it is likely to enter the waters of the state; and (3) except as provided in *ORS 468B.050* or *ORS 468B.053*, discharging waste into the waters of the state if the discharge reduces the quality of those waters below state water quality standards. None of those provisions directly governs DEQ's issuance of permits.

Furthermore, [**12] pursuant to the plain text of the statute at issue, in context, the prohibition on discharges that reduce the receiving water below state water quality standards is not absolute. On the contrary, as noted, *ORS 468B.025(1)(b)* specifically refers to the permit section of the statute, providing that, "[*e*]*xcept as provided in ORS 468B.050 or 468B.053*," persons may not discharge waste into the water if those discharges reduce the water quality below applicable state water quality standards. (Emphasis added.) Under *ORS 468B.050*, DEQ is authorized to issue a permit allowing the discharge of wastes into the waters of the state. Alternatively, under *ORS 468B.053*, EQC may exempt *de minimis* discharges (and other specified discharges not relevant here) from the permits "required under *ORS 468B.025* or *468B.050*[.]" [9] Read together, the statutes prohibit any person from discharging wastes into the waters of the state if those discharges would reduce the quality of that water below the state's water quality standards *unless* the person has a permit from DEQ specifically authorizing the discharge at issue. Neither statute requires that permits issued must contain provisions mandating compliance with [**13] water quality standards. [10] Instead of placing that type of limitation on respondent's ability to determine and impose [*141] appropriate permit conditions, the statutes generally give respondent discretion in those areas. Indeed, the only express requirement included in *ORS 468B.050* as to the issuance of permits thereunder is that such permits "shall specify applicable effluent limitations."

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9 Specifically, pursuant to *ORS 468B.053(2)*, EQC may exempt "from permit requirements subsurface injection of fluids that are authorized under the underground injection control program of" DEQ. Also, *ORS 468B.050* references *ORS 468B.215*, pursuant to which, "[e]xcept for an animal feeding operation subject to regulation under *33 USC 1342*, a fee shall not be assessed to nor permit required under *ORS 468B.050(1)(d)* of confined animal feeding operations of four months or less duration or that do not have waste water control facilities."

10 Federal law generally requires that discharges pursuant to NPDES permits must strictly comply with state water quality standards. *33 USC § 1311(b)(1)(C)*; *see Defenders of Wildlife, 191 F3d at 1163*. However, under *33 USC section 1342(p)(3)(B)*, dischargers of municipal storm [**14] water are not subject to that requirement. *See Defenders of Wildlife, 191 F3d at 1165-66*. Instead, federal law requires that NPDES permits relating to municipal storm water discharges require reduction of "the discharge of pollutants to the maximum extent practicable." *33 USC § 1342(p)(3)(B)(iii)*; *see Defenders of Wildlife, 191 F3d at 1165* ("*§ 1342(p)(3)(B)(iii)* creates a lesser standard than *§ 1311*").

Petitioners, citing *ORS 468B.030*, suggest that an effluent limitation, by definition, must mandate compliance with state water quality standards. That is not the case. *ORS 468B.030* provides, in relevant part:

> "In relation to waters of the state, the [EQC] by rule may establish effluent limitations, as defined in [the Clean Water Act], and other minimum requirements for disposal of wastes, minimum requirements for operation and maintenance of disposal systems, and all other matters pertaining to standards of quality for the waters of the state."

The Clean Water Act, in turn, defines "effluent limitation" as "*any* restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from [**15] point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." *33 USC § 1362(11)* (emphasis added). " Thus, although a permit must include restrictions on discharges of pollutants into the water, the applicable statute does not specify what form they must take. "Best management practices," such as those incorporated in the permits at issue in this case, are a type of effluent limitation. *See 40 CFR § 122.44(k)(2) - (3)* (best management practices are to be used in NPDES permits where authorized pursuant to *33 USC § 1342(p)* for the control of storm water discharges or where numeric effluent limits are infeasible); *see also Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water* [*142] *Permits, 61 Fed Reg 43,761-01 (Aug 26, 1996)* (EPA considers the use of best management practices appropriate in permitting of municipal storm water based on typical lack of information on which to base numeric water quality-based effluent limitations). In short, petitioners incorrectly equate effluent limitations with state water quality standards. A statutory requirement that storm water permits include effluent limitations [**16] is not the same as a requirement that the permits mandate compliance with state water quality standards.

11 Effluent limitations can be water-quality based, *see, e.g., OAR 340-041-0002(67)* (a WLA is a water-quality-based effluent limitation) or technology based, *see, e.g., 40 CFR § 125.3* (discussing technology-based effluent limitations).

Petitioners urge that the context of the statute supports their assertion that *ORS 468B.025(1)(b)* should be read to require the inclusion of specific terms mandating compliance with state water quality standards in any permit issued by respondent. [12] We disagree. In fact, our review of the statutory context confirms our determination that, rather than imposing that specific limitation on respondent's authority to issue the type of permits at issue, the legislature delegated broad discretion to the agency. *ORS 468B.015* sets forth the policies of the state to (1) conserve the waters of the state, (2) protect and improve water quality, (3) provide for treatment or other corrective action before waste is discharged into the water, (4) prevent and control pollution, and (5) cooperate with other agencies, states, and the federal government. [13] In order to [**17] carry out that policy, the legislature granted broad authority to respondent:

> "(2) In order to carry out the public policy set forth in *ORS 468B.015*, [DEQ] shall take such action as is necessary for the prevention of new pollution and the abatement of existing pollution by:
>
> [*143] "(a) Fostering and encouraging the cooperation of the people, industry, cities and counties, in order to prevent, control and reduce pollution of waters of the state; and
>
> "(b) Requiring the use of *all available and reasonable methods necessary* to

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> achieve the purposes of *ORS 468B.015* and to conform to the standards of water quality and purity established under *ORS 468B.048*."

ORS 468B.020 (emphasis added); *see also Springfield Education Asso. v. Springfield School Dist., 290 Ore. 217, 228, 621 P.2d 547 (1980)* (Terms such as "unreasonable" or "public convenience and necessity" are delegative in nature and give an agency "authority, responsibility and discretion for refining and executing generally expressed legislative policy."); *ORS 468B.048* (authorizing the agency to "establish standards of quality and purity for waters of this state"); *ORS 468.065(1)* (providing that all permits shall be "in a form prescribed by" the agency and shall [**18] "specify its duration, and the conditions for compliance with the rules and standards, if any, adopted by the [EQC] pursuant to * * * ORS chapters 468 * * * and 468B"). Those statutes, taken together, make clear that, instead of including many specific requirements regarding the issuance of permits, the legislature intended to delegate the responsibility for appropriately implementing its policies to the agency. That context, in turn, supports our conclusion that the plain text of *ORS 468B.025(1)(b)* does not require respondent to include in its storm water permits specific conditions mandating compliance with state water quality standards. [14] In light of the foregoing, we conclude that respondent's issuance of the permits in this case did not violate *ORS 468B.025(1)(b)*. [15]

> 12 Petitioners also point to our decision in *EQC v. City of Coos Bay, 171 Ore. App. 106, 14 P3d 649 (2000)*, in support of their first assignment of error. However, that case does not inform our decision here. There, we considered whether *ORS 468B.025* and *ORS 468B.050* authorized EQC to impose penalties on a permittee that violated the terms of its permit and concluded that only *ORS 468B.025* prohibited violations of [**19] permit conditions. We did not address the question whether *ORS 468B.025* required particular conditions mandating compliance with water quality standards to be included in NPDES permits issued by DEQ.
>
> 13 *ORS 468B.015* was amended in 2009. Or Laws 2009, ch 248, § 1. That amendment does not significantly modify the statute's language and, in any event, is not relevant to this case.
>
> 14 We note that we have considered the legislative history submitted by petitioners but did not find it helpful in resolving the issue presented.
>
> 15 We further note, parenthetically, that petitioners' argument, if extended to *ORS 468B.025(1)(a)*, would lead to an absurd result. That section of the statute prohibits any person from, among other things, causing "pollution of any waters of the state" except as provided by *ORS 468B.050* or *ORS 468B.053*. As noted, *ORS 468B.050*, in turn, provides for the issuance of permits. Under petitioners' reasoning, however, the issuance of permits that would allow for pollution of waters of the state would be impermissible. As a result, NPDES permits, which allow for pollution by their terms, could never be issued.

Petitioners next assert that the permits are inconsistent with the requirements [**20] of *OAR 340-045-0015(5)(c)*. [*144] According to petitioners, that rule creates "a distinct and specific regulatory requirement that permits for municipal stormwater discharges comply with Water Quality Standards." We are not persuaded.

"Administrative rules are interpreted under the same analytical framework we apply when construing statutes." *Birmingham v. Department of Forestry, 209 Ore. App. 736, 743-44, 149 P3d 600 (2006), rev den, 342 Ore. 644, 158 P.3d 507 (2007)*. We defer to an agency's interpretation of its own rule if that interpretation is plausible and not inconsistent with the text of the rule, its context, or some other source of law. *Don't Waste Or. Comm. v. Energy Facility Siting Council, 320 Ore. 132, 142, 881 P.2d 119 (1994)*.

Pursuant to *OAR 340-045-0015(5)*:

> "Each person required by sections (1) and (2) of this rule to obtain a permit must:
>
> "(a) Promptly apply to the Department for the permit;
>
> "(b) Fulfill all terms and conditions of the permit issued;
>
> "(c) Comply with applicable federal and state requirements, effluent standards, and limitations including but not limited to those contained in or promulgated pursuant to Sections 204, 301, 302, 304, 306, 307, 402, and 403 of the [Clean Water Act] and [**21] applicable federal and state water quality standards[.]"

The permittees in this case are required to obtain permits pursuant to *OAR 340-045-0015(2)*, which provides:

> "Without first obtaining an NPDES permit, a person may not discharge into navigable waters pollutants from a point

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> source or storm water subject to permit requirements in *40 CFR § 122.26* or *§ 122.33*, including storm water from large, medium, and regulated small municipal separate storm sewer systems and storm water associated with industrial or construction activity."

Like *ORS 468B.025*, the text of *OAR 340-045-0015(5)*, does not, by its terms, regulate the issuance of permits by the agency. Instead, it requires persons who must obtain permits pursuant to sections (1) and (2) of the rule to do certain things. Namely, those persons must apply for the [*145] required permit promptly, fulfill the terms and conditions of the permit, and comply with applicable federal and state requirements and standards. On its face, the rule says nothing about what must be included in a permit, nor does it impose particular conditions on the issuance of permits. In contrast, other rules do impose requirements on respondent with respect to the issuance [**22] of permits. *See, e.g., OAR 340-045-0027* (public notice and participation requirements for permitting actions); *OAR 340-045-0033* (requirements for general permits). Indeed, *OAR 340-045-0035*, which governs the issuance of the type of permit at issue in this case, imposes specific requirements on respondent.

Furthermore, *OAR 340-045-0015(5)* does not itself make state water quality standards applicable to storm water dischargers. Instead, it simply requires compliance with "applicable" federal and state water quality standards. The text of the provision, thus, only requires that permittees comply with legal standards that some other source makes applicable to them. As we have observed, pursuant to federal and state statutes, permits for the discharge of municipal storm water, unlike other NPDES permits, need not incorporate provisions requiring compliance with state water quality standards. In the context of storm water, permittees must implement best management practices to reduce the discharge of pollutants in storm water to the maximum extent practicable. *OAR 340-045-0015(5)* does not impose a stricter requirement. Instead, it simply requires that, to the extent that state water quality [**23] standards otherwise apply, a permittee must comply with them. Because those standards are not otherwise strictly applicable to storm water, the rule does not, itself, make them applicable. In sum, we are not persuaded by petitioners' assertion that, because they do not contain specific conditions requiring compliance with in-stream state water quality standards, the permits violate the requirements of *OAR 340-045-0015(5)*.

In their second assignment of error, petitioners argue that respondent acted inconsistently with *ORS 468B.050* and *OAR 340-042-0080* when it issued the permits "because the [p]ermits do not incorporate wasteload allocations as enforceable effluent limitations." Petitioners' argument suggests that wasteload allocations should be set forth [*146] as numeric limits within the permits and that the benchmarks incorporated into the permits are impermissible.

In their argument regarding the statute, petitioners suggest that the permits are inconsistent with the requirements of *ORS 468B.050* and point to that statute's general requirement that permits "shall specify applicable effluent limitations." As discussed above, that statute does not mandate that such effluent limitations take [**24] a particular form. A best management practices requirement is a type of effluent limitation. In this case, the permits included such a limitation (set forth in detail in the incorporated storm water management plans). We reject petitioners' assertion that the permits violate *ORS 468B.050*.

We turn to petitioners' assertion that the permits violate *OAR 340-042-0080*. That rule is part of a set of rules adopted by respondent relating to "total maximum daily loads (TMDLs)." A TMDL is

> "a written quantitative plan and analysis for attaining and maintaining water quality standards and includes the elements described in *OAR 340-042-0040*. These elements include a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet state water quality standards, allocations of portions of that amount to the pollutant sources or sectors, and a Water Quality Management Plan to achieve water quality standards."

OAR 340-042-0030(15). TMDLs are established for pollutants in waters of the state that are identified, pursuant to *33 USC section 1313(d)*, as being water quality impaired. *OAR 340-042-0040(1)*; *see 33 USC § 1313(d)*. Among other things TMDLs must include loading capacities [**25] (the amount of a pollutant that a waterbody can receive and still meet water quality standards), wasteload allocations (the portions of the receiving water's loading capacity allocated to particular point sources), and a water quality management plan (a framework of management strategies to attain and maintain water quality standards, including proposed strategies to meet wasteload allocations in the TMDL). *OAR 340-042-0040(4)*.

As part of the implementation of TMDLs, "[f]or sources subject to permit requirements in *ORS 468B.050*,

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[*147] wasteload allocations and other management strategies will be incorporated into permit requirements." *OAR 340-042-0080(4)*. In relation to TMDLs, the term "wasteload allocation" is defined, by rule, to mean "the portion of [the] receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. [Wasteload allocations] constitute a type of water quality-based effluent limitation." *OAR 340-041-0002(67)*. However, the rule does not specifically provide the manner in which those wasteload allocations must be implemented. Petitioners' argument raises the question whether wasteload allocations have been incorporated into [**26] the permits in a meaningful way. We conclude that they have.

The applicable TMDLs in this case set forth specific wasteload allocations for municipal storm water. The permits at issue, in turn, indicate the bodies of water for which TMDLs and wasteload allocations have been established and reference the specific TMDL for those bodies of water. The permits provide in the "adaptive management" section that, "[w]here TMDL wasteload allocations have been established for pollutant parameters associated with the permittee's [municipal separate storm sewer system] discharges, the permittee must use the estimated pollutant load reductions (benchmarks) established in the [storm water management plan] to guide the adaptive management process." Furthermore, they include a section that specifically addresses the TMDL wasteload allocations. The section is intended to "ensure pollutant discharges for those parameters listed in the TMDL are reduced to the [maximum extent practicable]. Adequate progress toward achieving assigned wasteload allocations * * * will be demonstrated through the implementation of best management practices that are targeted at TMDL-related pollutants." Pursuant to that section, [**27] permittees must evaluate progress toward reducing pollutant loads "through the use of performance measures and pollutant load reduction benchmarks developed and listed in the [storm water management plan]." [16] The storm water management [*148] plan describes a program, including best management practices, designed to achieve reductions in TMDL pollutants. Failure to meet an approved benchmark is not, itself, a violation of permit conditions. However, such a failure gives rise to an obligation on the part of the permittee to follow the adaptive management process to improve the storm water management plan. Failure to engage in that process would be a violation of the permits.

16 A benchmark is defined in the permit as

> "a total pollutant load reduction estimate for each parameter or surrogate, where applicable, for which a [wasteload allocation] is established at the time of permit issuance. A benchmark is used to measure the overall effectiveness of the storm water management plan in making progress toward the wasteload allocation * * * and is intended to be a tool for guiding the adaptive management activities."

In our view, the provisions of the permits are sufficient to meet the requirement [**28] of *OAR 340-042-0080(4)* that wasteload allocations be incorporated into permit requirements. The agency has interpreted what it means to "incorporate" wasteload allocations through its implementation of that rule in the issuance of permits, and that interpretation is a reasonable one. Although the permits do not themselves include numeric wasteload allocations like those set forth in the TMDLs, the TMDL wasteload allocations are clearly referenced in the permits, and the permits require implementation of best management practices, set forth in the storm water management plans, to make progress toward meeting those wasteload allocations. Again, best management practices are a type of effluent limitation that is used in municipal storm water permits. *See 40 CFR § 122.44(k)(2) - (3)*. Furthermore, the permits incorporate benchmarks, through incorporation of the storm water management plan, which are specific pollutant load reduction goals for the permittees. Those measures are "permit requirements" that properly incorporate the TMDL wasteload allocations.

As well, contrary to petitioners' assertion, the permits incorporate wasteload allocations in a way that is enforceable. Although the [**29] failure to reduce pollutants to the extent set forth in a particular benchmark is not itself a violation of the permit, it gives rise to specific obligations on the part of the permittee. Furthermore, the requirement that permittees implement best management practices that are set out in their approved storm water management plan is an enforceable requirement. Looking at the permits in light of [*149] the requirements of the regulatory scheme, we conclude that their provisions are sufficient to meet the requirement of *OAR 340-042-0080* that "wasteload allocations * * * be incorporated into permit requirements."

In light of the foregoing discussion, we conclude that the permits do not violate *ORS 468B.025*, *ORS 468B.050*, *OAR 340-045-0015*, or *OAR 340-042-0080*. Accordingly, the trial court did not err in granting summary judgment in favor of respondent.

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TAB "23"

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*** CURRENT THROUGH PL 112-20, APPROVED 6/24/2011 ***

TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL
STANDARDS AND ENFORCEMENT

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33 USCS § 1311

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [*33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344*], the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives. In order to carry out the objective of this Act there shall be achieved--

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act [*33 USCS § 1314(b)*], or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act [*33 USCS § 1317*]; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act [*33 USCS § 1283*] prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act [*33 USCS § 1314(d)(1)*]; or,

(C) not later than July 1, 1977, 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 510 [*33 USCS § 1370*]) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

(2) (A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [*33 USCS § 1314(b)(2)*], which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of

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information available to him (including information developed pursuant to section 315 [*33 USCS § 1325*]), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [*33 USCS § 1314(b)(2)*], or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act [*33 USCS § 1317*];

(B) [Repealed]

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [*33 USCS § 1314(b)*], and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act [*33 USCS § 1317*] which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 304(b) [*33 USCS § 1314(b)*], and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [*33 USCS § 1314(b)*], and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 304(a)(4) of this Act [*33 USCS § 1314(a)(4)*] shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(4) of this Act [*33 USCS § 1314(b)(4)*]; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3) (A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [*33 USCS § 1314(b)*], and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 402(a)(1) [*33 USCS § 1342(a)(1)*] in a permit issued after enactment of the Water Quality Act of 1987 [enacted Feb. 4, 1987], compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable. The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations. Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations. Effluent limitations established pursuant to this section or section 302 of this Act [*33 USCS § 1312*] shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act [*33 USCS §§ 1251* et seq.].

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste or medical

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waste. Notwithstanding any other provisions of this Act [*33 USCS §§ 1251* et seq.] it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants.

(1) General authority. The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F)) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications. A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that--

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(3) Limitation on authority to apply for subsection (c) modification. If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants.

(A) General authority. Up on petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 304(a)(4) of this Act [*33 USCS § 1314(a)(4)*], toxic pollutants subject to section 307(a) of this Act [*33 USCS § 1317(a)*], and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing.

(i) Sufficient information. The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the determinations required by this subparagraph.

(ii) Toxic criteria determination. The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 307(a) of this Act [*33 USCS § 1317(a)*].

(iii) Listing as toxic pollutant. If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 307(a) [*33 USCS § 1317(a)*], the Administrator shall list the pollutant as a toxic pollutant under section 307(a) [*33 USCS § 1317(a)*].

(iv) Nonconventional criteria determination. If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the determinations required by paragraph (2) of this subsection with respect to the pollutant, the Administrator shall add the pollutant to the list of pollutants specified in paragraph (1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions. A petition for listing of a pollutant under this paragraph--

(i) must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 304 [*33 USCS § 1314*];

(ii) may be filed before promulgation of such guideline; and

(iii) may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition. A decision to add a pollutant to the list of pollutants for which modifications

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under this subsection are authorized must be made within 270 days after the date of promulgation of an applicable effluent guideline under section 304 [*33 USCS § 1314*].

(E) Burden of proof. The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

(5) Removal of pollutants. The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if the Administrator determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.

(h) Modification of secondary treatment requirements. The Administrator, with the concurrence of the State, may issue a permit under section 402 [*33 USCS § 1342*] which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that--

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 304(a)(6) of this Act [*33 USCS § 1314(a)(6)*];

(2) the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) in the case of any treatment works serving a population of 50,000 or more, with respect to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and if such works had no pretreatment program with respect to such pollutant;

(7) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(8) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(9) the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria established under section 304(a)(1) of this Act [*33 USCS § 1314(a)(1)*] after initial mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 101(a)(2) of this Act [*33 USCS § 1251(a)(2)*]. For the purposes of paragraph (9), "primary or equivalent treatment" means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the

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discharge of sewage sludge into marine waters. In order for a permit to be issued under this subsection for the discharge of a pollutant into marine waters, such marine waters must exhibit characteristics assuring that water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of 73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions.

(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this Act [*33 USCS §§ 1251* et seq.] available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 402 of this Act [*33 USCS § 1342*] or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of the Water Quality Act of 1987 [enacted Feb. 7, 1987]. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 201 of this Act [*33 USCS § 1281(b)*-(g)], section 307 of this Act [*33 USCS § 1317*], and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this Act [*33 USCS §§ 1251* et seq.].

(2) (A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and--

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this Act [*33 USCS §§ 1251* et seq.] for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 402 [*33 USCS § 1342*] to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection [enacted Dec. 27, 1977] or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point

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source, as the Administrator determines are necessary to carry out the provisions of this Act [*33 USCS §§ 1251* et seq.].

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 204 of this Act [*33 USCS § 1284*], and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 307(a) and (b) [*33 USCS § 1317(a)*, (b)] during the period of such time modification.

(j) Modification procedures.

(1) Any application filed under this section for a modification of the provisions of--

(A) subsection (b)(1)(B) under subsection (h) of this section shall be filed not later that [than] the 365th day which begins after the date of enactment of the Municipal Wastewater Treatment Construction Grant Amendments of 1981 [enacted Dec. 29, 1981], except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h), may apply for a modification of subsection (h) in its own right not later than 30 days after the date of the enactment of the Water Quality Act of 1987 [enacted Feb. 7, 1987], and except as provided in paragraph (5);

(B) subsection (b)(2)(A) as it applies to pollutants identified in subsection (b)(2)(F) shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 304 [*33 USCS § 1314*] or not later than 270 days after the date of enactment of the Clean Water Act of 1977 [enacted Dec. 27, 1977], whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this Act [*33 USCS §§ 1251* et seq.], unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(3) Compliance requirements under subsection (g).

(A) Effect of filing. An application for a modification under subsection (g) and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the requirement that the person seeking such modification or listing comply with effluent limitations under this Act [*33 USCS §§ 1251* et seq.] for all pollutants not the subject of such application or petition.

(B) Effect of disapproval. Disapproval of an application for a modification under subsection (g) shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this Act [*33 USCS §§ 1251* et seq.].

(4) Deadline for subsection (g) decision. An application for a modification with respect to a pollutant filed under subsection (g) must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such application must be approved or disapproved not later than 365 days after the date of approval of such petition.

(5) Extension of application deadline.

(A) In general. In the 180-day period beginning on the date of the enactment of this paragraph [enacted Oct. 31, 1994], the city of San Diego, California, may apply for a modification pursuant to subsection (h) of the requirements of

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subsection (b)(1)(B) with respect to biological oxygen demand and total suspended solids in the effluent discharged into marine waters.

(B) Application. An application under this paragraph shall include a commitment by the applicant to implement a waste water reclamation program that, at a minimum, will--

(i) achieve a system capacity of 45,000,000 gallons of reclaimed waste water per day by January 1, 2010; and

(ii) result in a reduction in the quantity of suspended solids discharged by the applicant into the marine environment during the period of the modification.

(C) Additional conditions. The Administrator may not grant a modification pursuant to an application submitted under this paragraph unless the Administrator determines that such modification will result in removal of not less than 58 percent of the biological oxygen demand (on an annual average) and not less than 80 percent of total suspended solids (on a monthly average) in the discharge to which the application applies. A

(D) Preliminary decision deadline. The Administrator shall announce a preliminary decision on an application submitted under this paragraph not later than 1 year after the date the application is submitted.

(k) Innovative technology. In the case of any facility subject to a permit under section 402 [*33 USCS § 1342*] which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 402 [*33 USCS § 1342*], in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industry-wide application.

(l) Toxic pollutants. Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a)(1) of this Act [*33 USCS § 1317(a)(1)*].

(m) Modification of effluent limitation requirements for point sources.

(1) The Administrator, with the concurrence of the State, may issue a permit under section 402 [*33 USCS § 1342*] which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 403 [*33 USCS § 1343*], with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that--

(A) the facility for which modification is sought is covered at the time of the enactment of this subsection [enacted Jan. 8, 1983] by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) and section 403 [*33 USCS § 1343*] exceed by an unreasonable amount the benefits to be obtained, including the objectives of this Act [*33 USCS §§ 1251* et seq.];

(C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

(D) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(E) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(F) the discharge is into waters where there is strong tidal movement and other hydrological and geological

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characteristics which are necessary to allow compliance with this subsection and section 101(a)(2) of this Act [*33 USCS § 1251(a)(2)*];

(G) the applicant accepts as a condition to the permit a contractural [contractual] obligation to use funds in the amount required (but not less than $ 250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;

(H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this Act [*33 USCS §§ 1251* et seq.] applicable to similarly situated discharges; and

(I) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.

(3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: *Provided,* That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) Fundamentally different factors.

(1) General rule. The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) or section 307(b) [*33 USCS § 1317(b)*] for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that--

(A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 304(b) or 304(g) and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B) the application--

(i) is based solely on information and supporting data submitted to the Administrator during the rule-making for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a nonwater quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

(2) Time limit for applications. An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) Time limit for decision. The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.

(4) Submission of information. The Administrator may allow an applicant under this subsection to submit information

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and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) Treatment of pending applications. For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on the date of the enactment of this subsection [enacted Feb. 7, 1987] shall be treated as having been submitted to the Administrator on the 180th day following such date of enactment [enacted Feb. 7, 1987]. The applicant may amend the application to take into account the provisions of this subsection.

(6) Effect of submission of application. An application for an alternative requirement under this subsection shall not stay the applicant's obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.

(7) Effect of denial. If an application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection is denied by the Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.

(8) Reports. By January 1, 1997, and January 1 of every odd-numbered year thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under section 301 or 304 of this Act [*33 USCS § 1311* or *1314*] or any national categorical pretreatment standard under section 307(b) of this Act [*33 USCS § 1317(b)*] filed before, on, or after such date of enactment [enacted Feb. 7, 1987].

(o) Application fees. The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of section 301, section 304(d)(4), and section 316(a) of this Act [*33 USCS §§ 1311(c)*, (g), (i), (k), (m), (n), 1314(d)(4), 1316(a)]. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled "Water Permits and Related Services" which shall thereafter be available for appropriation to carry out activities of the Environmental Protection Agency for which such fees were collected.

(p) Modified permit for coal remining operations.

(1) In general. Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 402(b) [*33 USCS § 1342(b)*], may issue a permit under section 402 [*33 USCS § 1342*] which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remaining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

(2) Limitations. The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No discharge from, or affected by, the remining operation shall exceed State water quality standards established under section 303 of this Act [*33 USCS § 1313*].

(3) Definitions. For purposes of this subsection--

(A) Coal remining operation. The term "coal remining operation" means a coal mining operation which begins after the date of the enactment of this subsection [enacted Feb. 4, 1987] at a site on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.

(B) Remined area. The term "remined area" means only that area of any coal remining operation on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.

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(C) Pre-existing discharge. The term "pre-existing discharge" means any discharge at the time of permit application under this subsection.

(4) Applicability of strip mining laws. Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 to any coal remining operation, including the application of such Act to suspended solids.

HISTORY:

(June 30, 1948, ch 758, Title III, § 301, as added Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 844; Dec. 27, 1977, P.L. 95-217, §§ 42-47, 53(c), 91 Stat. 1582-1586, 1590; Dec. 29, 1981, P.L. 97-117, §§ 21(a) in part, (b), 22(a)-(d), 95 Stat. 1631, 1632; Jan. 8, 1983, P.L. 97-440, 96 Stat. 2289; Feb. 4, 1987, P.L. 100-4, Title III, §§ 301(a)-(e), 302(a)-(d), 303(a), (b)(1), (c)-(f), 304(a), 305, 306(a), (b), 307, 101 Stat. 29; Nov. 18, 1988, P.L. 100-688, Title III, Subtitle B, § 3202(b), 102 Stat. 4154; Oct. 31, 1994, P.L. 103-431, § 2, 108 Stat. 4396; Dec. 21, 1995, P.L. 104-66, Title II, Subtitle B, § 2021(b), 109 Stat. 727.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

With respect to the Committee on Public Works and Transportation of the House of Representatives, referred to in this section, § 1(a)(9) of Act June 3, 1995, P.L. 104-14, which appears as a note preceding *2 USCS § 21*, provides that any reference to such Committee in any provision of law enacted before January 4, 1995, shall be treated as referring to the Committee on Transportation and Infrastructure of the House of Representatives.

The "Surface Mining Control and Reclamation Act of 1977", referred to in this section, is Act Aug. 3, 1977, P.L. 95-87, which appears generally as *30 USCS §§ 1201* et seq. For full classification of such Act, consult USCS Tables volumes.

Explanatory notes:

The bracketed word "than" has been inserted in subsec. (j)(1)(A) as the word probably intended by Congress.

The bracketed word "contractual" has been inserted in subsec. (m)(1)(G) as the word probably intended by Congress.

Amendments:

1977. Act Dec. 27, 1977, in subsec. (b)(2), in subpara. (A), substituted "for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph," for "not later than July 1, 1983," and substituted the concluding semicolon for "; and", in subpara. (B), substituted the concluding semicolon for a period, and added subparas. (C)-(F); and added subsecs. (g)-(l).

1981. Act Dec. 29, 1981, in subsec. (b)(2), deleted subpara. (B) which read: "(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 201(g)(2)(A) of this Act;"; in subsec. (i), substituted "July 1, 1988" for "July 1, 1983" wherever appearing.

Such Act further (effective as provided by § 22(e) of such Act, which appears as a note to this section), in subsec. (h), in the introductory matter, deleted "in an existing discharge" after "any pollutant", in para. (7), substituted the final period for a semi-colon, deleted para. (8) which read: "any funds available to the owner of such treatment works under title II of this Act will be used to achieve the degree of effluent reduction required by section 201(b) and (g)(2)(A) or to carry out the requirements of this subsection.", and in the concluding matter, inserted the sentences beginning "A municipality . . ." and "No permit"; and substituted subsec. (j)(1)(A) for one which read "subsection (b)(1)(B) under

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33 U.C.S. § 1313. Water quality standards and implementation plans

(a) Existing water quality standards.

(1) In order to carry out the purpose of this Act [33 USCS §§ 1251 et seq.], any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]. If the Administrator makes such a determination he shall, within three months after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this Act [33 USCS §§ 1251 et seq.] unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3) (A) Any State which prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972] has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant

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to subsection (b) of this section.

(b) Proposed regulations.

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], if--

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication.

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2) (A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act [33 USCS §§ 1251 et seq.]. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 307(a)(1) of this Act [33 USCS § 1317(a)(1)] for which criteria have been published under section 304(a) [33 USCS § 1314(a)], the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 304(a)(8) [33 USCS § 1314(a)(8)]. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of

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this Act [33 USCS §§ 1251 et seq.], such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this Act [33 USCS §§ 1251 et seq.], he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved--

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this Act [33 USCS §§ 1251 et seq.], or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this Act [33 USCS §§ 1251 et seq.].

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this Act [33 USCS §§ 1251 et seq.].

(d) Identification of areas with insufficient controls; maximum daily load; certain effluvient limitations revision.

(1) (A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) [33 USCS § 1311(b)(1)(A), (B)] are not stringent enough to implement any water quality standard 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.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 301 [33 USCS § 1311] are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each 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, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] 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 which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in

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the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 304(a)(2)(D) [33 USCS § 1314(a)(2)(D)], for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

(4) Limitations on revision of certain effluent limitations.

(A) Standard not attained. For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained. For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process.

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this Act [33 USCS §§ 1251 et seq.].

(2) Each State shall submit not later than 120 days after the date of the enactment of the Water Pollution Control Amendments of 1972 [enacted Oct. 18, 1972] to the Administrator for his approval a proposed continuing planning process which is consistent with this Act [33 USCS §§ 1251 et seq.]. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this Act [33 USCS §§ 1251 et seq.]. The Administrator shall not approve any State permit program under title IV of this

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Act [33 USCS §§ 1341 et seq.] for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 301(b)(1), section 301(b)(2), section 306, and section 307 [33 USCS §§ 1311(b)(1), (2), 1316, 1317], and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 208 [33 USCS § 1288], and applicable basin plans under section 209 of this Act [33 USCS § 1289];

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 301 and 302 [33 USCS §§ 1311, 1312].

(f) Earlier compliance. Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 301(b)(1) and 301(b)(2) [33 USCS § 1311(b)(1), (2)] nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards. Water quality standards relating to heat shall be consistent with the requirements of section 316 of this Act [33 USCS § 1326].

(h) Thermal water quality standards. For the purposes of this Act [33 USCS §§ 1251 et seq.] the term "water quality standards" includes thermal water quality standards.

(i) Coastal recreation water quality criteria.

(1) Adoption by States.

(A) Initial criteria and standards. Not later than 42 months after the date of the enactment of this subsection [enacted Oct. 10, 2000], each State having coastal recreation waters shall adopt and submit to the Administrator water quality criteria and standards for the coastal recreation waters of the State for those pathogens and pathogen indicators for which the Administrator has published criteria under section 304(a) [33 USCS § 1314(a)].

(B) New or revised criteria and standards. Not later than 36 months after the date of publication by the Administrator of new or revised water quality criteria under section 304(a)(9) [33 USCS § 1314(a)(9)], each State having coastal recreation waters shall adopt and submit to the Administrator new or revised water quality standards for the coastal recreation waters of the State for all pathogens and pathogen indicators to which the new or revised water quality criteria are applicable.

(2) Failure of States to adopt.

(A) In general. If a State fails to adopt water quality criteria and standards in

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accordance with paragraph (1)(A) that are as protective of human health as the criteria for pathogens and pathogen indicators for coastal recreation waters published by the Administrator, the Administrator shall promptly propose regulations for the State setting forth revised or new water quality standards for pathogens and pathogen indicators described in paragraph (1)(A) for coastal recreation waters of the State.

(B) Exception. If the Administrator proposes regulations for a State described in subparagraph (A) under subsection (c)(4)(B), the Administrator shall publish any revised or new standard under this subsection not later than 42 months after the date of the enactment of this subsection [enacted Oct. 10, 2000].

(3) Applicability. Except as expressly provided by this subsection, the requirements and procedures of subsection (c) apply to this subsection, including the requirement in subsection (c)(2)(A) that the criteria protect public health and welfare.

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33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act [33 USCS §§ 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [33 USCS § 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 USCS §§ 1311, 1312, 1316, 1317, 1318, 1343], (B) or 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 Act [33 USCS §§ 1251 et seq.].

(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 13 of the Act of March 3, 1899 [33 USCS § 407], shall be deemed to be permits issued under this title [33 USCS §§ 1341 et seq.], and permits issued under this title [33 USCS §§ 1341 et seq.] shall be deemed to be permits issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act [33 USCS §§ 1251 et seq.].

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], after the date of enactment of this title [enacted Oct. 18, 1972]. Each application for a permit under section 13 of the Act of March 3, 1899 [33 USCS § 407], pending on the date of enactment of this Act [enacted Oct. 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 Act [33 USCS §§ 1251 et seq.], 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 the date of enactment of this Act [enacted Oct. 18, 1972] and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], 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 Act [33 USCS §§ 1251 et seq.]. 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 (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Governor of each State desiring to administer its own permit

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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 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343];

(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 308 of this Act [33 USCS § 1318] or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act [33 USCS § 1318];

(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 307(b) of this Act [33 USCS § 1317(b)] 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 306 [33 USCS § 1316] if such source were discharging pollutants, (B) new introductions of pollutants into such works from a

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source which would be subject to section 301 [33 USCS § 1311] 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 204(b), 307, and 308 [33 USCS §§ 1284(b), 1317, 1318].

(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 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)]. If the Administrator so determines, he shall notify the State of any revisions 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 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)].

(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, and the Administrator may withdraw under paragraph (3) of this subsection approval, of--

(A) a State partial permit program approved under subsection (n)(3) 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) 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) of 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 Act [33 USCS §§ 1251 et seq.]. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons

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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 the date of enactment of this paragraph [enacted Dec. 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 Act [33 USCS §§ 1251 et seq.].

(e) Waiver of notification requirement. In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], 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 212 of this Act [33 USCS § 1292]) 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 309(a) of this Act [33 USCS § 1319(a)] 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 309 of this Act [33 USCS § 1319].

(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

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reproduction.

(k) Compliance with permits. Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505 [33 USCS §§ 1319, 1365], with sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343], except any standard imposed under section 307 [33 USCS § 1317] 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 301, 306, or 402 of this Act [33 USCS § 1311, 1316, or 1342], or (2) section 13 of the Act of March 3, 1899 [33 USCS § 407], 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 the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899 [33 USCS § 407], the discharge by such source shall not be a violation of this Act [33 USCS §§ 1251 et seq.] 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 212 of this Act [33 USCS § 1292]) 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 304(a)(4) of this Act [33 USCS § 1314(a)(4)] into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 307(b)(1) of this Act [33 USCS § 1317(b)(1)]. Nothing in this subsection shall affect the Administrator's authority under sections 307 and 309 of this Act [33 USCS §§ 1317, 1319], affect State and local authority under sections 307(b)(4) and 510 of this Act [33 USCS §§ 1317(b)(4), 1370], relieve such treatment works of its obligations to meet requirements established under this Act [33 USCS §§ 1251 et seq.], or

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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).

(3) Approval or 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).

(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) if--

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b); 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) 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 304(b) [33 USCS § 1314(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. In the case of effluent limitations established on the basis of section 301(b)(1)(C) or section 303 (d) or (e) [33 USCS § 1311(b)(1)(C) or 1313(d) or (e)], 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 303(d)(4) [33 USCS § 1313(d)(4)].

(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

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interpretations of law were made in issuing the permit under subsection (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) [33 USCS § 1311(c), (g), (h), (i), (k), (n), or 1326(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). 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 Act [33 USCS §§ 1251 et seq.] 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 303 [33 USCS § 1313] 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 section 402 of this Act [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 the date of the enactment of this subsection [enacted Feb. 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 301 [33 USCS § 1311].

(B) Municipal discharge. Permits for discharges from municipal storm sewers--

(i) may be issued on a system- or jurisdiction-wide basis;

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(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 the date of the enactment of this subsection [enacted Feb. 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 such date of enactment [enacted Feb. 4, 1987]. Not later than 4 years after such date of enactment [enacted Feb. 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 the date of the enactment of this subsection [enacted Feb. 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 such date of enactment [enacted Feb. 4, 1987]. Not later than 6 years after such date of enactment [enacted Feb. 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

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issued pursuant to this Act [33 USCS §§ 1251 et seq.] after the date of enactment of this subsection [enacted Dec. 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 Act [33 USCS §§ 1251 et seq.] 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 runoff, 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.

33 USCS § 1342

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LEXSTAT 33 USC 1370

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*** CURRENT THROUGH PL 111-191, APPROVED 6/15/2010 ***

TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL
GENERAL PROVISIONS

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33 USCS § 1370

§ 1370. State authority

Except as expressly provided in this Act [*33 USCS §§ 1251* et seq.], nothing in this Act [*33 USCS §§ 1251* et seq.] shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act [*33 USCS §§ 1251* et seq.], such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act [*33 USCS §§ 1251* et seq.]; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

HISTORY:
(June 30, 1948, ch. 758, Title V, § 510, as added, Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 893.)

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LEXSTAT 40 CFR 122.26

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*** THIS SECTION IS CURRENT THROUGH THE JUNE 17, 2010 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D -- WATER PROGRAMS
PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
SUBPART B -- PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

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40 CFR 122.26

§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

(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:

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(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, including 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 medium 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.

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(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.

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(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

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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

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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 paragraph (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;

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(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 basedon 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 ASSICIATED 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).)

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EXHIBIT 1 TO § 122.26(b)(15).--SUMMARY OF COVERAGE OF "STORM WATER DISCHARGES ASSICIATED WITH SMALL CONSTRUCTION ACTIVITY" UNDER THE NPDES STORM WATER PROGRAM

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 sewersystems 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;

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(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 non-structural 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;

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(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;

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(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

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(or surfactants) 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 undertaken 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, in-

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cluding 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 stormwater 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]

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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[sub]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 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:

(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;

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(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 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 programdescription 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:

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(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, BOD5, 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 nonstructural 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 requirements. 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:

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(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 submittted 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);

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(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 violation 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.

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(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 un-permitted 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));

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(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."

HISTORY: *[55 FR 48063,* Nov. 16, 1990, as amended at *56 FR 12100,* Mar. 21, 1991; *56 FR 56554,* Nov. 5, 1991; *57 FR 11412,* Apr. 2, 1992; *57 FR 60447,* Dec. 18, 1992; *60 FR 40235,* Aug. 7, 1995; *64 FR 68722, 68838,* Dec. 8, 1999; *65 FR 30886, 30907,* May 15, 2000; *68 FR 11325, 11329,* Mar. 10, 2003; *70 FR 11560, 11563,* Mar. 9, 2005; *71 FR 33628, 33639,* June 12, 2006]

AUTHORITY: The Clean Water Act, *33 U.S.C. 1251* et seq.

NOTES: [EFFECTIVE DATE NOTE: *71 FR 33628, 33639,* June 12, 2006, revised paragraphs (a)(2) and (e)(8), effective June 12, 2006.]

NOTES APPLICABLE TO ENTIRE CHAPTER:
[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at *65 FR 47323, 47324, 47325,* Aug. 2, 2000.]

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[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: *71 FR 25504,* May 1, 2006.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: *74 FR 66496,* Dec. 15, 2009.]

NOTES APPLICABLE TO ENTIRE PART:
[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: *61 FR 41698,* Aug. 9, 1998.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION –
American Mining Congress v United States EPA (1992, CA9) 965 F2d 759, 92 CDOS 4465, 92 Daily Journal DAR 7079, 35 Envt Rep Cas 1032, 22 ELR 21135, 121 OGR 375
Envtl. Def. Ctr., Inc. v EPA (2003, CA9 Cal) 344 F3d 832, 57 Envt Rep Cas 1039, 33 ELR 20269, cert den *(2004) 541 US 1085, 124 S Ct 2811, 159 L Ed 2d 246, 59 Envt Rep Cas 1160*

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*** THIS SECTION IS CURRENT THROUGH THE JUNE 17, 2010 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D -- WATER PROGRAMS
PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
SUBPART A -- DEFINITIONS AND GENERAL PROGRAM REQUIREMENTS

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40 CFR 122.2

§ 122.2 Definitions.

The following definitions apply to parts 122, 123, and 124. Terms not defined in this section have the meaning given by CWA. When a defined term appears in a definition, the defined term is sometimes placed in quotation marks as an aid to readers.

Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative.

Animal feeding operation is defined at § 122.23.

Applicable standards and limitations means all State, interstate, and federal standards and limitations to which a "discharge," a "sewage sludge use or disposal practice," or a related activity is subject under the CWA, including "effluent limitations," water quality standards, standards of performance, toxic effluent standards or prohibitions, "best management practices," pretreatment standards, and "standards for sewage sludge use or disposal" under sections 301, 302, 303, 304, 306, 307, 308, 403 and 405 of CWA.

Application means the EPA standard national forms for applying for a permit, including any additions, revisions or modifications to the forms; or forms approved by EPA for use in "approved States," including any approved modifications or revisions.

Approved program or approved State means a State or interstate program which has been approved or authorized by EPA under part 123.

Aquaculture project is defined at § 122.25.

Average monthly discharge limitation means the highest allowable average of "daily discharges" over a calendar month, calculated as the sum of all "daily discharges" measured during a calendar month divided by the number of "daily discharges" measured during that month.

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Average weekly discharge limitation means the highest allowable average of "daily discharges" over a calendar week, calculated as the sum of all "daily discharges" measured during a calendar week divided by the number of "daily discharges" measured during that week.

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

BMPs means "best management practices."

Bypass is defined at § 122.41(m).

Class I sludge management facility means any POTW identified under 40 CFR 403.8(a) as being required to have an approved pretreatment program (including such POTWs located in a State that has elected to assume local program responsibilities pursuant to 40 CFR 403.10(e)) and any other treatment works treating domestic sewage classified as a Class I sludge management facility by the Regional Administrator, or, in the case of approved State programs, the Regional Administrator in conjunction with the State Director, because of the potential for its sludge use or disposal practices to adversely affect public health and the environment.

Concentrated animal feeding operation is defined at § 122.23.

Concentrated aquatic animal feeding operation is defined at § 122.24.

Contiguous zone means the entire zone established by the United States under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone.

Continuous discharge means a "discharge" which occurs without interruption throughout the operating hours of the facility, except for infrequent shutdowns for maintenance, process changes, or other similar activities.

CWA means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Public Law 92-500, as amended by Public Law 95-217, Public Law 95-576, Public Law 96-483 and Public Law 97-117, *33 U.S.C. 1251* et seq.

CWA and regulations means the Clean Water Act (CWA) and applicable regulations promulgated thereunder. In the case of an approved State program, it includes State program requirements.

Daily discharge means the "discharge of a pollutant" measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the "daily discharge" is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the "daily discharge" is calculated as the average measurement of the pollutant over the day.

Direct discharge means the "discharge of a pollutant."

Director means the Regional Administrator or the State Director, as the context requires, or an authorized representative. When there is no "approved State program," and there is an EPA administered program, "Director" means the Regional Administrator. When there is an approved State program, "Director" normally means the State Director. In some circumstances, however, EPA retains the authority to take certain actions even when there is an approved State program. (For example, when EPA has issued an NPDES permit prior to the approval of a State program, EPA may retain jurisdiction over that permit after program approval, see § 123.1.) In such cases, the term "Director" means the Regional Administrator and not the State Director.

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.

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This definition 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, 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."

Discharge Monitoring Report ("DMR") means the EPA uniform national form, including any subsequent additions, revisions, or modifications for the reporting of self-monitoring results by permittees. DMRs must be used by "approved States" as well as by EPA. EPA will supply DMRs to any approved State upon request. The EPA national forms may be modified to substitute the State Agency name, address, logo, and other similar information, as appropriate, in place of EPA's.

DMR means "Discharge Monitoring Report."

Draft permit means a document prepared under § 124.6 indicating the Director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a "permit." A notice of intent to terminate a permit, and a notice of intent to deny a permit, as discussed in § 124.5, are types of "draft permits." A denial of a request for modification, revocation and reissuance, or termination, as discussed in § 124.5, is not a "draft permit." A "proposed permit" is not a "draft permit."

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.

Effluent limitations guidelines means a regulation published by the Administrator under section 304(b) of CWA to adopt or revise "effluent limitations."

Environmental Protection Agency ("EPA") means the United States Environmental Protection Agency.

EPA means the United States "Environmental Protection Agency."

Facility or activity means any NPDES "point source" or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.

Federal Indian reservation means all land within the limits of any Indian *67981 reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

General permit means an NPDES "permit" issued under § 122.28 authorizing a category of discharges under the CWA within a geographical area.

Hazardous substance means any substance designated under 40 CFR part 116 pursuant to section 311 of CWA.

Indian country means:

(1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;

(2) All dependent Indian communities with the borders of the United States whether within the originally or subsequently acquired territory thereof, and whether within or without the limits of a state; and

(3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Indian Tribe means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

Indirect discharger means a nondomestic discharger introducing "pollutants" to a "publicly owned treatment works."

Individual control strategy is defined at 40 CFR 123.46(c).

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Interstate agency means an agency of two or more States established by or under an agreement or compact approved by the Congress, or any other agency of two or more States having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator under the CWA and regulations.

Major facility means any NPDES "facility or activity" classified as such by the Regional Administrator, or, in the case of "approved State programs," the Regional Administrator in conjunction with the State Director.

Maximum daily discharge limitation means the highest allowable "daily discharge."

Municipal separate storm sewer system is defined at § 122.26 (b)(4) and (b)(7).

Municipality means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved managment agency under section 208 of CWA.

National Pollutant Discharge Elimination System (NPDES) means the 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 CWA. The term includes an "approved program."

New discharger means any building, structure, facility, or installation:

(a) From which there is or may be a "discharge of pollutants;"

(b) That did not commence the "discharge of pollutants" at a particular "site" prior to August 13, 1979;

(c) Which is not a "new source;" and

(d) Which has never received a finally effective NDPES permit for discharges at that "site."

This definition includes an "indirect discharger" which commences discharging into "waters of the United States" after August 13, 1979. It also includes any existing mobile point source (other than an offshore or coastal oil and gas exploratory drilling rig or a coastal oil and gas developmental drilling rig) such as a seafood processing rig, seafood processing vessel, or aggregate plant, that begins discharging at a "site" for which it does not have a permit; and any offshore or coastal mobile oil and gas exploratory drilling rig or coastal mobile oil and gas developmental drilling rig that commences the discharge of pollutants after August 13, 1979, at a "site" under EPA's permitting jurisdiction for which it is not covered by an individual or general permit and which is located in an area determined by the Regional Administrator in the issuance of a final permit to be an area or biological concern. In determining whether an area is an area of biological concern, the Regional Administrator shall consider the factors specified in 40 CFR 125.122(a) (1) through (10).

An offshore or coastal mobile exploratory drilling rig or coastal mobile developmental drilling rig will be considered a "new discharger" only for the duration of its discharge in an area of biological concern.

New source means any building, structure, facility, or installation from which there is or may be a "discharge of pollutants," the construction of which commenced:

(a) After promulgation of standards of performance under section 306 of CWA which are applicable to such source, or

(b) After proposal of standards of performance in accordance with section 306 of CWA which are applicable to such source, but only if the standards are promulgated in accordance with section 306 within 120 days of their proposal.

NPDES means "National Pollutant Discharge Elimination System."

Owner or operator means the owner or operator of any "facility or activity" subject to regulation under the NPDES program.

Permit means an authorization, license, or equivalent control document issued by EPA or an "approved State" to implement the requirements of this part and parts 123 and 124. "Permit" includes an NPDES "general permit" (§ 122.28). Permit does not include any permit which has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit."

Person means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

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Point source means 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, landfill leachate collection system, 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 storm water runoff. (See § 122.3).

Pollutant means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended *(42 U.S.C. 2011* et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. It does not mean:

(a) Sewage from vessels; or

(b) Water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that the injection or disposal will not result in the degradation of ground or surface water resources.

NOTE: Radioactive materials covered by the Atomic Energy Act are those encompassed in its definition of source, byproduct, or special nuclear materials. Examples of materials not covered include radium and accelerator-produced isotopes. See *Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976).*

POTW is defined at § 403.3 of this chapter.

Primary industry category means any industry category listed in the NRDC settlement agreement (*Natural Resources Defense Council et al. v. Train, 8 E.R.C. 2120 (D.D.C. 1976),* modified *12 E.R.C. 1833 (D.D.C. 1979));* also listed in appendix A of part 122.

Privately owned treatment works means any device or system which is (a) used to treat wastes from any facility whose operator is not the operator of the treatment works and (b) not a "POTW."

Process wastewater means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product.

Proposed permit means a State NPDES "permit" prepared after the close of the public comment period (and, when applicable, any public hearing and administrative appeals) which is sent to EPA for review before final issuance by the State. A "proposed permit" is not a "draft permit."

Publicly owned treatment works is defined at 40 CFR 403.3.

Recommencing discharger means a source which recommences discharge after terminating operations.

Regional Administrator means the Regional Administrator of the appropriate Regional Office of the Environmental Protection Agency or the authorized representative of the Regional Administrator.

Schedule of compliance means a schedule of remedial measures included in a "permit", including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and regulations.

Secondary industry category means any industry category which is not a "primary industry category."

Secretary means the Secretary of the Army, acting through the Chief of Engineers.

Septage means the liquid and solid material pumped from a septic tank, cesspool, or similar domestic sewage treatment system, or a holding tank when the system is cleaned or maintained.

Sewage from vessels means human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes that are discharged from vessels and regulated under section 312 of CWA, except that with respect to commercial vessels on the Great Lakes this term includes graywater. For the purposes of this definition, "graywater" means galley, bath, and shower water.

Sewage Sludge means any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage. Sewage sludge includes, but is not limited to, solids removed during primary, secondary, or advanced waste water treatment, scum, septage, portable toilet pumpings, type III marine sanitation device pumpings

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(33 CFR part 159), and sewage sludge products. Sewage sludge does not include grit or screenings, or ash generated during the incineration of sewage sludge.

Sewage sludge use or disposal practice means the collection, storage, treatment, transportation, processing, monitoring, use, or disposal of sewage sludge.

Silvicultural point source is defined at § 122.27.

Site means the land or water area where any "facility or activity" is physically located or conducted, including adjacent land used in connection with the facility or activity.

Sludge-only facility means any "treatment works treating domestic sewage" whose methods of sewage sludge use or disposal are subject to regulations promulgated pursuant to section 405(d) of the CWA and is required to obtain a permit under § 122.1(b)(2).

Standards for sewage sludge use or disposal means the regulations promulgated pursuant to section 405(d) of the CWA which govern minimum requirements for sludge quality, management practices, and monitoring and 6reporting applicable to sewage sludge or the use or disposal of sewage sludge by any person.

State means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, or an Indian Tribe as defined in these regulations which meets the requirements of § 123.31 of this chapter.

State Director means the chief administrative officer of any State or interstate agency operating an "approved program," or the delegated representative of the State Director. If responsibility is divided among two or more State or interstate agencies, "State Director" means the chief administrative officer of the State or interstate agency authorized to perform the particular procedure or function to which reference is made.

State/EPA Agreement means an agreement between the Regional Administrator and the State which coordinates EPA and State activities, responsibilities and programs including those under the CWA programs.

Storm water is defined at § 122.26(b)(13).

Storm water discharge associated with industrial activity is defined at § 122.26(b)(14).

Total dissolved solids means the total dissolved (filterable) solids as determined by use of the method specified in 40 CFR part 136.

Toxic pollutant means any pollutant listed as toxic under section 307(a)(1) or, in the case of "sludge use or disposal practices," any pollutant identified in regulations implementing section 405(d) of the CWA.

Treatment works treating domestic sewage means a POTW or any other sewage sludge or waste water treatment devices or systems, regardless of ownership (including federal facilities), used in the storage, treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated for the disposal of sewage sludge. This definition does not include septic tanks or similar devices. For purposes of this definition, "domestic sewage" includes waste and waste water from humans or household operations that are discharged to or otherwise enter a treatment works. In States where there is no approved State sludge management program under section 405(f) of the CWA, the Regional Administrator may designate any person subject to the standards for sewage sludge use and disposal in 40 CFR part 503 as a "treatment works treating domestic sewage," where he or she finds that there is a potential for adverse effects on public health and the environment from poor sludge quality or poor sludge handling, use or disposal practices, or where he or she finds that such designation is necessary to ensure that such person is in compliance with 40 CFR part 503.

TWTDS means "treatment works treating domestic sewage."

Upset is defined at § 122.41(n).

Variance means any mechanism or provision under section 301 or 316 of CWA or under 40 CFR part 125, or in the applicable "effluent limitations guidelines" which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on sections 301(c), 301(g), 301(h), 301(i), or316(a) of CWA.

Waters of the United States or waters of the U.S. means:

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(a) All 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;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Whole effluent toxicity means the aggregate toxic effect of an effluent measured directly by a toxicity test.

NOTE: At *45 FR 48620,* July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning "This exclusion applies . . ." in the definition of "Waters of the United States." This revision continues that suspension. n1

n1 EDITORIAL NOTE: The words "This revision" refer to the document published at *48 FR 14153,* Apr. 1, 1983.

HISTORY: *[48 FR 14153,* Apr. 1, 1983, as amended at *48 FR 39619,* Sept. 1, 1983; *50 FR 6940, 6941,* Feb. 19, 1985; *54 FR 254,* Jan. 4, 1989; *54 FR 18781,* May 2, 1989; *54 FR 23895,* June 2, 1989; *58 FR 45037,* Aug. 25, 1993 as corrected at *58 FR 48424,* Sept. 15, 1993; *58 FR 67980,* Dec. 22, 1993; *64 FR 41434, 42462,* Aug. 4, 1999, as corrected at *64 FR 43426,* Aug. 10, 1999; *65 FR 30886, 30905,* May 15, 2000]

AUTHORITY: (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 (42U.S.C. 6901 et seq.))

NOTES: [EFFECTIVE DATE NOTE: *64 FR 41434, 42462,* Aug. 4, 1999, added the definitions for "Indian Country" and "TWTDS," effective Dec. 2, 1999; *65 FR 30886, 30905,* May 15, 2000, amended this section, effective June 14, 2000.]

NOTES APPLICABLE TO ENTIRE CHAPTER:
[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at *65 FR 47323, 47324, 47325,* Aug. 2, 2000.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: *71 FR 25504,* May 1, 2006.]

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Friends of Pinto Creek v United States EPA (2007, CA9) 504 F3d 1007, 65 Envt Rep Cas 1289
N. Cal. River Watch v City of Healdsburg (2004, ND Cal) 2004 US Dist LEXIS 1008, affd (2006, CA9 Cal) *457 F3d 1023, 62 Envt Rep Cas 2089, 36 ELR 20163* (criticized in *United States v Johnson (2006, CA1 Mass) 467 F3d 56, 63 Envt Rep Cas 1289, 36 ELR 20218)* and (criticized in *United States v Cundiff (2007, WD Ky) 480 F Supp 2d 940)* and (criticized in *United States v Fabian (2007, ND Ind) 2007 US Dist LEXIS 24254)* and op withdrawn, reh den, reh, en banc, den (2007, CA9 Cal) *2007 US App LEXIS 18612* and substituted op (2007, CA9 Cal) *2007 US App LEXIS 18615*

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§ 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).

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(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.

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(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

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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 Environmental 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).

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(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 paragraph (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 pollutants 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

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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 non-compliance;

(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

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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

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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 co-permittee, that may be necessary in the permit issued to the treatment works to ensure compliance with

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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 POTWs 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 intothe 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

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(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.

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TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D -- WATER PROGRAMS
PART 130 -- WATER QUALITY PLANNING AND MANAGEMENT

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40 CFR 130.2

§ 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

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§ 130.3 Water quality standards.

A water quality standard (WQS) defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses. States and EPA adopt WQS to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (CWA). Serve the purposes of Act (as defined in sections 101(a)(2) and 303(c) of the Act) means that WQS should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and valuefor public water supplies, propagation of fish, shellfish, wildlife, recreation in and on the water, and agricultural, industrial and other purposes including navigation.

Such standards serve the dual purposes of establishing the water quality goals for a specific water body and serving as the regulatory basis for establishment of water quality-based treatment controls and strategies beyond the technology-based level of treatment required by sections 301(b) and 306 of the Act. States shall review and revise WQS in accordance with applicable regulations and, as appropriate, update their Water Quality Management (WQM) plans to reflect such revisions. Specific WQS requirements are found in 40 CFR part 131.

HISTORY:
[50 FR 1779, Jan. 11, 1985; 65 FR 43586, 43662, July 13, 2000, withdrawn at 68 FR 13608, 13614, Mar. 19, 2003; 66 FR 53044, 53048, Oct. 18, 2001]

AUTHORITY:
AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
33 U.S.C. 1251 et seq.

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NOTES APPLICABLE TO ENTIRE CHAPTER:
[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: 74 FR 66496, Dec. 15, 2009.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: 75 FR 49556, Aug. 13, 2010.]

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NOTES APPLICABLE TO ENTIRE PART:
[PUBLISHER'S NOTE: For Federal Register citations concerning Part 130 Notice of change in procedures, see: 73 FR 52928, Sept. 12, 2008.]

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40 CFR 130.7

§ 130.7 Total maximum daily loads (TMDL) and individual water quality-based effluent limitations.

(a) General. The process for identifying water quality limited segments still requiring wasteload allocations, load allocations and total maximum daily loads (WLAs/LAs and TMDLs), setting priorities for developing these loads; establishing these loads for segments identified, including water quality monitoring, modeling, data analysis, calculation methods, and list of pollutants to be regulated; submitting the State's list of segments identified, priority ranking, and loads established (WLAs/LAs/TMDLs) to EPA for approval; incorporating the approved loads into the State's WQM plans and NPDES permits; and involving the public, affected dischargers, designated areawide agencies, and local governments in this process shall be clearly described in the State Continuing Planning Process (CPP).

(b) Identification and priority setting for water quality-limited segments still requiring TMDLs.

(1) Each State shall identify those water quality-limited segments still requiring TMDLs within its boundaries for which:

(i) Technology-based effluent limitations required by sections 301(b), 306, 307, or other sections of the Act;

(ii) More stringent effluent limitations (including prohibitions) required by either State or local authority preserved by section 510 of the Act, or Federal authority (law, regulation, or treaty); and

(iii) Other pollution control requirements (e.g., best management practices) required by local, State, or Federal authority are not stringent enough to implement any water quality standards (WQS) applicable to such waters.

(2) Each State shall also identify on the same list developed under paragraph (b)(1) of this section those water quality-limited segments still requiring TMDLs or parts thereof within its boundaries for which controls on thermal

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discharges under section 301 or State or local requirements are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish and wildlife.

(3) For the purposes of listing waters under § 130.7(b), the term "water quality standard applicable to such waters" and "applicable water quality standards" refer to those water quality standards established under section 303 of the Act, including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements.

(4) The list required under §§ 130.7(b)(1) and 130.7(b)(2) of this section shall include a priority ranking for all listed water quality-limited segments still requiring TMDLs, taking into account the severity of the pollution and the uses to be made of such waters and shall identify the pollutants causing or expected to cause violations of the applicable water quality standards. The priority ranking shall specifically include the identification of waters targeted for TMDL development in the next two years.

(5) Each State shall assemble and evaluate all existing and readily available water quality-related data and information to develop the list required by §§ 1A130.7(b)(1) and 130.7(b)(2). At a minimum "all existing and readily available water quality-related data and information" includes but is not limited to all of the existing and readily available data and information about the following categories of waters:

(i) Waters identified by the State in its most recent section 305(b) report as "partially meeting" or "not meeting" designated uses or as "threatened";

(ii) Waters for which dilution calculations or predictive models indicate nonattainment of applicable water quality standards;

(iii) Waters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions. These organizations and groups should be actively solicited for research they may be conducting or reporting. For example, university researchers, the United States Department of Agriculture, the National Oceanic and Atmospheric Administration, the United States Geological Survey, and the United States Fish and Wildlife Service are good sources of field data; and

(iv) Waters identified by the State as impaired or threatened in a nonpoint assessment submitted to EPA under section 319 of the CWA or in any updates of the assessment.

(6) Each State shall provide documentation to the Regional Administrator to support the State's determination to list or not to list its waters as required by §§ 130.7(b)(1) and 130.7(b)(2). This documentation shall be submitted to the Regional Administrator together with the list required by §§ 130.7(b)(1) and 130.7(b)(2) and shall include at a minimum:

(i) A description of the methodology used to develop the list; and

(ii) A description of the data and information used to identify waters, including a description of the data and information used by the State as required by § 130.7(b)(5); and

(iii) A rationale for any decision to not use any existing and readily available data and information for any one of the categories of waters as described in § 130.7(b)(5); and

(iv) Any other reasonable information requested by the Regional Administrator. Upon request by the Regional Administrator, each State must demonstrate good cause for not including a water orwaters on the list. Good cause includes, but is not limited to, more recent or accurate data; more sophisticated water quality modeling; flaws in the original analysis that led to the water being listed in the categories in § 130.7(b)(5); or changes in conditions, e.g., new control equipment, or elimination of discharges.

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(c) Development of TMDLs and individual water quality based effluent limitations.

(1) Each State shall establish TMDLs for the water quality limited segments identified in paragraph (b)(1) of this section, and in accordance with the priority ranking. For pollutants other than heat, TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical WQS with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. Determinations of TMDLs shall take into account critical conditions for stream flow, loading, and water quality parameters.

(i) TMDLs may be established using a pollutant-by-pollutant or biomonitoring approach. In many cases both techniques may be needed. Site-specific information should be used wherever possible.

(ii) TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards as identified pursuant to paragraph (b)(1) of this section. Calculations to establish TMDLs shall be subject to public review as defined in the State CPP.

(2) Each State shall estimate for the water quality limited segments still requiring TMDLs identified in paragraph (b)(2) of this section, the total maximum daily thermal load which cannot be exceeded in order to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife in the identified waters or parts thereof.

(d) Submission and EPA approval. (1) Each State shall submit biennially to the Regional Administrator beginning in 1992 the list of waters, pollutants causing impairment, and the priority ranking including waters targeted for TMDL development within the next two years as required under paragraph (b) of this section. For the 1992 biennial submission, these lists are due no later than October 22, 1992. Thereafter, each State shall submit to EPA lists required under paragraph (b) of this section on April 1 of every even-numbered year. For the year 2000 submission, a State must submit a list required under paragraph (b) of this section only if a court order or consent decree, or commitment in a settlement agreement dated prior to January 1, 2000, expressly requires EPA to take action related to that State's year 2000 list. For the year 2002 submission, a State must submit a list required under paragraph (b) of this section by October 1, 2002, unless a court order, consent decree or commitment in a settlement agreement expressly requires EPA to take an action related to that State's 2002 list prior to October 1, 2002, in which case, the State must submit a list byApril 1, 2002. The list of waters may be submitted as part of the State's biennial water quality report required by § 130.8 of this part and section 305(b) of the CWA or submitted under separate cover. All and TMDLs established under paragraph (c) for water quality limited segments shall continue to be submitted to EPA for review and approval. Schedules for submission of TMDLs shall be determined by the Regional Administrator and the State.

(2) The Regional Administrator shall either approve or disapprove such listing and loadings not later than 30 days after the date of submission. The Regional Administrator shall approve a list developed under § 130.7(b) that is submitted after the effective date of this rule only if it meets the requirements of § 130.7(b). If the Regional Administrator approves such listing and loadings, the State shall incorporate them into its current WQM plan. If the Regional Administrator disapproves such listing and loadings, he shall, not later than 30 days after the date of such disapproval, identify such waters in such State and establish such loads for such waters as determined necessary to implement applicable WQS. The Regional Administrator shall promptly issue a public notice seeking comment on such listing and loadings. After considering public comment and making any revisions he deems appropriate, the Regional Administrator shall transmit the listing and loads to the State, which shall incorporate them into its current WQM plan.

(e) For the specific purpose of developing information and as resources allow, each State shall identify all

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segments within its boundaries which it has not identified under paragraph (b) of this section and estimate for such waters the TMDLs with seasonal variations and margins of safety, for those pollutants which the Regional Administrator identifies under section 304(a)(2) as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife. However, there is no requirement for such loads to be submitted to EPA for approval, and establishing TMDLs for those waters identified in paragraph (b) of this section shall be given higher priority.

HISTORY: *[50 FR 1779,* Jan. 11, 1985, as amended at *57 FR 33049,* July 24, 1992; *65 FR 17166, 17170,* Mar. 31, 2000; *65 FR 43586, 43663,* July 13, 2000, withdrawn at *68 FR 13608, 13614,* Mar. 19, 2003; *66 FR 53044, 53048,* Oct. 18, 2001]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
33 U.S.C. 1251 et seq.

NOTES: NOTES APPLICABLE TO ENTIRE CHAPTER:
[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at *65 FR 47323, 47324, 47325,* Aug. 2, 2000.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: *71 FR 25504,* May 1, 2006.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: *74 FR 66496,* Dec. 15, 2009.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: *75 FR 49556,* Aug. 13, 2010.]

NOTES APPLICABLE TO ENTIRE PART:
[PUBLISHER'S NOTE: For Federal Register citations concerning Part 130 Notice of change in procedures, see: *73 FR 52928,* Sept. 12, 2008.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --
Sierra Club, Inc. v Leavitt (2007, CA11 Fla) 488 F3d 904, 64 Envt Rep Cas 1705, 37 ELR 20138, 20 FLW Fed C 689

1851 words

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Cal Gov Code § 17514 (2010)
§ 17514. "Costs mandated by the state"

"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 XIIIB of the California Constitution.

Cal Gov Code § 17514

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Cal Gov Code § 17500

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GOVERNMENT CODE
Title 2. Government of the State of California
Division 4. Fiscal Affairs
Part 7. State-Mandated Local Costs
Chapter 1. Legislative Intent

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> Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 324 "Jurisdiction: Subject Matter Jurisdiction".

> Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 474 "Availability of Judicial Review of Agency Decisions".

> Cal. Employment Law (Matthew Bender(R)), § 21.02.

More...

Cal Gov Code § 17500 (2011)

§ 17500. Legislative findings and declarations

The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under Section 6 of Article XIIIB of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary and, therefore, in order to relieve unnecessary congestion of the judicial system, it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs.

It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIIIB of the California Constitution. Further, the Legislature intends that the Commission on State Mandates, as a quasi-judicial body, will act in a deliberative manner in accordance with the requirements of Section 6 of Article XIIIB of the California Constitution.

History:

Added Stats 1984 ch 1459 § 1. Amended Stats 2004 ch 890 § 2 (AB 2856).

Notes:

1. Amendments
2. Note

1. Amendments:

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2004 Amendment:

Deleted "and to consolidate the procedures for reimbursement of statutes specified in the Revenue and Taxation Code with those identified in the constitution" at the end of the first sentence in the second paragraph.

2.

Note

Stats 2005 ch 72 provides:

SEC. 17. (a) Notwithstanding any other provision of law, the Commission on State Mandates, no later than June 30, 2006, shall reconsider its test claim statement of decision in CSM-4202 on the Mandate Reimbursement Program to determine whether Chapter 486 of the Statutes of 1975 and Chapter 1459 of the Statutes of 1984 constitute a reimbursable mandate under Section 6 of Article XIII B of the California Constitution in light of federal and state statutes enacted and federal and state court decisions rendered since these statutes were enacted. If a new test claim is filed on Chapter 890 of the Statutes of 2004, the commission shall, if practicable, hear and determine the new test claim at the same time as the reconsideration of CSM-4202. The commission, if necessary, shall revise its parameters and guidelines in CSM-4485 to be consistent with this reconsideration and, if practicable, shall include a reasonable reimbursement methodology as defined in Section 17518.5 of the Government Code. If the parameters and guidelines are revised, the Controller shall revise the appropriate claiming instructions to be consistent with the revised parameters and guidelines. Any changes by the commission to the original statement of decision in CSM-4202 shall be deemed effective on July 1, 2006.

(b) Notwithstanding any other provision of law, the Commission on State Mandates shall set-aside all decisions, reconsiderations, and parameters and guidelines on the Open Meetings Act (CSM-4257) and Brown Act Reform (CSM-4469) test claims. The operative date of these actions shall be the effective date of this act. In addition, the Commission on State Mandates shall amend the appropriate parameters and guidelines, and the Controller shall revise the appropriate reimbursement claiming instructions, as necessary to be consistent with any other provisions of this act.

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 324 "Jurisdiction: Subject Matter Jurisdiction".

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 474 "Availability of Judicial Review of Agency Decisions".

Cal. Employment Law (Matthew Bender(R)), § 21.02.

9 Witkin Summary (10th ed) Taxation § 122.

Hierarchy Notes:

Tit. 2, Div. 4 Note

Tit. 2, Div. 4, Pt. 7 Note

Notes of Decisions:

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1. Generally
2. Legislative Intent
3. Construction with Other Law
4. Jurisdiction

1. Generally

Gov C § 17500-17630 was enacted to implement Cal Const Art XIII B § 6. County of Fresno v. State (1991) 53 Cal 3d 482, 280 Cal Rptr 92, 808 P2d 235, 1991 Cal LEXIS 1363.

Gov C § 17556(d) declares 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. County of Fresno v. State (1991) 53 Cal 3d 482, 280 Cal Rptr 92, 808 P2d 235, 1991 Cal LEXIS 1363.

2. Legislative Intent

In enacting Gov C § 17500 et seq., the Legislature established the Commission on State Mandates as a quasi-judicial body to carry out a comprehensive administrative procedure for resolving claims for reimbursement of state-mandated local costs arising out of Cal Const Art XIII B § 6. The Legislature did so because the absence of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process. It is apparent from the comprehensive nature of this legislative scheme, and from the Legislature's expressed intent, that the exclusive remedy for a claimed violation of Cal Const Art XIII B § 6, lies in these procedures. The statutes create an administrative forum for resolution of state mandate claims, and establish procedures that exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. In short, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce Cal Const Art XIII B § 6. Thus, the statutory scheme contemplates that the commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. Redevelopment Agency v. California Comm'n on State Mandates (1996, Cal App 4th Dist) 43 Cal App 4th 1188, 51 Cal Rptr 2d 100, 1996 Cal App LEXIS 267.

3. Construction with Other Law

The Legislature's initial appropriation to reimburse counties for the costs of Pen C § 987.9 (funding by court for preparation of defense for indigent defendants in capital cases), was not a final and unchallengeable determination that the statute constitutes a state mandate, nor did the Commission on State Mandates err in finding that the statute is not a state mandate, despite the Legislature's finding to the contrary in a later appropriations bill. The commission was not bound by the Legislature's determination, and it had discretion to determine whether a state mandate existed. The comprehensive administrative procedures for resolution of claims arising out of Cal Const Art XIII B § 6 (Gov C § 17500 et seq.), are the exclusive procedures by which to implement and enforce the constitutional provision. Thus, the commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. Any legislative findings are irrelevant to the issue of whether a state mandate exists, and the commission properly determined that no such mandate existed. In any event, the Legislature itself ceased to regard the provisions of Pen C § 987.9, as a state mandate in 1983. County of Los Angeles v. Commission on State Mandates (1995, Cal App 2d Dist) 32 Cal App 4th 805, 38 Cal Rptr 2d 304, 1995 Cal App LEXIS 161, review denied (1995, Cal) 1995 Cal LEXIS 3339.

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While the legislative history of an amendment to Lab C § 4707 may have evinced the understanding or belief of the Legislature that the amendment created a state mandate, such understanding or belief was irrelevant to the issue of whether a state mandate existed. The Legislature has entrusted that determination to the Commission on State Mandates, subject to judicial review (Gov C §§ 17500, 17559), and has provided that the initial determination by Legislative Counsel is not binding on the Commission. (Gov C § 17575.) City of Richmond v. Commission on State Mandates (1998, Cal App 3d Dist) 64 Cal App 4th 1190, 75 Cal Rptr 2d 754, 1998 Cal App LEXIS 546, review denied (1998, Cal) 1998 Cal LEXIS 5509.

4. Jurisdiction

The superior court had jurisdiction to adjudicate a county's assertion that the Legislature's transfer to counties of the responsibility for providing health care services for medically indigent adults constituted a new program that required state funding under Cal Const Art XIII B § 6 (reimbursement to local government for costs of new state-mandated program). Although the administrative procedures for determining state-mandated local costs, set forth in Gov C § 17500 et seq., are the exclusive means by which the state's obligations under Cal Const Art XIII B § 6, are to be determined, in this case requiring the county to resort to the statutory procedures would have unduly restricted the county's constitutional right. Other counties' test claim to determine the state's obligations, which was supposed to create an administrative process capable of resolving all disputes, was settled and dismissed without resolving the pertinent issues. This undermined the adequacy of the statutory procedures. Moreover, the county had twice filed claims for reimbursement with the Commission on State Mandates, but the commission did not respond. Requiring the county to pursue further, futile administrative procedures would have resulted in irreparable harm in light of the county's expressed intent to terminate, for lack of funding, its program for the medically indigent. County of San Diego v.State of California (1995, 4th Dist) 33 Cal App 4th 1787, 40 Cal Rptr 2d 193, 1995 Cal App LEXIS 364, review granted ty of San Diego (1995) 46 Cal Rptr 2d 586, 904 P 2d 1197, 1995 Cal LEXIS 4446.

In a water quality regulation dispute, Gov C § 17500 et seq., deprived the trial court of jurisdiction to consider an issue regarding state-mandated costs. San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Bd. (2010, 3d Dist) 183 Cal App 4th 1110, 2010 Cal App LEXIS 514.

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Cal Wat Code § 13370

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WATER CODE
Division 7. Water Quality
Chapter 5.5. Compliance With the Provisions of the Federal Water Pollution Control Act as Amended in 1972

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> Federal Water Pollution Control Act: 33 USCS §§ 1251 et seq.

> National Pollutant Discharge Elimination System, permits: 33 USCS § 1342.

More...

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Cal Wat Code § 13370 (2010)

§ 13370. Public interest in state implementation of provisions of federal act, etc.

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.

History:

Added Stats 1972 ch 1256 § 1, effective December 19, 1972. Amended Stats 1978 ch 746 § 1; Stats 1980 ch 676 § 319; Stats 1987 ch 1189 § 1.

Notes:

Amendments:
1978 Amendment
1980 Amendment
1987 Amendment

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Div. 7, Ch. 5.5 Note

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1. Federal Facilities

Under Federal Water Pollution Control Act amendments of 1972, 86 Stat. 816, 33 USCS §§ 1251 et seq., federal installations discharging water pollutants in state with federally approved permit program are not required to secure permits from state under its program adopted pursuant to National Pollutant Discharge Elimination System, since amendments do not subject federal facilities to such state permit requirements with requisite degree of clarity. EPA v. California (1976) 426 US 200, 48 L Ed 2d 578, 96 S Ct 2022, 1976 US LEXIS 105.

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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION
ORDER NO. R9-2002-0001
NPDES NO. CAS0108740

WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES OF URBAN RUNOFF FROM THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s) DRAINING THE WATERSHEDS OF THE COUNTY OF ORANGE, THE INCORPORATED CITIES OF ORANGE COUNTY, AND THE ORANGE COUNTY FLOOD CONTROL DISTRICT WITHIN THE SAN DIEGO REGION

The California Regional Water Quality Control Board, San Diego Region (hereinafter SDRWQCB), finds that:

1. **COPERMITTEES ARE DISCHARGERS OF URBAN RUNOFF:** Each of the persons in Table 1 below, hereinafter called Copermittees or dischargers, owns or operates a municipal separate storm sewer system (MS4), through which it discharges urban runoff into waters of the United States within the San Diego Region. The Copermittees serve a population of approximately 500,000 people within the San Diego Region. The MS4s operated by the Copermittees 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.

Table 1. Municipal Copermittees

1.	City of Aliso Viejo	8.	City of Mission Viejo
2.	City of Dana Point	9.	City of Rancho Santa Margarita
3.	City of Laguna Beach	10.	City of San Clemente
4.	City of Lake Forest	11.	City of San Juan Capistrano
5.	City of Laguna Hills	12.	County of Orange
6.	City of Laguna Niguel	13.	Orange County Flood Control District
7.	City of Laguna Woods		

2. **URBAN RUNOFF CONTAINS "WASTE" AND IS A "POINT SOURCE DISCHARGE OF POLLUTANTS":** Urban runoff contains waste, as defined in the California Water Code, and pollutants that adversely affect the quality of the waters of the State. The discharge of urban runoff from an MS4 is a "discharge of pollutants from a point source" into waters of the United States as defined in the Clean Water Act.

3. **URBAN DEVELOPMENT AND RUNOFF CAUSES RECEIVING WATER DEGRADATION:** Urban runoff discharges from MS4s are a leading cause of receiving water quality impairment in the San Diego Region and throughout the United States. As runoff flows over urban areas, it picks up harmful pollutants such as pathogens, sediment (resulting from human activities), fertilizers, pesticides, heavy metals, and petroleum products. These pollutants often become dissolved or suspended in urban runoff and are conveyed and discharged to receiving waters, such as streams, lakes, lagoons, bays, and the ocean without treatment. Once in receiving waters, these pollutants harm aquatic life primarily through toxicity and habitat degradation. Furthermore, the pollutants can enter the food chain and may eventually enter the tissues of fish and humans.

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There is a strong direct correlation between "urbanization" and "impacts to receiving water quality". In general, the more heavily developed the area, the greater the impacts to receiving waters from urban runoff.

These impacts especially threaten environmentally sensitive areas (such as Clean Water Act section 303(d) impaired water bodies, areas designated as Areas of Special Biological Significance, water bodies designated with the RARE beneficial use, riparian or estuarine areas designated by the Copermittees as Critical Aquatic Resources (CARS), and regional parks and preserves containing receiving waters within the Cities and County of Orange). Such environmentally sensitive areas have a much lower capacity to withstand pollutant shocks than might be acceptable in the general circumstance. In essence, urban development that is ordinarily insignificant in its impact on the environment may, in a particularly sensitive environment, be significant.

4. **URBAN DEVELOPMENT INCREASES POLLUTANT LOAD, VOLUME, AND VELOCITY OF RUNOFF:** During urban development two important changes occur. First, natural vegetated pervious ground cover is converted to impervious surfaces such as paved highways, streets, rooftops, and parking lots. Natural vegetated soil can both absorb rainwater and remove pollutants providing a very effective natural purification process. Because pavement and concrete can neither absorb water nor remove pollutants, the natural purification characteristics of the land are lost.

   Secondly, urban development creates new pollution sources as human population density increases and brings with it proportionately higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, household hazardous wastes, pet wastes, trash, etc. which can either be washed or directly dumped into the MS4.

   As a result of these two changes, the runoff leaving the developed urban area is significantly greater in volume, velocity and pollutant load than the pre-development runoff from the same area.

   The significance of the impacts of urban development on receiving waters is determined by the scope of the project, such as the size of the project, the project land-use type, etc. Large projects (such as commercial developments greater than 100,000 square feet, home subdivisions greater than 10 units, and streets, roads, highways, and freeways) generally have large amounts of impervious surface, and therefore have greater potential to significantly impact receiving waters by increasing erosion (through increased peak flow rates, flow velocities, flow volumes, and flow durations) than smaller projects. Projects of particular land use types also have greater potential to significantly impact receiving waters due to the presence of typically large amounts of pollutants on site or an increased potential for pollutants to move off site (such as automotive repair shops, restaurants, parking lots, streets, roads, highways, and freeways, hillside development, and retail gasoline outlets).

5. **WATER QUALITY DEGRADATION INCREASES WITH PERCENT IMPERVIOUSNESS:** The increased volume and velocity of runoff from developed urban areas greatly accelerates the erosion of downstream natural channels. Numerous studies have demonstrated a direct correlation between the degree of imperviousness of an area and the degradation of its receiving water quality. Significant declines in the biological integrity and physical habitat of streams and other receiving waters have been found to occur with as little as a 10% conversion from natural to impervious surfaces. (Developments of medium density single family homes range between 25 to 60% impervious). Today "% impervious coverage" is believed to be a reliable indicator and predictor of the water quality degradation expected from planned new development.

6. **URBAN RUNOFF IS A HUMAN HEALTH THREAT:** Urban runoff contains pollutants, which threaten human health. Human illnesses have been clearly linked to recreating (i.e., swimming, surfing, etc.) near storm drains flowing to coastal beach waters. Such flows from urban areas often result in the posting or closure of local beaches.

   Pollutants transported to receiving waters by urban runoff can also enter the food chain. Once in the food chain they can "bioaccumulate" in the tissues of invertebrates (e.g., mussels, oysters, and

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lobsters) and fish which may be eventually consumed by humans. Furthermore, some pollutants are also known to "biomagnify". This phenomenon can result in pollutant concentrations in the body fat of top predators that are millions of times greater than the concentrations in the tissues of their lower trophic (food chain) counterparts or in ambient waters.

7. **POLLUTANT TYPES:** The most common categories of pollutants in urban runoff include total suspended solids, sediment (due to anthropogenic activities); 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 (decaying vegetation, animal waste), and trash.

8. **URBAN STREAMS AS AN MS4 COMPONENT:** Historic and current development make use of natural drainage patterns and features as conveyances for urban runoff. Urban streams used in this manner are both MS4s and receiving waters.

9. **URBAN RUNOFF CAUSES BENEFICIAL USE IMPAIRMENT:** Individually and in combination, the discharge of pollutants and increased flows from MS4s can cause or threaten to cause a condition of pollution (i.e., unreasonable impairment of water quality for designated beneficial uses), contamination, or nuisance. The discharge of pollutants from MS4s can cause the concentration of pollutants to exceed applicable receiving water quality objectives and impair or threaten to impair designated beneficial uses. The discharge of urban runoff may also impact the physical habitat of receiving waters. Significant stream channel incision and bank erosion is a feature common in the Aliso Creek watershed and other drainages in Orange County and may be caused in part by changes in peak flow rates and volumes resulting from urban development. Preliminary results of the Ambient Bioassessment Monitoring Program in Aliso Creek and San Juan Creek in 1998 and 1999 indicate impacts to the benthic community that may be the result of water quality and habitat degradation.

10. **COPERMITTEES IMPLEMENT URBAN RUNOFF MANAGEMENT PROGRAMS (URMPs):** Copermittee implementation of Urban Runoff Management Programs (URMPs) designed to reduce discharges of pollutants and flow into and from MS4s to the maximum extent practicable (MEP) can protect receiving water quality by promoting attainment of water quality objectives necessary to support designated beneficial uses. To be most effective, URMPs must contain both structural and non-structural best management practices (BMPs).

11. **BEST MANAGEMENT PRACTICES (BMPs):** Pollutants can be effectively reduced in urban runoff by the application of a combination of pollution prevention, source control, and treatment control BMPs. Source control BMPs (both structural and non-structural) minimize the contact between pollutants and flows (e.g., rerouting run-on around pollutant sources or keeping pollutants on-site and out of receiving waters). Treatment control (or structural) BMPs remove pollutants from urban runoff. Where feasible, use of BMPs that utilize natural processes should be assessed. These types of BMPs, such as grassy swales and constructed wetlands, can frequently be as effective as less natural BMPs, while providing additional benefits such as aesthetics and habitat.

12. **POLLUTION PREVENTION:** Pollution prevention, the initial reduction/elimination of pollutant generation at its source, is the best "first line of defense" for Copermittees and should be used in conjunction with source control and treatment control BMPs. Pollutants that are never generated do not have to be controlled or treated. Encouragement during planning processes of the use of pollution prevention BMPs can be an effective means for pollution prevention BMPs to be implemented, through such methods as education, landscaping, etc.

13. **RECEIVING WATER LIMITATIONS:** Compliance with receiving water limits based on applicable water quality objectives is necessary to ensure that MS4 discharges will not cause or contribute to violations of water quality objectives and the creation of conditions of pollution.

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14. **RECEIVING WATER LIMITATION COMPLIANCE STRATEGY:** Implementation of BMPs cannot ensure attainment of receiving water quality objectives under all circumstances; some BMPs may not prove to be as effective as anticipated. An iterative process of BMP development, implementation, monitoring, and assessment is necessary to assure that an Urban Runoff Management Program is sufficiently comprehensive and effective to achieve compliance with receiving water quality objectives.

15. **COPERMITTEES' RESPONSIBILITY FOR ILLICIT DISCHARGES FROM THIRD PARTIES:** As operators of MS4s, the Copermittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to the waters of the United States, the operator of an MS4 that does not prohibit and/or control discharges into its system essentially accepts responsibility for those discharges. These discharges may cause or contribute to a condition of contamination or exceedances of receiving water quality objectives.

16. **COPERMITTEES' RESPONSIBILITY BASED ON LAND USE AUTHORITY:** Utilizing their land use authority, Copermittees authorize and realize benefits from the urban development which generates the pollutants and runoff that impair receiving waters. Since the Copermittees utilize their legal authority to authorize urbanization, they must also exercise their legal authority to ensure that the resulting increased pollutant loads and flows do not further degrade receiving waters.

17. **THREE PHASES OF URBAN DEVELOPMENT:** Urban development has three major phases: (1) land use planning for new development; (2) construction; and (3) the "use" or existing development phase. Because the Copermittees authorize, permit, and realize benefits from each of these phases, and because each phase has a profound impact on water quality, the Copermittees have commensurate responsibilities to protect water quality during each phase. In other words, Copermittees are held responsible for the short and long-term water quality consequences of their land use planning, construction, and existing development decisions.

18. **PLANNING PHASE FOR NEW DEVELOPMENT:** Because land use planning and zoning is where urban development is conceived, it is the phase in which the greatest and most cost-effective opportunities to protect water quality exists. When a Copermittee incorporates policies and principles designed to safeguard water resources into its General Plan and development project approval processes, it has taken a far-reaching step towards the preservation of local water resources for future generations.

19. **CONSTRUCTION PHASE:** Construction activities are a significant cause of receiving water impairment. Siltation is currently the largest cause of river impairment in the United States. Sediment runoff rates from construction sites greatly exceed natural erosion rates of undisturbed lands causing siltation and impairment of receiving waters. In addition to requiring implementation of the full range of BMPs, an effective construction runoff program must include local plan review, permit conditions, field inspections, and enforcement.

20. **EXISTING DEVELOPMENT:** The Copermittees' wet weather monitoring results collected during the past decade, as well as volumes of other references in the literature today, confirm substantial pollutant loads to receiving waters in runoff from existing urban development. Implementation of jurisdictional and watershed URMPs, which include extensive controls on existing development, can reduce pollutant loadings over the long term.

21. **CHANGES NEEDED:** Because the urbanization process is a direct and leading cause of water quality degradation in this Region, fundamental changes to existing policies and practices about urban development are needed if the beneficial uses of the San Diego Region's natural water resources are to be protected.

22. **DUAL REGULATION OF INDUSTRIAL AND CONSTRUCTION SITES:** Discharges of runoff from industrial and construction sites in this Region are subject to dual (state and local) regulation. (1) All industries and construction sites are subject to the local permits, plans, and ordinances of the municipal jurisdiction in which it is located. Pursuant to this Order, local (storm water, grading,

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construction, and use) permits, plans, and ordinances must (a) prohibit the discharge of pollutants and non-storm water into the MS4; and (b) require the routine use of BMPs to reduce pollutants in site runoff. (2) Many industries and construction sites are also subject to regulation under the statewide General Industrial Storm Water Permit or statewide General Construction Storm Water Permit[1]. These statewide general permits are adopted by the State Water Resources Control Board and enforced by the nine Regional Water Quality Control Boards throughout California. Like the Copermittees' local permits and ordinances, the statewide General Industrial and Construction Permits also (a) prohibit the discharge of pollutants and non-storm water; and (b) require the routine use of BMPs to reduce pollutants in site runoff.

Recognizing that both authorities share a common goal, the federal storm water regulations at 40 CFR 122.26 (and its preamble) call for the dual system to ensure the most effective oversight of industrial and construction site discharges. Under this dual system, each municipal Copermittee is responsible for enforcing its local permits, plans, and ordinances within its jurisdiction. Similarly, the SDRWQCB is responsible for enforcing both statewide general permits and this Order within the San Diego Region.

23. **EDUCATION:** Education is the foundation of every effective URMP and the basis for changes in behavior at a societal level. Education of municipal planning, inspection, and maintenance department staffs is especially critical to ensure that in-house staffs understand how their activities impact water quality, how to accomplish their jobs while protecting water quality, and their specific roles and responsibilities for compliance with this Order. Public education, designed to target various urban land users and other audiences, is also essential to inform the public of how individual actions impact receiving water quality and how these impacts can be minimized. The proposed Drainage Area Management Plan (DAMP) that was submitted to the SDRWQCB by the Orange County Copermittees in September 2000 has a strong emphasis on education measures.

24. **ENFORCING LOCAL LEGAL AUTHORITY**: Enforcement of local urban runoff related ordinances, permits, and plans is an essential component of every URMP and is specifically required in the federal storm water regulations and this Order. Routine inspections provide an effective means by which Copermittees can evaluate compliance with their permits and ordinances. Inspections are especially important at high-risk areas for pollutant discharges such as industrial and construction sites.

    When industrial or construction site discharges occur in violation of local permits and ordinances, the SDRWQCB looks to the municipality that has authorized the discharge for appropriate actions (typically education followed by enforcement where education has been unsuccessful). Each Copermittee must also provide enforcement against illegal discharges from other land uses it has authorized, such as commercial and residential developments.

25. **PUBLIC PARTICIPATION:** Public participation during the URMP development process is necessary to ensure that all stakeholder interests and a variety of creative solutions are considered.

26. **TOXICITY**: Urban runoff discharges from MS4s often contain pollutants that cause toxicity, (i.e., adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies). The water quality objectives for toxicity provided in the Water Quality Control Plan, San Diego Basin, Region 9, (Basin Plan), state in part *"All waters shall be free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life....The survival of aquatic life in surface waters subjected to a waste discharge or other controllable water quality factors, shall not be less than*

[1] The "statewide General Industrial Storm Water Permit" refers to State Water Resources Control Board Water Quality Order No. 97-03-DWQ National Pollutant Discharge Elimination System General Permit No. CAS000001, Waste Discharge Requirements for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities. The "statewide General Construction Storm Water Permit" refers to State Water Resources Control Board Order No. 99-08-DWQ National Pollutant Discharge Elimination System General Permit No. CAS000002, Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity.

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that for the same water body in areas unaffected by the waste discharge..." Urban runoff discharges from MS4s are considered toxic when (1) the toxic effect observed in an acute toxicity test exceeds zero Toxic Units Acute (TUa=0); or (2) the toxic effect observed in a chronic toxicity test exceeds one Toxic Unit Chronic (TUc=1).

27. **FOCUS ON MAN-MADE POLLUTANTS AND FLOWS:** The focus of this Order is on the control of urban runoff pollutants and flows, which are either generated or accelerated by human activities. This Order is not meant to control background or naturally occurring pollutants and flows.

28. **COMMON WATERSHEDS AND CWA SECTION 303(d) IMPAIRED WATERS:** The Copermittees discharge urban runoff into lakes, streams, creeks, bays, the Pacific Ocean, and tributaries thereto within six hydrologic areas within Orange County as shown in Table 2 below. During its downstream course, urban runoff is conveyed through lined and unlined (natural, manmade, and partially modified) channels, all of which are defined as components of the Copermittees' MS4.

    Some of the receiving water bodies listed below, which receive or convey urban runoff discharges, have been designated as impaired by the SDRWQCB and USEPA in 1998 pursuant to Clean Water Act section 303(d). Additional water bodies may be listed during the term of this Order pursuant to Clean Water Act section 303(d) as impaired as more information is collected and analyzed.

Table 2. Watershed Management Areas (WMAs)

SDRWQCB WATERSHED MANAGEMENT AREA (WMA)	HYDROLOGIC UNIT(S)	MAJOR SURFACE WATER BODIES	303(d) POLLUTANT(S) OF CONCERN OR WATER QUALITY EFFECT	COPERMITTEES
San Juan Creek WMA	San Juan Hydrologic Unit (901.00)	Moro Canyon Creek Laguna Canyon Creek Aliso Creek English Canyon Creek Sulphur Creek Wood Canyon Creek Salt Creek San Juan Creek Bell Canyon Creek Canada Gobernadora Arroyo Trabuco Oso Creek Prima Deshecha Canada Segunda Deshecha Canada Pacific Ocean	1. Coliform Bacteria	1. County of Orange 2. City of Aliso Viejo 3. City of Dana Point 4. City of Laguna Beach 5. City of Lake Forest 6. City of Laguna Hills 7. City of Laguna Niguel 8. City of Laguna Woods 9. City of Mission Viejo 10. City of Rancho Santa Margarita 11. City of San Juan Capistrano 12. City of San Clemente 13. Orange County Flood Control District

29. **CUMULATIVE POLLUTANT LOAD CONTRIBUTIONS:** Because they are interconnected, each MS4 within a watershed contributes to the cumulative pollutant loading, volume, and velocity of urban runoff and the ensuing degradation of downstream receiving water bodies. Accordingly, inland MS4s contribute to coastal impairments.

30. **LAND USE PLANNING ON A WATERSHED SCALE:** Because urban runoff does not recognize political boundaries, "watershed-based" land use planning (pursued collaboratively by neighboring local governments) can greatly enhance the protection of shared natural water resources. Such planning enables multiple jurisdictions to work together to plan for both development and resource conservation that can be environmentally as well as economically sustainable.

31. **INTERGOVERNMENTAL COORDINATION:** Within their common watersheds it is essential for the Copermittees to coordinate their water quality protection and land use planning activities to achieve the greatest protection of receiving water bodies. Copermittee coordination with other watershed stakeholders, especially CALTRANS and the Department of Defense is also critical.

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Continued implementation of the management structure developed under previous permits, within which the Copermittees subject to this Order, will fund and coordinate those aspects of their joint obligations will promote implementation of Urban Runoff Management Programs on a watershed and regional basis in the most cost effective manner.

32. **WASTE REMOVAL:** Waste and pollutants which are deposited and accumulate in MS4 drainage structures will be discharged from these structures to waters of the United States unless they are removed. These discharges may cause or contribute to, or threaten to cause or contribute to, a condition of pollution in receiving waters. Once removed, such accumulated wastes must be characterized and lawfully disposed.

33. **CHANGING THE STORM WATER MANAGEMENT APPROACH:** In contrast to the conventional "conveyance" approach, a more natural approach to storm water management seeks to filter and infiltrate runoff by allowing it to flow slowly over permeable vegetated surfaces. By "preserving and restoring the natural hydrologic cycle", filtration and infiltration can greatly reduce the volume/peak rate, velocity, and pollutant loads of urban runoff. The greatest opportunities for changing from a "conveyance" to a more natural management approach occur during the land use planning and zoning processes and when new development projects are under early design.

34. **INFILTRATION AND POTENTIAL GROUNDWATER CONTAMINATION:** Any drainage feature that infiltrates runoff poses some risk of potential groundwater contamination. Although dependent on several factors, the risks typically associated with properly managed infiltration of runoff (especially from residential land use areas) are not significant. The risks associated with infiltration can be managed by many techniques, including (1) designing landscape drainage features that promote infiltration of runoff, but do not "inject" runoff (injection bypasses the natural processes of filtering and transformation that occur in the soil); (2) taking reasonable steps to prevent the illegal disposal of wastes; and (3) ensuring that each drainage feature is adequately maintained in perpetuity. Minimum conditions needed to protect groundwater are specified in section F.1.b. of this Order.

35. **VECTOR CONTROL:** Certain BMPs implemented or required by municipalities for urban runoff management may create a habitat for vectors (e.g. mosquitoes and rodents) if not properly designed or maintained. Close collaboration and cooperative effort between municipalities and local vector control agencies and the State Department of Health Services during the development and implementation of the Urban Runoff Management Programs is necessary to minimize nuisances and public health impacts resulting from vector breeding.

36. **LEGAL AUTHORITY:** This Order is based on the federal Clean Water Act, the Porter-Cologne Water Quality Control Act (Division 7 of the Water Code, 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 Resources Control Board, the Regional Water Quality Control Plan (Basin Plan) adopted by the Regional Board, the California Toxics Rule, and the California Toxics Rule Implementation Plan.

37. **TOTAL MAXIMUM DAILY LOADS (TMDLs):** 40 CFR 122.44 (d)(vii)(B) requires that NPDES permits contain effluent limitations that are consistent with waste load allocations developed under a TMDL. Several TMDLs are being developed in the San Diego Region for impaired water bodies that receive Copermittees' discharge. Once these TMDLs are approved by the SDRWQCB and USEPA, Copermittees' discharge of urban runoff into an impaired water body will be subject to load allocations established by the TMDLs. This Order may be revised by the Regional Board to implement the TMDL waste load allocations for specific water bodies within the Orange County watersheds.

38. **ANTIDEGRADATION:** Conscientious implementation of URMPs that satisfy the requirements contained in this Order will reduce the likelihood that discharges from MS4s will cause or contribute to unreasonable degradation of the quality of receiving waters. Therefore, this Order is in

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conformance with SWRCB Resolution No. 68-16 and the federal antidegradation policy described in 40 CFR 131.12.

39. **CEQA:** The issuance of waste discharge requirements for the discharge of urban runoff from MS4s to waters of the United States is exempt from the requirement for preparation of environmental documents under the California Environmental Quality Act (CEQA) (Public Resources Code, Division 13, Chapter 3, § 21000 et seq.) in accordance with the CWC § 13389.

40. **COMMON INTEREST DEVELOPMENTS AND HOMEOWNERS ASSOCIATIONS:** Common interest developments occur within the jurisdiction of the Copermittees. Commonly owned areas can include those used to convey urban runoff. State Law (Civil code 1350-1376) requires that an association be established to manage the commonly owned areas. Urban runoff from storm water conveyance systems within common interest developments is discharged to receiving waters and/or MS4s. This runoff is expected to have water quality and quantity characteristics similar to runoff from areas of similar land use and drainage area.

41. **REPORT OF WASTE DISCHARGE:** In September 2000, the Orange County Copermittees submitted a Report of Waste Discharge and a proposed Drainage Area Management Plan (DAMP) for 2001-2006 to the SDRWQCB.

42. **PUBLIC NOTICE:** The SDRWQCB has notified the Copermittees, all known interested parties, and the public of its intent to consider adoption of an Order prescribing waste discharge requirements that would serve to renew an NPDES permit for the existing discharge of urban runoff.

43. **PUBLIC HEARING:** The SDRWQCB has, at a public meeting on January 9, 2002, held a public hearing and heard and considered all comments pertaining to the terms and conditions of this Order.

IT IS HEREBY ORDERED that the Copermittees, in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted thereunder, and the provisions of the Clean Water Act and regulations adopted thereunder, shall each comply with the following:

A. PROHIBITIONS -- DISCHARGES

1. Discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC § 13050), in waters of the state are prohibited.

2. Discharges from MS4s that cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited.

3. Discharges from MS4s containing pollutants which have not been reduced to the maximum extent practicable (MEP) are prohibited.

4. In addition to the above prohibitions, discharges from MS4s are subject to all Basin Plan prohibitions cited in **Attachment A** to this Order.

B. PROHIBITIONS -- NON-STORM WATER DISCHARGES

1. Each Copermittee shall effectively prohibit **all** types of non-storm water discharges into its Municipal Separate Storm Sewer System (MS4) unless such discharges are either authorized by a separate NPDES permit; or not prohibited in accordance with B.2. and B.3. below.

2. Pursuant to 40 CFR 122.26(d)(2)(iv)(B)(1), the following categories of non-storm water discharges need only be prohibited from entering an MS4 if such categories of discharges are identified by the Copermittee as a significant source of pollutants to waters of the United States:

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a. Diverted stream flows;
b. Rising ground waters;
c. Uncontaminated ground water infiltration [as defined at 40 CFR 35.2005(20)] to MS4s;
d. Uncontaminated pumped ground water;
e. Foundation drains;
f. Springs;
g. Water from crawl space pumps;
h. Footing drains;
i. Air conditioning condensation;
j. Flows from riparian habitats and wetlands;
k. Water line flushing;
l. Landscape irrigation;
m. Discharges from potable water sources other than water main breaks;
n. Irrigation water;
o. Lawn watering;
p. Individual residential car washing; and
q. Dechlorinated swimming pool discharges.

3. When a discharge category above is identified as a significant source of pollutants to waters of the United States, the Copermittee shall either:

   a. Prohibit the discharge category from entering its MS4; ***OR***

   b. Not prohibit the discharge category and implement, or require the responsible party(ies) to implement, BMPs which will reduce pollutants to the MEP; ***AND***

   c. For each discharge category not prohibited, the Copermittee shall submit the following information to the SDRWQCB within **365 days** of adoption of this Order:

      (1) The non-storm water discharge category listed above which the Copermittee elects not to prohibit; and

      (2) The BMP(s) for each discharge category listed above which the Copermittee will implement, or require the responsible party(ies) to implement, to prevent or reduce pollutants to the MEP.

4. **Fire Fighting Flows:** Emergency and non-emergency fire fighting flows need not be prohibited. However, where applicable, when not interfering with health and safety issues, BMPs for non-emergency fire fighting flows are encouraged.

5. **Dry Weather Monitoring and Non-Storm Water Discharges:** Each Copermittee shall examine all dry weather monitoring results collected in accordance with section F.5. and Attachment E of this Order to identify water quality problems which may be the result of any non-prohibited discharge category(ies) identified above in Non-Storm Water Discharges to MS4s Prohibition B.2. Follow-up investigations shall be conducted as necessary to identify and control any non-prohibited discharge category(ies) listed above.

C. RECEIVING WATER LIMITATIONS

1. Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited.

2. Each Copermittee shall comply with Part C.1., Part A.2, and Part A.4 as it applies to Prohibition 5 in Attachment A of this Order through timely implementation of control measures and other actions to

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reduce pollutants in urban runoff discharges in accordance with the Jurisdictional Urban Runoff Management Program (Jurisdictional URMP) and other requirements of this Order including any modifications. The Jurisdictional URMP shall be designed to achieve compliance with Part C.1., Part A.2, and Part A.4 as it applies to Prohibition 5 in Attachment A of this Order. If exceedance(s) of water quality standards persist notwithstanding implementation of the URMP and other requirements of this Order, the Copermittee shall assure compliance with Part C.1., Part A.2, and Part A.4 as it applies to Prohibition 5 in Attachment A of this Order by complying with the following procedure:

a. Upon a determination by either the Copermittee or the SDRWQCB that MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard, the Copermittee shall promptly notify and thereafter submit a report to the SDRWQCB 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 water quality standards. The report may be incorporated in the annual update to the Jurisdictional URMP unless the SDRWQCB directs an earlier submittal. The report shall include an implementation schedule. The SDRWQCB may require modifications to the report;

b. Submit any modifications to the report required by the SDRWQCB within 30 days of notification;

c. Within 30 days following approval of the report described above by the SDRWQCB, the Copermittee shall revise its Jurisdictional URMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required;

d. Implement the revised Jurisdictional URMP and monitoring program in accordance with the approved schedule.

So long as the Copermittee has complied with the procedures set forth above and are implementing the revised Jurisdictional URMP, the Copermittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the SDRWQCB to do so.

3. Nothing in this section shall prevent the SDRWQCB from enforcing any provision of this Order while the Copermittee prepares and implements the above report.

D. LEGAL AUTHORITY

1. Each Copermittee shall establish, maintain, and enforce adequate legal authority to control pollutant discharges **into** and **from** its MS4 through ordinance, statute, permit, contract or similar means. This legal authority must, at a minimum, authorize the Copermittee to:

   a. Control the contribution of pollutants in discharges of runoff associated with industrial and construction activity **to** its MS4 and control the quality of runoff **from** industrial and construction sites. This requirement applies both to industrial and construction sites that have coverage under the statewide general industrial or construction storm water permits, as well as to those sites that do not. Grading ordinances shall be upgraded and enforced as necessary to comply with this Order.

   b. Prohibit **all** identified illicit discharges not otherwise allowed pursuant to section B.2 including but not limited to:

      (1) Sewage;

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(2) Discharges of wash water resulting from the hosing or cleaning of gas stations, auto repair garages, or other types of automotive services facilities;

(3) Discharges resulting from the cleaning, repair, or maintenance of any type of equipment, machinery, or facility including motor vehicles, cement-related equipment, and port-a-potty servicing, etc.;

(4) Discharges of wash water from mobile operations such as mobile automobile washing, steam cleaning, power washing, and carpet cleaning, etc.;

(5) Discharges of wash water from the cleaning or hosing of impervious surfaces in municipal, industrial, commercial, and residential areas including parking lots, streets, sidewalks, driveways, patios, plazas, work yards and outdoor eating or drinking areas, etc.;

(6) Discharges of runoff from material storage areas containing chemicals, fuels, grease, oil, or other hazardous materials;

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

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

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

c. Prohibit and eliminate illicit connections to the MS4;

d. Control the discharge of spills, dumping, or disposal of materials other than storm water to its MS4;

e. Require compliance with conditions in Copermittee ordinances, permits, contracts or orders (i.e., hold dischargers to its MS4 accountable for their contributions of pollutants and flows);

f. Utilize enforcement mechanisms to require compliance with Copermittee storm water ordinances, permits, contracts, or orders;

g. Control the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements among Copermittees. Control of the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements with other owners of the MS4 such as CALTRANS, Native American Tribes, and the Department of Defense is encouraged;

h. Carry out all inspections, surveillance, and monitoring necessary to determine compliance and noncompliance with local ordinances and permits and with this Order, including the prohibition on illicit discharges to the MS4. This means the Copermittee must have authority to enter, sample, inspect, review and copy records, and require regular reports from industrial facilities discharging into its MS4, including construction sites; and

i. Require the use of best management practices (BMPs) to prevent or reduce the discharge of pollutants to MS4s.

2. Within **365 days** of adoption of this Order, each Copermittee shall provide to the SDRWQCB a statement certified by its chief legal counsel that the Copermittee has adequate legal authority to

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implement and enforce each of the requirements contained in 40 CFR 122.26(d)(2)(i)(A-F) and this Order. This statement shall include:

a. Identification of all departments within the jurisdiction that conduct urban runoff related activities, and their roles and responsibilities under this Order. Include an up to date organizational chart specifying these departments and key personnel;

b. Citation of urban runoff related ordinances and the reasons they are enforceable;

c. Identification of the local administrative and legal procedures available to mandate compliance with urban runoff related ordinances and therefore with the conditions of this Order;

d. Description of how these ordinances are implemented and appealed; and

e. Description of whether the municipality can issue administrative orders and injunctions or if it must go through the court system for enforcement actions.

E. TECHNOLOGY BASED STANDARDS

Each Copermittee shall implement, or require implementation of, best management practices to ensure that the following pollutant discharges **into** and/or **from** its MS4 are reduced to the applicable technology based standard as specified below:

Table 3. Technology Based Standards[2]

POLLUTANT DISCHARGE FROM	DESCRIPTION	APPLICABLE PERFORMANCE STANDARD
Industrial Activity owned by the Copermittee	Categorical Industry in 40 CFR 122.26	The Copermittees are required to implement BMPs to the BAT/BCT standard (pursuant to Statewide General Industrial Permit)
Industrial Activity	All other industry	The Copermittees are required to implement or require the implementation of BMPs to the MEP standard for discharges into their MS4s.[3]
Construction Activity owned by the Copermittee	Greater than or Equal to 5 Acres (or less than 5 acres and Part of a Larger Common Plan of Sale or Development)	The Copermittees are required to implement BMPs to the BAT/BCT standard (pursuant to Statewide General Construction Permit)
Construction Activity	All Other construction	The Copermittees are required to implement or require the implementation of BMPs to the MEP standard for discharges into their MS4s[4]
Other Sources	All Other Land Use Activities	The Copermittees are required to implement or require the implementation of BMPs to the MEP standard for discharges into their MS4s
MS4s	All discharges from MS4s	The Copermittees are required to implement or require the implementation of BMPs to the MEP standard for all discharges from their MS4s

[2] Pursuant to this Order, each Copermittee shall ensure that pollutants in runoff from industrial and construction sites within its jurisdiction have been reduced to the MEP standard before entering its MS4. The industrial and construction site dischargers themselves however must ensure that pollutants in runoff leaving their sites have been reduced to the BAT/BCT standard pursuant to either the statewide General Industrial or Construction Storm Water Permit. Runoff from industrial and construction sites owned by municipalities and subject to either the General Industrial or Construction Storm Water Permits, must meet the BAT/BCT standard.

[3] The facility operator is required to implement BMPs to the BAT/BCT standard pursuant to the Statewide General Industrial permit.

[4] The facility operator is required to implement BMPs to the BAT/BCT standard pursuant to the Statewide General Construction permit.

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F. JURISDICTIONAL URBAN RUNOFF MANAGEMENT PROGRAM

Each Copermittee shall take appropriate actions to reduce discharges of pollutants and runoff flow during each of the three major phases of urban development, i.e., the planning, construction, and existing development (or use) phases. Following the adoption of the Order and prior to the full implementation of the Jurisdictional URMP, each Copermittee shall at a minimum implement the provisions and commitments of the proposed DAMP submitted in September 2000.

Each Copermittee shall implement a Jurisdictional Urban Runoff Management Program (Jurisdictional URMP) that contains the components shown below as described in Sections F.1. through F.9:

F.1. Land-Use Planning for New Development and Redevelopment Component
F.2. Construction Component
F.3. Existing Development Component
- **a. Municipal**
- **b. Industrial**
- **c. Commercial**
- **d. Residential**

F.4. Education Component
F.5. Illicit Discharge Detection and Elimination Component
F.6. Common Interest Areas and Homeowners Associations
F.7. Public Participation Component
F.8. Assessment of Jurisdictional URMP Effectiveness Component
F.9. Fiscal Analysis Component

F.1. Land-Use Planning for New Development and Redevelopment Component

Each Copermittee shall minimize the short and long-term impacts on receiving water quality from new development and redevelopment. In order to reduce pollutants and runoff flows from new development and redevelopment to the maximum extent practicable, each Copermittee shall at a minimum:

F.1.a Assess General Plan
F.1.b Modify Development Project Approval Processes
F.1.c Revise Environmental Review Processes
F.1.d Conduct Education Efforts Focused on New Development and Redevelopment

F.1.a. Assess General Plan

Each Copermittee's General Plan or equivalent plan (e.g., Comprehensive, Master, or Community Plan) shall include water quality and watershed protection principles and policies to direct land-use decisions and require implementation of consistent water quality protection measures for development projects. As part of its Jurisdictional Urban Runoff Management Program document, each Copermittee shall provide a workplan with time schedule detailing any changes to its General Plan regarding water quality and watershed protection. Examples of water quality and watershed protection principles and policies to be considered include the following:

(1) Minimize the amount of impervious surfaces and directly connected impervious surfaces in areas of new development and redevelopment and where feasible slow runoff and maximize on-site infiltration of runoff.

(2) Implement pollution prevention methods supplemented by pollutant source controls and treatment. Use small collection strategies located at, or as close as possible to, the source (i.e., the point where water initially meets the ground) to minimize the transport of urban runoff and pollutants offsite and into an MS4.

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(3) Preserve, and where possible, create or restore areas that provide important water quality benefits, such as riparian corridors, wetlands, and buffer zones. Encourage land acquisition of such areas.

(4) Limit disturbances of natural water bodies and natural drainage systems caused by development including roads, highways, and bridges.

(5) Prior to making land use decisions, utilize methods available to estimate increases in pollutant loads and flows resulting from projected future development. Require incorporation of structural and non-structural BMPs to mitigate the projected increases in pollutant loads and flows.

(6) Avoid development of areas that are particularly susceptible to erosion and sediment loss; or establish development guidance that identifies these areas and protects them from erosion and sediment loss.

(7) Reduce pollutants associated with vehicles and increasing traffic resulting from development. Coordinate local traffic management reduction efforts with Orange County Transit Authority's Congestion Management Plan.

(8) Post-development runoff from a site shall not contain pollutant loads that cause or contribute to an exceedance of receiving water quality objectives and which have not been reduced to the maximum extent practicable.

F.1.b. Modify Development Project Approval Processes

Prior to project approval and issuance of local permits, Copermittees shall require each proposed project to implement measures to ensure that pollutants and runoff from the development will be reduced to the maximum extent practicable and will not cause or contribute to an exceedance of receiving water quality objectives. Each Copermittee shall further ensure that all development will be in compliance with Copermittee storm water ordinances, local permits, all other applicable ordinances and requirements, and this Order.

(1) Development Project Requirements

Each Copermittee shall include development project requirements in local permits to ensure that pollutant discharges from development are reduced to the maximum extent practicable, peak runoff velocities and runoff volumes from development are controlled, and that receiving water quality objectives are not violated throughout the life of the project. Such requirements shall, at a minimum:

(a) Require project proponent to implement source control BMPs for all applicable development projects.
(b) Require project proponent to implement site design/landscape characteristics where feasible which maximize infiltration, provide retention, slow runoff, and minimize impervious land coverage for all development projects.
(c) Require project proponent to implement buffer zones for natural water bodies, where feasible. Where buffer zone implementation is infeasible, require project proponent to implement other buffers such as trees, lighting restrictions, access restrictions, etc.
(d) Require industrial applicants subject to California's statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction), (hereinafter General Industrial Permit), to provide evidence of coverage under the General Industrial Permit.
(e) Require project proponent to ensure its grading or other construction activities meet the provisions specified in Section F.2. of this Order.

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(f) Require project proponent to provide proof of a mechanism which will ensure ongoing long-term maintenance of all structural post-construction BMPs.

(2) Standard Urban Storm Water Mitigation Plans (SUSMPs)

Within 365 days of adoption of this Order, the Copermittees shall collectively develop a model Standard Urban Storm Water Mitigation Plan (SUSMP) to reduce pollutants and to maintain or reduce downstream erosion and stream habitat from all new development and significant redevelopment projects falling under the priority project categories or locations listed in section F.1.b.(2)(a) below. The Copermittes shall submit the model SUSMP to the SDRWQCB. Within 180 days of development of the model SUSMP, each Copermittee shall adopt its own local SUSMP, and amended ordinances consistent with the model SUSMP, and shall submit both (local SUSMP and amended ordinances) to the SDRWQCB.

Immediately following adoption of its local SUSMP, each Copermittee shall ensure that all new development and significant redevelopment projects falling under the priority project categories or locations listed in F.1.b.(2)(a) below meet SUSMP requirements. The SUSMP requirements shall apply to all priority projects or phases of priority projects that have not yet begun grading or construction activities. If a Copermittee determines that lawful prior approval of a project exists, whereby application of SUSMP requirements to the project is infeasible, SUSMP requirements need not apply to the project. Where feasible, the Copermittees shall utilize the 18-month SUSMP implementation period to ensure that projects undergoing approval processes include application of SUSMP requirements in their plans.

(a) *Priority Development Project Categories - SUSMP requirements shall apply to all new development and significant redevelopment projects falling under the priority project categories or locations listed below.* Significant redevelopment is defined as the creation or addition of at least 5,000 square feet of impervious surfaces on an already developed site. Significant redevelopment includes, but is not limited to: the expansion of a building footprint or addition or replacement of a structure; structural development including an increase in gross floor area and/or exterior construction or remodeling; replacement of impervious surface that is not part of a routine maintenance activity; and land disturbing activities related with structural or impervious surfaces. Where significant redevelopment results in an increase of less than fifty percent of the impervious surfaces of a previously existing development, and the existing development was not subject to SUSMP requirements, the numeric sizing criteria discussed in section F.1.b.(2)(c) applies only to the addition, and not to the entire development.

i. *Home subdivisions of 10 or more housing units.* This category includes single-family homes, multi-family homes, condominiums, and apartments.

ii. *Commercial developments greater than 100,000 square feet.* 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 100,000 square feet. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; commercial airfields; and other light industrial facilities.

iii. *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.

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iv. *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 F.1.b.(2)(c) and peak flow rate requirement F.1.b(2)(b)(i).

v. *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.

vi. *Environmentally Sensitive Areas: All development and redevelopment located within or directly adjacent to or discharging directly to an environmentally sensitive area (where discharges from the development or redevelopment will enter receiving waters within the environmentally sensitive area), 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.* Environmentally sensitive areas include but are not limited to all Clean Water Act Section 303(d) impaired water bodies; areas designated as Areas of Special Biological Significance by the State Water Resources Control Board (Water Quality Control Plan for the San Diego Basin (1994) and amendments); water bodies designated with the RARE beneficial use by the State Water Resources Control Board (Water Quality Control Plan for the San Diego Basin (1994) and amendments); areas designated as preserves or equivalent under the Natural Community Conservation Planning Program; and any areas designated as Critical Aquatic Resources (CARS) or other equivalent environmentally sensitive areas which have been identified by the Copermittees. "Directly adjacent" means situated within 200 feet of the environmentally sensitive area. "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.

vii. *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.

viii. *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.

(b) BMP Requirements – The SUSMP shall include a list of recommended source control and structural treatment BMPs. The SUSMP shall require all new development and significant redevelopment projects falling under the above priority project categories or locations to implement a combination of BMPs selected from the recommended BMP list, including at a minimum (1) source control BMPs and (2) structural treatment BMPs. The BMPs shall, at a minimum:

i. Control the post-development peak storm water runoff discharge rates and velocities to maintain or reduce pre-development downstream erosion, and to protect stream habitat;

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ii. Conserve natural areas where feasible;
iii. Minimize storm water pollutants of concern in urban runoff from the new development or significant redevelopment (through implementation of source control BMPs). Identification of pollutants of concern should include at a minimum consideration of any pollutants for which water bodies receiving the development's runoff are listed as impaired under Clean Water Act section 303(d), any pollutant associated with the land use type of the development, and any pollutant commonly associated with urban runoff;
iv. Remove pollutants of concern from urban runoff (through implementation of structural treatment BMPs);
v. Minimize directly connected impervious areas where feasible;
vi. Protect slopes and channels from eroding;
vii. Include storm drain stenciling and signage;
viii. Include properly designed outdoor material storage areas;
ix. Include properly designed trash storage areas;
x. Include proof of a mechanism, to be provided by the project proponent or Copermittee, which will ensure ongoing long-term structural BMP maintenance;
xi. Include additional water quality provisions applicable to individual priority project categories;
xii. Be correctly designed so as to remove pollutants to the maximum extent practicable;
xiii. Be implemented close to pollutant sources, when feasible, and prior to discharging into receiving waters supporting beneficial uses; and
xiv. Ensure that post-development runoff does not contain pollutant loads which cause or contribute to an exceedance of water quality objectives and which have not been reduced to the maximum extent practicable.

(c) Numeric Sizing Criteria – The SUSMP shall require structural treatment BMPs to be implemented for all priority development projects. All structural treatment BMPs shall be located so as to infiltrate, filter, or treat the required runoff volume or flow prior to its discharge to any receiving water body supporting beneficial uses. Structural treatment BMPs may be shared by multiple new development projects as long as construction of any shared structural treatment BMPs is completed prior to the use of any new development project from which the structural treatment BMP will receive runoff.

In addition to meeting the BMP requirements listed in item F.1.b.(2)(b) above, all structural treatment BMPs for a single priority development project shall collectively be sized to comply with the following numeric sizing criteria:

Volume

Volume-based BMPs shall be designed to mitigate (infiltrate, filter, or treat) either:

i. The volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the local historical rainfall record (0.8 inch approximate average for the Orange County area);[5] or
ii. The volume of runoff produced by the 85th percentile 24-hour rainfall event, determined as the maximized capture storm water volume for the area, from the formula recommended in Urban Runoff Quality

[5]This volume is not a single volume to be applied to all of Orange County. The size of the 85th percentile storm event is different for various parts of the County. The Copermittees are encouraged to calculate the 85th percentile storm event for each of their jurisdictions using local rain data pertinent to their particular jurisdiction (the 0.8 inch standard is a rough average for the County and should only be used where appropriate rain data is not available). In addition, isopluvial maps may be used to extrapolate rainfall data to areas where insufficient data exists in order to determine the volume of the local 85th percentile storm event in such areas. Where the Copermittees will use isopluvial maps to determine the 85th percentile storm event in areas lacking rain data, the Copermittees shall describe their method for using isopluvial maps in the model and local SUSMPs.

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Management, WEF Manual of Practice No. 23/ASCE Manual of Practice No. 87, (1998); or

iii. The volume of annual runoff based on unit basin storage volume, to achieve 90% or more volume treatment by the method recommended in California Stormwater Best Management Practices Handbook – Industrial/Commercial, (1993); or

iv. The volume of runoff, as determined from the local historical rainfall record, that achieves approximately the same reduction in pollutant loads and flows as achieved by mitigation of the 85th percentile 24-hour runoff event;[6]

OR

Flow

Flow-based BMPs shall be designed to mitigate (infiltrate, filter, or treat) either:

i. The maximum flow rate of runoff produced from a rainfall intensity of 0.2 inch of rainfall per hour, for each hour; or

ii. The maximum flow rate of runoff produced by the 85th percentile hourly rainfall intensity, as determined from the local historical rainfall record, multiplied by a factor of two; or

iii. The maximum flow rate of runoff, as determined from the local historical rainfall record, that achieves approximately the same reduction in pollutant loads and flows as achieved by mitigation of the 85th percentile hourly rainfall intensity multiplied by a factor of two.

(d) Equivalent Numeric Sizing Criteria - The Copermittees may develop, as part of the model SUSMP, any equivalent method for calculating the volume or flow which must be mitigated (i.e., any equivalent method for calculating numeric sizing criteria) by post-construction structural treatment BMPs. Such equivalent sizing criteria may be authorized by the SDRWQCB for use in place of the above criteria. In the absence of development and subsequent authorization of such equivalent numeric sizing criteria, the above numeric sizing criteria requirement shall be implemented.

(e) Pollutants or Conditions of Concern – As part of the model SUSMP, the Copermittees shall develop a procedure for pollutants or conditions of concern to be identified for each new development or significant redevelopment project. The procedure shall include, at a minimum, consideration of (1) receiving water quality (including pollutants for which receiving waters are listed as impaired under Clean Water Act section 303(d)); (2) land use type of the development project and pollutants associated with that land use type; (3) pollutants expected to be present on site; (4) changes in storm water discharge flow rates, velocities, durations, and volumes resulting from the development project; and (5) sensitivity of receiving waters to changes in storm water discharge flow rates, velocities, durations, and volumes.

(f) Implementation Process – As part of the model SUSMP, the Copermittees shall develop a process by which SUSMP requirements will be implemented. The process shall identify at what point in the planning process development projects will be required to meet SUSMP requirements. The process shall also include identification of the roles and responsibilities of various municipal departments in implementing the SUSMP requirements, as well as any other measures necessary for the implementation of SUSMP requirements.

[6] Under this volume criteria, hourly rainfall data may be used to calculate the 85th percentile storm event, where each storm event is identified by its separation from other storm events by at least six hours of no rain. Where the Copermittees may use hourly rainfall data to calculate the 85th percentile storm event, the Copermittees shall describe their method for using hourly rainfall data to calculate the 85th percentile storm event in the model and local SUSMPs.

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(g) Waiver Provision – A Copermittee may provide for a project to be waived from the requirement of implementing all structural treatment BMPs (F.1.b.(2)(b) & F.1.b.(2)(c)) if infeasibility can be established. A waiver of infeasibility shall only be granted by a Copermittee when all available structural treatment BMPs have been considered and rejected as infeasible. Copermittees shall notify the SDRWQCB within 5 days of each waiver issued and shall include the name of the person granting each waiver.

As part of the model SUSMP, the Copermittees may develop a program to require project proponents who have received waivers to transfer the savings in cost, as determined by the Copermittee(s), to a storm water mitigation fund. This program may be implemented by all Copermittees that choose to provide waivers. Funds may be used on projects to improve urban runoff quality within the watershed of the waived project. The waiver program may identify:

i. The entity or entities that will manage the storm water mitigation fund (i.e., assume full responsibility for)
ii. The range and types of acceptable projects for which mitigation funds may be expended;
iii. The entity or entities that will assume full responsibility for each mitigation project including its successful completion
iv. How the dollar amount of fund contributions will be determined.

(h) Infiltration and Groundwater Protection – To protect groundwater quality, each Copermittee shall apply restrictions to the use of structural treatment BMPs which are designed to primarily function as infiltration devices (such as infiltration trenches and infiltration basins). Such restrictions shall ensure that the use of such infiltration structural treatment BMPs shall not cause or contribute to an exceedance of groundwater quality objectives. At a minimum, use of structural treatment BMPs which are designed to primarily function as infiltration devices shall meet the following conditions:[7]

i. Urban runoff shall undergo pretreatment such as sedimentation or filtration prior to infiltration.
ii. All dry weather flows shall be diverted from infiltration devices.
iii. Pollution prevention and source control BMPs shall be implemented at a level appropriate to protect groundwater quality at sites where infiltration structural treatment BMPs are to be used.
iv. Infiltration structural treatment BMPs shall be adequately maintained so that they remove pollutants to the maximum extent practicable.
v. The vertical distance from the base of any infiltration structural treatment BMP to the seasonal high groundwater mark shall be at least 10 feet. Where groundwater basins do not support beneficial uses, this vertical distance criteria may be reduced, provided groundwater quality is maintained.
vi. The soil through which infiltration is to occur shall have physical and chemical characteristics (such as appropriate cation exchange capacity, organic content, clay content, and infiltration rate) which are adequate for proper infiltration durations and treatment of urban runoff for the protection of groundwater beneficial uses.
vii. Infiltration structural treatment BMPs shall not be used for areas of industrial or light industrial activity; areas subject to high vehicular traffic (25,000 or greater average daily traffic on main roadway or 15,000 or more average daily traffic on any intersecting roadway); automotive repair shops; car washes; fleet storage

[7] These conditions do not apply to structural treatment BMPs which allow incidental infiltration and are not designed to primarily function as infiltration devices (such as grassy swales, detention basins, vegetated buffer strips, constructed wetlands, etc.)

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areas (bus, truck, etc.); nurseries; and other high threat to water quality land uses and activities as designated by each Copermittee.

viii. Infiltration structural BMPs shall be located a minimum of 100 feet horizontally from any water supply wells.

As part of the model and local SUSMPs, the Copermittees may develop alternative restrictions on the use of structural treatment BMPs which are designed to primarily function as infiltration devices.

(i) Downstream Erosion – As part of the model SUSMP 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.

F.1.c. Revise Environmental Review Processes

(1) To the extent feasible, the Copermittees shall revise their current environmental review processes to include requirements for evaluation of water quality effects and identification of appropriate mitigation measures. The following questions are examples to be considered in addressing increased pollutants and flows from proposed projects:

(a) Could the proposed project result in an increase in pollutant discharges to receiving waters? Consider water quality parameters such as temperature, dissolved oxygen, turbidity and other typical storm water pollutants (e.g., heavy metals, pathogens, petroleum derivatives, synthetic organics, sediment, nutrients, oxygen-demanding substances, and trash).
(b) Could the proposed project result in significant alteration of receiving water quality during or following construction?
(c) Could the proposed project result in increased impervious surfaces and associated increased runoff?
(d) Could the proposed project create a significant adverse environmental impact to drainage patterns due to changes in runoff flow rates or volumes?
(e) Could the proposed project result in increased erosion downstream?
(f) Is the project tributary to an already impaired water body, as listed on the Clean Water Act Section 303(d) list? If so, can it result in an increase in any pollutant for which the water body is already impaired?
(g) Is project tributary to other environmentally sensitive areas? If so, can it exacerbate already existing sensitive conditions?
(h) Could the proposed project have a potentially significant environmental impact on surface water quality, to either marine, fresh, or wetland waters?
(i) Could the proposed project have a potentially significant adverse impact on ground water quality?
(j) Could the proposed project cause or contribute to an exceedance of applicable surface or groundwater receiving water quality objectives or degradation of beneficial uses?
(k) Can the project impact aquatic, wetland, or riparian habitat?

F.1.d. Conduct Education Efforts Focused on New Development and Redevelopment

(1) Internal: Municipal Staff and Others

Each Copermittee shall implement an education program to ensure that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

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(a) Federal, state, and local water quality laws and regulations applicable to development projects;
(b) The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization); and
(c) How impacts to receiving water quality resulting from development can be minimized (i.e., through implementation of various source control and structural BMPs).

(2) External: Project Applicants, Developers, Contractors, Property Owners, Community Planning Groups

As early in the planning and development process as possible, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, and community planning groups on the following topics:

(a) Federal, state, and local water quality laws and regulations applicable to development projects;
(b) Required federal, state, and local permits pertaining to water quality;
(c) Water quality impacts of urbanization; and
(d) Methods for minimizing the impacts of development on receiving water quality.

F.2. Construction Component

Each Copermittee shall implement a Construction Component of its Jurisdictional URMP to reduce pollutants in runoff from construction sites during all construction phases. At a minimum the construction component shall address:

F.2.a. Pollution Prevention
F.2.b. Grading Ordinance Update
F.2.c. Modify Construction and Grading Approval Process
F.2.d. Source Identification
F.2.e. Threat to Water Quality Prioritization
F.2.f. BMP Implementation
F.2.g. Inspection of Construction Sites
F.2.h. Enforcement of Construction Sites
F.2.i. Reporting of Non-compliant Sites
F.2.j. Education Focused on Construction Activities

F.2.a. Pollution Prevention (Construction)

Each Copermittee shall implement pollution prevention methods in its Construction Component and shall require its use by construction site owners, developers, contractors, and other responsible parties, where appropriate.

F.2.b. Grading Ordinance Update (Construction)

Each Copermittee shall review and update its grading ordinances as necessary for compliance with its storm water ordinances and this Order. The updated grading ordinance shall require implementation of BMPs and other measures during all construction activities, including the following BMPs and other measures or their equivalent:

(1) Erosion prevention;
(2) Seasonal restrictions on grading;
(3) Slope stabilization requirements;
(4) Phased grading;
(5) Revegetation as early as feasible;

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(6) Preservation of natural hydrologic features;
(7) Preservation of riparian buffers and corridors;
(8) Maintenance of all source control and structural treatment BMPs; and
(9) Retention and proper management of sediment and other construction pollutants on site.

F.2.c Modify Construction and Grading Approval Process (Construction)

Prior to approval and issuance of local construction and grading permits, each Copermittee shall require all individual proposed construction and grading projects to implement measures to ensure that pollutants from the site will be reduced to the maximum extent practicable and will not cause or contribute to an exceedance of water quality objectives. Each Copermittee shall further ensure that all grading and construction activities will be in compliance with applicable Copermittee ordinances (e.g., storm water, grading, construction, etc.) and other applicable requirements, including this Order.

(1) Construction and Grading Project Requirements

Include construction and grading project requirements in local grading and construction permits to ensure that pollutant discharges are reduced to the maximum extent practicable and water quality objectives are not violated during the construction phase. Such requirements shall include the following requirements or their equivalent:

(a) Require project proponent to develop and implement a plan to manage storm water and non-storm water discharges from the site at all times;
(b) Require project proponent to minimize grading during the wet season and coincide grading with seasonal dry weather periods to the extent feasible. If grading does occur during the wet season, require project proponent to implement additional BMPs for any rain events which may occur, as necessary for compliance with this Order;
(c) Require project proponent to emphasize erosion prevention as the most important measure for keeping sediment on site during construction;
(d) Require project proponent to utilize sediment controls as a supplement to erosion prevention for keeping sediment on-site during construction, and never as the single or primary method;
(e) Require project proponent to minimize areas that are cleared and graded to only the portion of the site that is necessary for construction;
(f) Require project proponent to minimize exposure time of disturbed soil areas;
(g) Require project proponent to temporarily stabilize and reseed disturbed soil areas as rapidly as possible;
(h) Require project proponent to permanently revegetate or landscape as early as feasible;
(i) Require project proponent to stabilize all slopes; and
(j) Require project proponents subject to California's statewide General NPDES Permit for Storm Water Discharges Associated With Construction Activities, (hereinafter General Construction Permit), to provide evidence of existing coverage under the General Construction Permit.

F.2.d. Source Identification (Construction)

Each Copermittee shall annually develop and update, prior to the rainy season, a watershed-based inventory of all construction sites within its jurisdiction regardless of site size or ownership. This requirement is applicable to all construction sites regardless of whether the construction site is subject to the California statewide General NPDES Permit for Storm Water Discharges Associated With Construction Activities (hereinafter General Construction Permit), or other individual NPDES permit. The use of an automated database system, such as Geographical Information System (GIS) is highly recommended, but not required.

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F.2.e. Threat to Water Quality Prioritization (Construction)

(1) To establish priorities for construction oversight activities under this Order, the Copermittee shall prioritize its watershed-based inventory (developed pursuant to F.2.d. above) by threat to water quality. Each construction site shall be classified as high, medium, or low threat to water quality. In evaluating threat to water quality each Copermittee shall consider (1) soil erosion potential; (2) site slope; (3) project size and type; (4) sensitivity of receiving water bodies; (5) proximity to receiving water bodies; (6) non-storm water discharges; and (7) any other relevant factors.

(2) A high priority construction site shall at a minimum be defined as a site meeting either of the following criteria or equivalent criteria:

(a) The site is 50 acres or more and grading will occur during the wet season; OR
(b) The site is (1) 5 acres or more and (2) tributary to a Clean Water Act section 303(d) water body impaired for sediment or is within or directly adjacent to or discharging directly to a receiving water within an environmentally sensitive area (as defined in section F.1.b.(2)(a)vi. of this Order).

F.2.f. BMP Implementation (Construction)

(1) Each Copermittee shall designate a set of minimum BMPs for high, medium, and low threat to water quality construction sites (as determined under section F.2.e). BMPs are to be implemented year round.

(2) Each Copermittee shall implement, or require the implementation of, the designated minimum BMPs (based upon the site's threat to water quality rating) at each construction site within its jurisdiction year round. If particular minimum BMPs are infeasible at any specific site, each Copermittee shall implement, or require the implementation of, other equivalent BMPs. Each Copermittee shall also implement or require any additional site specific BMPs as necessary to comply with this Order, including BMPs which are more stringent than those required under the statewide General Construction Permit.

(3) Each Copermittee shall implement, or require the implementation of, BMPs year round; however, BMP implementation requirements can vary based on wet and dry seasons.

(4) Each Copermittee shall implement, or require implementation of, additional controls for construction sites tributary to Clean Water Act section 303(d) water bodies impaired for sediment as necessary to comply with this Order. Each Copermittee shall implement, or require implementation of, additional controls for construction sites within or adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in section F.1.b.(2)(a)vi. of this Order) as necessary to comply with this Order.

F.2.g. Inspection of Construction Sites (Construction)

(1) Each Copermittee shall conduct construction site inspections for compliance with its ordinances (grading, storm water, etc.), permits (construction, grading, etc.), and this Order. Inspections shall include review of site erosion control and BMP implementation plans.

(2) Each Copermittee shall establish inspection frequencies and priorities as determined by the threat to water quality prioritization described in F.2.e above. During the wet season (i.e., October 1 through April 30 of each year), each Copermittee shall inspect, at a minimum, each High Priority construction site, either:

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(a) Weekly

OR

(b) Monthly for any site that the responsible Copermittee certifies in a written statement to the SDRWQCB all of the following (certified statements may be submitted to the SDRWQCB at any time for one or more sites):

i. Copermittee has record of construction site's Waste Discharge Identification Number (WDID#) documenting construction site's coverage under the statewide General Construction Permit; and
ii. Copermittee has reviewed the constructions site's Storm Water Pollution Prevention Plan (SWPPP); and
iii. Copermittee finds SWPPP to be in compliance with all local ordinances, permits, and plans; and
iv. Copermittee finds that the SWPPP is being properly implemented on site.

At a minimum, Medium and Low Priority construction sites shall be inspected by Copermittees twice during the wet season. All construction sites shall be inspected by the Copermittees as needed during the dry season (i.e., May 1 through September 30 of each year).

(3) Based upon site inspection findings, each Copermittee shall implement all follow-up actions necessary to comply with this Order.

F.2.h. Enforcement of Construction Sites (Construction)

Each Copermittee shall enforce its ordinances (grading, storm water, etc.) and permits (construction, grading, etc.) at all construction sites as necessary to maintain compliance with this Order. Copermittee ordinances or other regulatory mechanisms shall include sanctions to ensure compliance. Sanctions shall include the following or their equivalent: Non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance.

F.2.i. Reporting of Non-compliant Sites (Construction)

Each Copermittee shall provide oral notification to the SDRWQCB of non-compliant sites that are determined to pose a threat to human or environmental health within its jurisdiction within 24 hours of the discovery of noncompliance, as required under section R.1 (and B.6 of Attachment C) of this Order.

Each Copermittee shall develop and submit criteria by which to evaluate events of non-compliance to determine whether they pose a threat to human or environmental health. These criteria shall be submitted in the Jurisdictional Urban Runoff Management Program Document and Annual Reports for SDRWQCB review.

Such oral notification shall be followed up by a written report to be submitted to the SDRWQCB within 5 days of the incidence of non-compliance as required under section R.1 (and B.6 of Attachment C) of this Order. Sites are considered non-compliant when one or more violations of local ordinances, permits, plans, or this Order exist on the site.

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F.2.j. Education Focused on Construction Activities (Construction)

(1) Internal: Municipal Staff

Each Copermittee shall implement an education program to ensure that its construction, building, and grading review staffs and inspectors have an understanding of:

(a) Federal, state, and local water quality laws and regulations applicable to construction and grading activities.
(b) The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization).
(c) How erosion can be prevented.
(d) How impacts to receiving water quality resulting from construction activities can be minimized (i.e., through implementation of various source control and structural BMPs).
(e) Applicable topics listed in section F.4. of this Order.

(2) External: Project Applicants, Contractors, Developers, Property Owners, and other Responsible Parties

Each Copermittee shall implement an education program to ensure that project applicants, contractors, developers, property owners, and other responsible parties have an understanding of the topics outlined in section F.2.j.(1) above of this Order.

F.3. Existing Development Component

Each Copermittee shall minimize the short and long-term impacts on receiving water quality from all types of existing development.

F.3.a. Municipal (Existing Development)

Each Copermittee shall implement a Municipal (Existing Development) Component to prevent or reduce pollutants in runoff from all municipal land use areas and activities. At a minimum the municipal component shall address:

F.3.a.(1)	Pollution Prevention
F.3.a.(2)	Source Identification
F.3.a.(3)	Threat to Water Quality Prioritization
F.3.a.(4)	BMP Implementation
F.3.a.(5)	Maintenance of Municipal Separate Storm Sewer System
F.3.a.(6)	Management of Pesticides, Herbicides, and Fertilizers
F.3.a.(7)	Inspection of Municipal Areas and Activities
F.3.a.(8)	Enforcement of Municipal Areas and Activities

F.3.a.(1) Pollution Prevention (Municipal)

Each Copermittee shall include and describe pollution prevention methods within its Municipal (Existing Development) Component. Each Copermittee shall require the use of pollution prevention methods by municipal departments, contractors, and personnel, where appropriate.

F.3.a.(2) Source Identification (Municipal)

Each Copermittee shall develop, and update annually, a watershed-based inventory of the name, address (if applicable), and description of all municipal land use areas and activities which generate pollutants.

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F.3.a.(3) Threat to Water Quality Prioritization (Municipal)

(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.
ii. Flood Management Projects and Flood Control Devices.
iii. Areas and activities tributary to a Clean Water Act section 303(d) impaired water body, where an area or activity generates pollutants for which the water body is impaired. Areas and activities within or adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in section F.1.b.(2)(a)vi of this Order).
iv. Municipal Waste Facilities.
- Active or closed municipal landfills;
- Publicly owned treatment works (including water and wastewater treatment plants) and sanitary sewage collection systems;
- Municipal separate storm sewer systems;
- Incinerators;
- Solid waste transfer facilities;
- Land application sites;
- Uncontrolled sanitary landfills;
- Corporate yards including maintenance and storage yards for materials, waste, equipment and vehicles;
- Sites for disposing and treating sewage sludge; and
- Hazardous waste treatment, disposal, and recovery facilities.

v. Other municipal areas and activities that the Copermittee determines may contribute a significant pollutant load to the MS4.
vi. Municipal airfields.

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.

(b) Each Copermittee shall implement, or require the implementation of, the designated minimum BMPs (based upon the threat to water quality rating) at each municipal area or activity within its jurisdiction. If particular minimum BMPs are infeasible for any specific area or activity, each Copermittee shall implement, or require implementation of other equivalent BMPs. Each Copermittee shall also implement any additional BMPs as are necessary to comply with this Order.

i. Each Copermittee shall evaluate feasibility of retrofitting existing structural flood control devices and retrofit where needed.

(c) Each Copermittee shall implement, or require implementation of, any additional controls for municipal areas and activities tributary to Clean Water Act section 303(d) impaired

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water bodies (where an area or activity generates pollutants for which the water body is impaired) as necessary to comply with this Order. Each Copermittee shall implement, or require implementation of, additional controls for municipal areas and activities within or directly adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in section F.1.b.(2)(a)vi. of this Order) as necessary to comply with this Order.

F.3.a.(5) Maintenance of Municipal Separate Storm Sewer System (Municipal)

(a) Each Copermittee shall implement a schedule of maintenance activities at all structural 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 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.

F.3.a.(6) Management of Pesticides, Herbicides, and Fertilizers (Municipal)

The Copermittees shall implement BMPs to reduce the contribution of pollutants associated with the application, storage, and disposal of pesticides, herbicides and fertilizers from municipal areas and activities to MS4s. Important municipal areas and activities include municipal facilities, public rights-of-way, parks, recreational facilities, golf courses, cemeteries, botanical or zoological gardens and exhibits, landscaped areas, etc.

Such BMPs shall include, at a minimum: (1) educational activities, permits, certifications and other measures for municipal applicators and distributors; (2) integrated pest management measures that rely on non-chemical solutions; (3) the use of native vegetation; (4) schedules for irrigation and chemical application; and (5) the collection and proper disposal of unused pesticides, herbicides, and fertilizers.

F.3.a.(7) Inspection of Municipal Areas and Activities (Municipal)

At a minimum, each Copermittee shall inspect high priority municipal areas and activities annually. Based upon site inspection findings, each Copermittee shall implement all follow-up actions necessary to comply with this Order.

F.3.a.(8) Enforcement of Municipal Areas and Activities (Municipal)

Each Copermittee shall enforce its storm water ordinance for all municipal areas and activities as necessary to maintain compliance with this Order.

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F.3.b. Industrial (Existing Development)

Each Copermittee shall implement an Industrial (Existing Development) Component to reduce pollutants in runoff from all industrial sites. At a minimum the industrial component shall address:

F.3.b.(1)	Pollution Prevention
F.3.b.(2)	Source Identification
F.3.b.(3)	Threat to Water Quality Prioritization
F.3.b.(4)	BMP Implementation
F.3.b.(5)	Monitoring of Industrial Sites
F.3.b.(6)	Inspection of Industrial Sites
F.3.b.(7)	Enforcement Measures for Industrial Sites
F.3.b.(8)	Reporting of Non-compliant Sites

F.3.b.(1) Pollution Prevention (Industrial)

Each Copermittee shall include and describe pollution prevention methods within its Industrial (Existing Development) Component. Each Copermittee shall require the use of pollution prevention methods by industry, where appropriate.

F.3.b.(2) Source Identification (Industrial)

Each Copermittee shall develop and update annually a watershed-based inventory of all industrial sites within its jurisdiction regardless of site ownership. This requirement is applicable to all industrial sites regardless of whether the industrial site is subject to the California statewide General NPDES Permit for Storm Water Discharges Associated With Industrial Activities, Except Construction (hereinafter General Industrial Permit) or other individual NPDES permit.

The inventory shall include the following minimum information for each industrial site: name; address; and a narrative description including SIC codes which best reflects the principal products or services provided by each facility.

F.3.b.(3) Threat to Water Quality Prioritization (Industrial)

(a) To establish priorities for industrial oversight activities under this Order, the Copermittee shall prioritize each watershed-based inventory in F.3.b.(2) above by threat to water quality and update annually. Each industrial site 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 industrial activity (SIC Code); (2) materials used in industrial processes; (3) wastes generated; (4) pollutant discharge potential; (5) non-storm water discharges; (6) size of facility; (7) proximity to receiving water bodies; (8) sensitivity of receiving water bodies; (9) whether the industrial site is subject to the statewide General Industrial Permit; and (10) any other relevant factors.

(b) At a minimum the high priority industrial sites shall include industrial facilities that are subject to section 313 of Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA); industrial facilities tributary to a Clean Water Act section 303(d) impaired water body, where a facility generates pollutants for which the water body is impaired; industrial facilities within or directly adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in section F.1.b.(2)(a)vi. of this Order); facilities subject to the statewide General Industrial Permit (excluding those facilities that have been approved for No Exposure Certification); and all other industrial facilities that the Copermittee determines are contributing significant pollutant loading to its MS4, regardless of whether such facilities are covered under the statewide General Industrial Permit or other NPDES permit.

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F.3.b.(4) BMP Implementation (Industrial)

(a) Each Copermittee shall designate a set of minimum BMPs for high, medium, and low threat to water quality industrial sites (as determined under section F.3.b.(3)). The designated minimum BMPs for high threat to water quality industrial sites shall be industry and site specific as appropriate.

(b) Each Copermittee shall implement, or require the implementation of, the designated minimum BMPs (based upon the site's threat to water quality rating) at each industrial site within its jurisdiction. If particular minimum BMPs are infeasible at any specific site, each Copermittee shall implement, or require implementation of, other equivalent BMPs. Each Copermittee shall also implement or require any additional site specific BMPs as necessary to comply with this Order including BMPs which are more stringent than those required under the statewide General Industrial Permit.

(c) Each Copermittee shall implement, or require implementation of, additional controls for industrial sites tributary to Clean Water Act section 303(d) impaired water bodies (where a site generates pollutants for which the water body is impaired) as necessary to comply with this Order. Each Copermittee shall implement, or require implementation of, additional controls for industrial sites within or directly adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in section F.1.b.(2)(a)vi. of this Order) as necessary to comply with this Order.

F.3.b.(5) Monitoring of Industrial Sites (Industrial)

(a) Each Copermittee shall conduct, or require industry to conduct, a monitoring program for runoff from each high threat to water quality industrial site (identified in F.3.b.(3) above). Group monitoring by multiple industrial sites conducted under group monitoring programs approved by the State Water Resources Control Board is acceptable.

(b) At a minimum, the monitoring program shall provide quantitative data from two storm events per year on the following constituents:

i. Any pollutant listed in effluent guidelines subcategories where applicable;
ii. Any pollutant for which an effluent limit has been established in an existing NPDES permit for the facility;
iii. Oil and grease or Total Organic Carbon (TOC);
iv. pH;
v. Total suspended solids (TSS);
vi. Specific conductance; and
vii. Toxic chemicals and other pollutants that are likely to be present in storm water discharges.
viii. Any pollutant that may be used, stored, or generated at the facility, which may be discharged to a water body or a tributary of that water body that is listed as impaired under Clean Water Act Section 303(d) for that pollutant(s), unless the facility can demonstrate approval of No Exposure Certification.

F.3.b.(6) Inspection of Industrial Sites (Industrial)

(a) Each Copermittee shall conduct industrial site inspections for compliance with its ordinances, permits, and this Order. Inspections shall include review of BMP implementation plans.

(b) Each Copermittee shall establish inspection frequencies and priorities as determined by the threat to water quality prioritization described in F.3.b.(3) above. Each Copermittee shall inspect high priority industrial sites, at a minimum:

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i. Annually

OR

ii. Bi-annually for any site that the responsible Copermittee certifies in a written statement to the SDRWQCB all of the following (certified statements may be submitted to the SDRWQCB at any time for one or more sites):

- Copermittee has record of industrial site's Waste Discharge Identification Number (WDID#) documenting industrial site's coverage under the statewide General Industrial Permit; and
- Copermittee has reviewed the industrial site's Storm Water Pollution Prevention Plan (SWPPP); and
- Copermittee finds SWPPP to be in compliance with all local ordinances, permits, and plans; and
- Copermittee finds that the SWPPP is being properly implemented on site.

Each Copermittee shall inspect medium and low threat to water quality industrial sites as needed.

(c) Based upon site inspection findings, each Copermittee shall implement all follow-up actions necessary to comply with this Order.

(d) To the extent that the SDRWQCB has conducted an inspection of a high priority industrial site during a particular year, the requirement for the responsible Copermittee to inspect this site during the same year will be satisfied.

F.3.b.(7) Enforcement of Industrial Sites (Industrial)

Each Copermittee shall enforce its storm water ordinance at all industrial sites as necessary to maintain compliance with this Order. Copermittee ordinances or other regulatory mechanisms shall include sanctions to ensure compliance. Sanctions shall include the following or their equivalent: Non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance.

F.3.b.(8) Reporting of Non-compliant Sites (Industrial)

Each Copermittee shall provide oral notification to the SDRWQCB of non-compliant sites that are determined to pose a threat to human or environmental health within its jurisdiction within 24 hours of the discovery of noncompliance, as required under section R.1 (and B.6 of Attachment C) of this Order.

Each Copermittee shall develop and submit criteria by which to evaluate events of non-compliance to determine whether they pose a threat to human or environmental health. These criteria shall be submitted in the Jurisdictional Urban Runoff Management Program Document and Annual Reports for SDRWQCB review.

Such oral notification shall be followed up by a written report to be submitted to the SDRWQCB within 5 days of the incidence of non-compliance as required under section R.1(and B.6 of Attachment C) of this Order. Sites are considered non-compliant when one or more violations of local ordinances, permits, plans, or this Order exist on the site.

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F.3.c. Commercial (Existing Development)

Each Copermittee shall implement a Commercial (Existing Development) Component to reduce pollutants in runoff from commercial sites. At a minimum the commercial component shall address:

F.3.c.(1) Pollution Prevention
F.3.c.(2) Source Identification
F.3.c.(3) BMP Implementation
F.3.c.(4) Inspection of Commercial Sites and Sources
F.3.c.(5) Enforcement of Commercial Sites and Sources

F.3.c.(1) Pollution Prevention (Commercial)

Each Copermittee shall include and describe pollution prevention methods within its Commercial (Existing Development) Component. Each Copermittee shall require the use of pollution prevention methods by commercial facilities, where appropriate.

F.3.c.(2) Source Identification (Commercial)

Each Copermittee shall develop and update annually an inventory of the following high priority threat to water quality commercial sites/sources listed below. (If any commercial site/source listed below is inventoried as an industrial site, as required under section F.3.b.(2) of this Order, it is not necessary to also inventory it as a commercial site/source).

(a) Automobile mechanical repair, maintenance, fueling, or cleaning;
(b) Airplane mechanical repair, maintenance, fueling, or cleaning;
(c) Boat mechanical repair, maintenance, fueling, or cleaning;
(d) Equipment repair, maintenance, fueling, or cleaning;
(e) Automobile and other vehicle body repair or painting;
(f) Mobile automobile or other vehicle washing;
(g) Automobile (or other vehicle) parking lots and storage facilities;
(h) Retail or wholesale fueling;
(i) Pest control services;
(j) Eating or drinking establishments;
(k) Mobile carpet, drape or furniture cleaning;
(l) Cement mixing or cutting;
(m) Masonry;
(n) Painting and coating;
(o) Botanical or zoological gardens and exhibits;
(p) Landscaping;
(q) Nurseries and greenhouses;
(r) Golf courses, parks and other recreational areas/facilities;
(s) Cemeteries;
(t) Pool and fountain cleaning;
(u) Marinas;
(v) Port-a-Potty servicing;
(w) Other commercial sites/sources that the Copermittee determines may contribute a significant pollutant load to the MS4;
(x) Any commercial site or source tributary to a Clean Water Act section 303(d) impaired water body, where the site or source generates pollutants for which the water body is impaired; and
(y) Any commercial site or source within or directly adjacent to or discharging directly to a coastal lagoon or other receiving water within an environmentally sensitive area (as defined in F.1.b(2)(a)vi. of this Order).

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F.3.c.(3) BMP Implementation (Commercial)

(a) Each Copermittee shall designate a set of minimum BMPs for the high priority threat to water quality commercial sites/sources (listed above in section F.3.c.(2)). The designated minimum BMPs for the high threat to water quality commercial sites/sources shall be site and source specific as appropriate.

(b) Each Copermittee shall implement, or require the implementation of, the designated minimum BMPs at each high priority threat to water quality commercial site/source within its jurisdiction. If particular minimum BMPs are infeasible for any specific site/source, each Copermittee shall implement, or require the implementation of, other equivalent BMPs. Each Copermittee shall also implement or require any additional site specific BMPs as necessary to comply with this Order.

(c) Each Copermittee shall implement, or require implementation of, additional controls for commercial sites or sources tributary to Clean Water Act section 303(d) impaired water bodies (where a site or source generates pollutants for which the water body is impaired) as necessary to comply with this Order. Each Copermittee shall implement, or require implementation of, additional controls for commercial sites or sources within or directly adjacent to or discharging directly to coastal lagoons or other receiving waters within environmentally sensitive areas (as defined in section F.1.b.(2)(a)vi. of this Order) as necessary to comply with this Order.

F.3.c.(4) Inspection of Commercial Sites and Sources (Commercial)

Each Copermittee shall inspect high priority commercial sites and sources as needed. Based upon site inspection findings, each Copermittee shall implement all follow-up actions necessary to comply with this Order.

F.3.c.(5) Enforcement of Commercial Sites and Sources (Commercial)

Each Copermittee shall enforce its storm water ordinance for all commercial sites and sources as necessary to maintain compliance with this Order.

F.3.d. Residential (Existing Development)

Each Copermittee shall implement a Residential (Existing Development) Component to prevent or reduce pollutants in runoff from all residential land use areas and activities. At a minimum the residential component shall address:

F.3.d.(1) Pollution Prevention
F.3.d.(2) Threat to Water Quality Prioritization
F.3.d.(3) BMP Implementation
F.3.d.(4) Enforcement of Residential Areas and Activities

F.3.d.(1) Pollution Prevention (Residential)

Each Copermittee shall include pollution prevention methods in its Residential (Existing Development) Component and shall encourage their use by residents, where appropriate.

F.3.d.(2) Threat to Water Quality Prioritization (Residential)

Each Copermittee shall identify high priority residential areas and activities. At a minimum, these shall include:

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- Automobile repair and maintenance;
- Automobile washing;
- Automobile parking;
- Home and garden care activities and product use (pesticides, herbicides, and fertilizers);
- Disposal of household hazardous waste (e.g., paints, cleaning products, and other wastes generated during home improvement or maintenance activities);
- Disposal of pet waste;
- Disposal of green waste;
- Any other residential source that the Copermittee determines may contribute a significant pollutant load to the MS4;
- Any residence tributary to a Clean Water Act section 303(d) impaired water body, where the residence generates pollutants for which the water body is impaired; and
- Any residence within or directly adjacent to or discharging directly to coastal waters or other receiving waters within an environmentally sensitive area (as defined in F.1.b.(2)(a)vi. of this Order).

F.3.d.(3) BMP Implementation (Residential)

(a) Each Copermittee shall designate a set of minimum BMPs for high threat to water quality residential areas and activities (as required under section F.3.d.(2)). The designated minimum BMPs for high threat to water quality residential areas and activities shall be area or activity specific.

(b) Each Copermittee shall implement or require implementation of the designated minimum BMPs for high threat to water quality residential areas and activities. If particular minimum BMPs are infeasible for any specific site/source, each Copermittee shall require implementation of other equivalent BMPs. Each Copermittee shall also implement, or require implementation of, any additional BMPs as are necessary to comply with this Order.

(c) Each Copermittee shall implement, or require implementation of, any additional controls for residential areas and activities tributary to Clean Water Act Section 303(d) impaired water bodies (where a residential area or activity generates pollutants for which the water body is impaired) as necessary to comply with this Order. Each Copermittee shall implement, or require implementation of, additional controls for residential areas within or directly adjacent to or discharging directly to coastal waters or other receiving waters within environmentally sensitive areas (as defined in section F.1.b.(2)(a)vi. of this Order) as necessary to comply with this Order.

F.3.d.(4) Enforcement of Residential Areas and Activities (Residential)

Each Copermittee shall enforce its storm water ordinance for all residential areas and activities as necessary to maintain compliance with this Order.

F.4. Education Component

Each Copermittee shall implement an Education Component 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 component shall address the following target communities:

- Municipal Departments and Personnel

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- Construction Site Owners and Developers
- Industrial Owners and Operators
- Commercial Owners and Operators
- Residential Community, General Public, and School Children
- Quasi-Governmental Agencies/Districts (i.e., educational institutions, water districts, sanitation districts, etc.)

F.4.a. All Target Communities

The Education Program for each target audience may contain information on the following topics where applicable:

- State and Federal water quality laws
- Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits)
- Water conservation
- Impacts of urban runoff on receiving waters
- Watershed concepts (i.e., stewardship, connection between inland activities and coastal problems, etc.)
- Distinction between MS4s and sanitary sewers
- Importance of good housekeeping (e.g., sweeping impervious surfaces instead of hosing)
- Pollution prevention and safe alternatives
- Household hazardous waste collection
- Recycling
- BMPs: Site specific, structural and source control
- BMP maintenance
- Non-storm water disposal alternatives (e.g., all wash waters)
- Pet and animal waste disposal
- Proper solid waste disposal (e.g., garbage, tires, appliances, furniture, vehicles)
- Equipment and vehicle maintenance and repair
- Public reporting mechanisms
- Green waste disposal
- Integrated pest management
- Native vegetation
- Proper disposal of boat and recreational vehicle waste
- Traffic reduction, alternative fuel use

F.4.b. Municipal, Construction, Industrial, Commercial, and Quasi-Governmental (educational institutions, water districts, sanitation districts, etc.) Communities

In addition to the topics listed in F.4.a. above, the Municipal, Construction, Industrial, Commercial, and Quasi-Governmental (Educational Institutions, Water Districts, Sanitation Districts) Communities may also be educated on the following topics where applicable:

- Basic urban runoff training for all personnel
- Additional urban runoff training for appropriate personnel
- Illicit Discharge Detection and Elimination observations and follow-up during daily work activities
- Lawful disposal of catchbasin and other MS4 cleanout wastes
- Water quality awareness for Emergency/First Responders
- California's Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction).

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- California's Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities
- SDRWQCB's General NPDES Permit for Groundwater Dewatering
- 401 Water Quality Certification by the SDRWQCB
- Statewide General NPDES Utility Vault Permit (NPDES No. CAG990002)
- SDRWQCB Waste Discharge Requirements for Dredging Activities
- Local requirements beyond statewide general permits
- Federal, state and local water quality regulations that affect development projects
- Water quality impacts associated with land development
- Alternative materials & designs to maintain peak runoff values
- How to conduct a storm water inspection
- Potable water discharges to the MS4
- Dechlorination techniques
- Hydrostatic testing
- Spill response, containment, & recovery
- Preventive maintenance
- How to do your job and protect water quality

F.4.c. Residential, General Public, School Children Communities

In addition to the topics listed in F.4.a. above, the Residential, General Public, and School Children Communities may 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.)

F.5. Illicit Discharge Detection and Elimination Component

Each Copermittee shall implement an Illicit Discharge Detection and Elimination Component containing measures to actively seek and eliminate illicit discharges and connections. At a minimum the Illicit Discharge Detection and Elimination Component shall address:

F.5.a Illicit Discharges and Connections
F.5.b Dry Weather Monitoring Program
F.5.c Investigation / Inspection and Follow-up
F.5.d Elimination of Illicit Discharges and Connections
F.5.e Enforce Ordinances
F.5.f Prevent and Respond To Sewage Spills (Including from Private Laterals and Failing Septic Systems) and Other Spills
F.5.g Facilitate Public Reporting of Illicit Discharges and Connections – Public Hotline
F.5.h Facilitate Disposal of Used Oil and Toxic Materials
F.5.i Limit Infiltration From Sanitary Sewer to MS4

F.5.a. Illicit Discharges and Connections

Each Copermittee shall implement a program to actively seek and eliminate illicit discharges and connections into its MS4. The program shall address all types of illicit discharges and connections excluding those non-storm water discharges not prohibited by the Copermittee in accordance with Section B. of this Order.

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F.5.b. Dry Weather Monitoring Program

Each Copermittee shall conduct dry weather inspections, field screening, and analytical monitoring of MS4 outfalls within its jurisdiction to detect illicit discharges and connections in accordance with Attachment E of this Order.

F.5.c. Investigation / Inspection and Follow-Up

Each Copermittee shall investigate and inspect any portion of the MS4 that, based on dry weather monitoring results or other appropriate information, indicates a reasonable potential for illicit discharges, illicit connections, or other sources of non-storm water (including non-prohibited discharge(s) identified in Section B. of this Order). Each Copermittee shall establish criteria to identify portions of the system where such follow-up investigations are appropriate.

F.5.d. Elimination of Illicit Discharges and Connections

Each Copermittee shall eliminate all detected illicit discharges, discharge sources, and connections immediately.

F.5.e. Enforce Ordinances

Each Copermittee shall implement and enforce its ordinances, orders, or other legal authority to prevent illicit discharges and connections to its MS4. Each Copermittee shall also implement and enforce its ordinance, orders, or other legal authority to eliminate detected illicit discharges and connections to it MS4.

F.5.f. Prevent and Respond to Sewage Spills (Including from Private Laterals and Failing Septic Systems) and Other Spills

Each Copermittee shall prevent, respond to, contain and clean up all sewage and other spills that may discharge into its MS4 from any source (including private laterals and failing septic systems). Spill response teams shall prevent entry of spills into the MS4 and contamination of surface water, ground water and soil to the maximum extent practicable. Each Copermittee shall coordinate spill prevention, containment and response activities throughout all appropriate departments, programs and agencies to ensure maximum water quality protection at all times.

Each Copermittee shall develop and implement a mechanism whereby it is notified of all sewage spills from private laterals and failing septic systems into its MS4. Each Copermittee shall prevent, respond to, contain and clean up sewage from any such notification.

F.5.g. Facilitate Public Reporting of Illicit Discharges and Connections - Public Hotline

Each Copermittee shall promote, publicize and facilitate public reporting of illicit discharges or water quality impacts associated with discharges into or from MS4s. Each Copermittee shall facilitate public reporting through development and operation of a public hotline. Public hotlines can be Copermittee-specific or shared by Copermittees. All storm water hotlines shall be capable of receiving reports in both English and Spanish 24 hours per day / seven days per week. Copermittees shall respond to and resolve each reported incident. All reported incidents, and how each was resolved, shall be summarized in each Copermittee's individual Jurisdictional URMP Annual Report.

F.5.h. Facilitate Disposal of Used Oil and Toxic Materials

Each Copermittee shall facilitate the proper management and disposal of used oil, toxic materials, and other household hazardous wastes. Such facilitation shall include educational

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activities, public information activities, and establishment of collection sites operated by the Copermittee or a private entity. Neighborhood collection of household hazardous wastes is encouraged.

F.5.i. Limit Infiltration From Sanitary Sewer to MS4/ Provide Preventive Maintenance of Both

Each Copermittee shall implement controls and measures to limit infiltration of seepage from municipal sanitary sewers to MS4s through thorough, routine preventive maintenance of the MS4. Each Copermittee that operates both a municipal sanitary sewer system and a MS4 shall implement controls and measures to limit infiltration of seepage from the municipal sanitary sewers to the MS4s that shall include overall sanitary sewer and MS4 surveys and thorough, routine preventive maintenance of both.

F.6. Common Interest Areas and Homeowners Associations

a. Each Copermittee shall develop and implement a plan for ensuring that urban runoff within common interest areas from private roads, drainage facilities, and other components of the storm water conveyance system, including those managed by associations, meets the objectives of this Order.
b. As part of its individual Jurisdictional URMP Annual Report, each Copermittee shall describe the measures taken to ensure that urban runoff from common interest areas to the MS4 meets the objectives of this Order.

F.7. Public Participation Component

Each Copermittee shall incorporate a mechanism for public participation in the implementation of the Jurisdictional URMP.

F.8. 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.

F.9. Fiscal Analysis Component

Each Copermittee shall secure the resources necessary to meet the requirements of this Order. As part of its individual Jurisdictional URMP, each Copermittee shall develop a strategy to conduct a fiscal analysis of its urban runoff management program in its entirety. In order to demonstrate sufficient financial resources to implement the conditions of this Order, each Copermittee shall conduct an annual fiscal analysis as part of its individual Jurisdictional URMP Annual Report. This analysis shall, for each fiscal year covered by this Order, evaluate the expenditures (such as capital, operation and maintenance, education, and administrative expenditures) necessary to accomplish the activities of the Copermittee's urban runoff management program. Such analysis shall include a description of the source(s) of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

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G. IMPLEMENTATION OF JURISDICTIONAL URMP

Each Copermittee shall have completed full implementation of all requirements of the Jurisdictional URMP section of this Order no later than **365 days after adoption** of this Order, except as stated as follows: Within 180 days of development of the model SUSMP, each Copermittee shall adopt its own local SUSMP, and amended ordinances consistent with the model SUSMP, and shall submit both (local SUSMP and amended ordinances) to the SDRWQCB.

Following the adoption of the Order and prior to the full implementation of the Jurisdictional URMP, the Copermittees shall at a minimum implement the provisions and commitments of the proposed DAMP submitted in September 2000.

H. SUBMITTAL OF JURISDICTIONAL URMP DOCUMENT

The written account of the overall program to be conducted by each Copermittee within its jurisdiction during the five-year life of this Order is referred to as the "Jurisdictional URMP Document".

1. Individual – Each Copermittee shall submit to the Principal Permittee(s) an individual Jurisdictional URMP document which describes all activities it has undertaken or is undertaking to implement the requirements of each component of the Jurisdictional URMP section F. of this Order.

   a. At a minimum, the individual Jurisdictional URMP document shall contain the following information for the following components:

      (1) Construction Component

         (a) Which pollution prevention methods will be required for implementation, and how and where they will be required
         (b) Updated grading ordinances
         (c) A description of the modified construction and grading approval process
         (d) Updated construction and grading project requirements in local grading and construction permits
         (e) A completed watershed-based inventory of all construction sites
         (f) A completed prioritization of all construction sites based on threat to water quality
         (g) Which BMPs will be implemented, or required to be implemented, for each priority category
         (h) How BMPs will be implemented, or required to be implemented, for each priority category
         (i) Planned inspection frequencies for each priority category
         (j) Methods for inspection
         (k) A description of enforcement mechanisms and how they will be used
         (l) A description of how non-compliant sites will be identified and the process for notifying the SDRWQCB, including a list of current non-compliant sites
         (m) A description of the construction education program and how it will be implemented

      (2) Municipal (Existing Development) Component

         (a) Which pollution prevention methods will be required for implementation, and how and where they will be required
         (b) A completed watershed-based inventory of all municipal land use areas and activities
         (c) A completed prioritization of all municipal areas and activities based on threat to water quality
         (d) Which BMPs will be implemented, or required to be implemented, for each priority category
         (e) How BMPs will be implemented, or required to be implemented, for each priority category

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(f) Municipal maintenance activities and schedules
(g) Management strategy for pesticides, herbicides, and fertilizer use.
(h) Planned inspection frequencies for the high priority category
(i) Methods for inspection
(j) A description of enforcement mechanisms and how they will be used

(3) Industrial (Existing Development) Component

(a) Which pollution prevention methods will be required for implementation, and how and where they will be required
(b) A completed watershed-based inventory of all industrial sites
(c) A completed prioritization of all industrial sites based on threat to water quality
(d) Which BMPs will be implemented, or required to be implemented, for each priority category
(e) How BMPs will be implemented, or required to be implemented, for each priority category
(f) A description of the monitoring program to be conducted, or required to be conducted
(g) Planned inspection frequencies for each priority category
(h) Methods for inspection
(i) A description of enforcement mechanisms and how they will be used
(j) A description of how non-compliant sites will be identified and the process for notifying the SDRWQCB, including a list of current non-compliant sites

(4) Commercial (Existing Development) Component

(a) Which pollution prevention methods will be required for implementation, and how and where they will be required
(b) A completed watershed-based inventory of high priority commercial sites
(c) Which BMPs will be implemented, or required to be implemented, for high priority sites
(d) How BMPs will be implemented, or required to be implemented, for high priority sites
(e) Planned inspection frequencies for high priority sites
(f) Methods for inspection
(g) A description of enforcement mechanisms and how they will be used

(5) Residential (Existing Development) Component

(a) Which pollution prevention methods will be encouraged for implementation, and how and where they will be encouraged
(b) A completed inventory of high priority residential areas and activities
(c) Which BMPs will be implemented, or required to be implemented, for high priority areas and activities
(d) How BMPs will be implemented, or required to be implemented, for high priority areas and activities
(e) A description of enforcement mechanisms and how they will be used

(6) Education Component

(a) A description of the content, form, and frequency of education efforts for each target community

(7) Illicit Discharges Detection and Elimination Component

(a) A description of the program to actively seek and eliminate illicit discharges and connections

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(b) A description of dry weather monitoring to be conducted to detect illicit discharges and connections (see Attachment E)
(c) A description of investigation and inspection procedures to follow-up on dry weather monitoring results or other information which indicate potential for illicit discharges and connections
(d) A description of procedures to eliminate detected illicit discharges and connections
(e) A description of enforcement mechanisms and how they will be used
(f) A description of methods to prevent, respond to, contain, and clean up all sewage (including spills from private laterals and failing septic systems) and other spills in order to prevent entrance into the MS4
(g) A description of the mechanism to receive notification of spills from private laterals
(h) A description of efforts to facilitate public reporting of illicit discharges and connections, including a public hotline
(i) A description of efforts to facilitate proper disposal of used oil and other toxic materials
(j) A description of controls and measures to be implemented to limit infiltration of seepage from sanitary sewers to MS4s
(k) A description of routine preventive maintenance activities on the sanitary system (where applicable) and the MS4

(8) Public Participation Component

(a) A description of how public participation will be included in the implementation of the Jurisdictional URMP

(9) Assessment of Jurisdictional URMP Effectiveness Component

(a) A description of strategies to be used for assessing the long-term effectiveness of the individual Jurisdictional URMP.

(10) Fiscal Analysis Component

(a) A description of the strategy to be used to conduct a fiscal analysis of the urban runoff management program.

(11) Land-Use Planning for New Development and Redevelopment Component

(a) Workplan for inclusion in General Plan (or equivalent plan) of water quality and watershed protection principles and policies
(b) Development project requirements in local development permits
(c) Participation efforts conducted in the development of the Model SUSMP
(d) Environmental review processes revisions
(e) A description of the planning education program and how it will be implemented

(12) Fire Fighting

(a) A description of a program to reduce pollutants from non-emergency fire fighting flows identified by the Copermittee to be significant sources of pollutants.

(13) Common Interest Areas and Homeowners Associations

(a) A description of the program that will be implemented to ensure that urban runoff within common interest areas from private roads, drainage facilities, and other components of the storm water conveyance system including those managed by associations meets the objectives of this Order.

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b. Each Copermittee shall submit to the Principal Permittee(s) each part of its individual Jurisdictional URMP document by the dates specified by the Principal Permittee(s).

c. In addition to submittal of the Jurisdictional URMP document, each Copermittee shall submit to the SDRWQCB its own adopted local SUSMP consistent with the submitted Model SUSMP, as described in section F.1.b.(2). of this Order. Each Copermittee's own local SUSMP, along with its amended ordinances, shall be submitted to the SDRWQCB within 180 days of the submittal of the Model SUSMP to the SDRWQCB.

2. Unified – The Principal Permittee(s) shall submit the unified Jurisdictional URMP document to the SDRWQCB. The unified Jurisdictional URMP document shall be submitted in two parts (the collected Jurisdictional URMPs and the model SUSMP).

a. The unified Jurisdictional URMP document submittal shall address the requirements of the entire Jurisdictional URMP sections F.1 - F.9. of this Order, with the exception of the local SUSMP requirements (which are to be implemented 180 days after submittal of the model SUSMP by the SDRWQCB).

b. The unified Jurisdictional URMP document submittal shall contain a section covering common activities conducted collectively by the Copermittees including jointly developed reporting formats (section O.4), to be produced by the Principal Permittee(s), and the thirteen individual Jurisdictional URMP documents.

c. The Principal Permittee(s) shall be responsible for the development and production of a stand alone Model SUSMP document meeting the requirements of section F.1.b.(2) of this Order.

d. The Principal Permittee(s) shall submit the unified Jurisdictional URMP document, including the Model SUSMP, to the SDRWQCB within **365 days of adoption** of this Order.

3. Universal Reporting Requirements

All individual and unified Jurisdictional URMP document submittals shall include an executive summary, introduction, conclusion, recommendations, and signed certified statement. Each Copermittee shall submit its individual Jurisdictional Urban Runoff Management Program Document with a signed certified statement. The Principal Permittee(s) shall submit a signed certified statement referring to its individual Jurisdictional Urban Runoff Management Program Document, the section covering common activities conducted collectively by the Copermittees, and the Model SUSMP document meeting the requirements of section F.1.b.(2) of this Order as produced by the Principal Permittee(s).

I. SUBMITTAL OF JURISDICTIONAL URMP ANNUAL REPORT

1. Individual - Each individual Jurisdictional URMP Annual Report shall be a documentation of the activities conducted by each Copermittee during the past annual reporting period. Each Jurisdictional URMP Annual Report shall, at a minimum, contain the following:

a. Comprehensive description of all activities conducted by the Copermittee to meet all requirements of each component of the Jurisdictional URMP section of this Order;

F.1. Land-Use Planning for New Development and Redevelopment Component
F.2. Construction Component
F.3. Existing Development Component (Including Municipal, Industrial, Commercial, Residential, and Education)
F.4. Education Component
F.5. Illicit Discharge Detection and Elimination Component
F.6 Common Interest Areas and Homeowners Associations

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F.7. Public Participation Component
F.8. Assessment of Jurisdictional URMP Effectiveness Component
F.9. Fiscal Analysis Component

b. Each Copermittee's accounting of all:
   (1) Reports of illicit discharges (i.e., complaints) and how each was resolved (indicating referral source);
   (2) Inspections conducted;
   (3) Enforcement actions taken; and
   (4) Education efforts conducted.

c. Public participation mechanisms utilized during the Jurisdictional URMP implementation process;

d. Proposed revisions to the Jurisdictional URMP;

e. A summary of all urban runoff related data not included in the annual monitoring report (e.g., special investigations);

f. Budget for upcoming year;

g. Identification of management measures proven to be ineffective in reducing urban runoff pollutants and flow; and

h. Identification of water quality improvements or degradation.

2. Unified - The unified Jurisdictional URMP Annual Report shall contain a section covering common activities conducted collectively by the Copermittees, to be produced by the Principal Permittee(s), and the thirteen individual Jurisdictional URMP Annual Reports. Each Copermittee shall submit to the Principal Permittee(s) an individual Jurisdictional URMP Annual Report by the date specified by the Principal Permittee(s). The Principal Permittee(s) shall submit a unified Jurisdictional URMP Annual Report to the SDRWQCB prior to **November 9, 2003 and prior to every November 9th thereafter.** The reporting period for these annual reports shall be the previous fiscal year. For example, the report submitted prior to November 9, 2003 shall cover the reporting period July 1, 2002 to June 30, 2003.

3. Universal Reporting Requirements

   All individual and unified Jurisdictional URMP submittals shall include an executive summary, introduction, conclusion, recommendations, and signed certified statement. Each Copermittee shall submit its individual Jurisdictional Urban Runoff Management Program Annual Report with a signed certified statement. The Principal Permittee(s) shall submit a signed certified statement referring to its individual Jurisdictional Urban Runoff Management Program Annual Report and the section covering common activities conducted collectively by the Copermittees as produced by the Principal Permittee(s).

J. WATERSHED URBAN RUNOFF MANAGEMENT PROGRAM

1. Each Copermittee shall collaborate with other Copermittees to identify, address, and mitigate the highest priority water quality issues/pollutants in the six (Table 4) watersheds in the San Juan Creek Watershed Management Area.

2. Each Copermittee shall collaborate with all other Copermittees discharging urban runoff into the same watershed to develop and implement a Watershed Urban Runoff Management Program (Watershed URMP) for the six watersheds in the San Juan Creek Watershed Management Area.

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The Watershed URMP shall, at a minimum contain the following:

a. An accurate map of the watersheds of the San Juan Creek Watershed Management Area in Orange County (preferably in Geographical Information System [GIS] format) that identifies all receiving waters (including the Pacific Ocean); all Clean Water Act section 303(d) impaired receiving waters (including the Pacific Ocean); existing and planned land uses; MS4s, major highways; jurisdictional boundaries; and inventoried commercial, construction, industrial, municipal sites, and residential areas.

b. An assessment of the water quality of all receiving waters in the watershed based upon (1) existing water quality data; and (2) annual dry weather monitoring that satisfies requirements of section F.5 and Attachment E of this Order; and (3) watershed receiving water quality monitoring that satisfies the watershed monitoring requirements of Attachment B;

c. An identification and prioritization of major water quality problems in the watershed caused or contributed to by MS4 discharges and the likely source(s) of the problem(s);

d. An implementation time schedule of short and long-term recommended activities (individual and collective) needed to address the highest priority water quality problem(s) identified in section J.2.c of this Order. For this section, "short-term activities" shall mean those activities that are to be completed during the life of this Order and "long-term activities" shall mean those activities that are to be completed beyond the life of this Order;

e. A mechanism for public participation throughout the entire watershed URMP process;

f. A watershed-based education program that builds on and expands upon the education activities conducted by each Copermittee in a given watershed and that can focus on water quality issues specific to that watershed;

g. A mechanism to facilitate collaborative "watershed-based" (i.e., natural resource-based) land use planning with neighboring local governments in the watershed.

h. Short-term strategy for assessing the effectiveness of the activities and programs implemented under the Watershed URMP. The short term assessment strategy shall identify methods to assess the Watershed URMP effectiveness and include specific direct and indirect performance measurements that will track the immediate progress and accomplishments of the Watershed URMP towards improving receiving water quality impacted by urban runoff discharges. The short-term strategy shall also discuss the role of monitoring data collected by the Copermittees in substantiating or refining the assessment.

i. Long-term strategy for assessing the effectiveness of the Watershed URMP. The long-term assessment strategy shall identify specific direct and indirect performance measurements that will track the long-term progress of Watershed URMP towards achieving improvements in receiving water quality impacted by urban runoff discharges. 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.

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Table 4. Orange County Copermittees by Watershed
for the San Juan Creek Watershed Management Area

Watershed	Major Receiving Water Bodies[8]	Copermittees
Orange County Coastal Streams - Laguna	Moro Canyon Creek Emerald Canyon Creek Laguna Canyon Creek Blue Bird Canyon Creek Rim Rock Canyon Creek Hobo Canyon Creek	County of Orange Laguna Beach Laguna Woods Orange County Flood Control District Aliso Viejo
Aliso Creek	Aliso Creek English Canyon Creek Sulphur Canyon Creek Wood Canyon Creek	Aliso Viejo Laguna Beach Laguna Hills Laguna Niguel Laguna Woods Lake Forest Mission Viejo County of Orange Orange County Flood Control District
Dana Point Coastal Streams	Salt Creek Arroyo Salada Creek San Juan Canyon	Dana Point Laguna Niguel Orange County Flood Control District
San Juan Creek	San Juan Creek Trampas Canyon Creek Canada Gobernadora Canada Chiquita Horno Creek Arroyo Trabuco Creek Tijeras Canyon Creek Live Oak Canyon Creek Oso Creek La Paz Creek Lucas Canyon Creek Verdugo Canyon Creek Bell Canyon Creek Dove Canyon Creek Crow Canyon Creek	San Juan Capistrano Mission Viejo Laguna Hills Laguna Niguel Dana Point Rancho Santa Margarita County of Orange Orange County Flood Control District San Clemente
Orange County Coastal Streams - San Clemente	Prima Deshecha Canada Segunda Deshecha Canada	San Clemente San Juan Capistrano County of Orange Orange County Flood Control District Dana Point
San Mateo Creek	Christianitos Creek Gambino Canyon Creek La Paz Canyon Creek Talega Canyon Creek	San Clemente County of Orange Orange County Flood Control District

[8] Indented water bodies are tributary to the above water body.

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K. IMPLEMENTATION OF WATERSHED URMP

Each Copermittee shall implement all requirements of the Watershed URMP section of this Order by August 13, 2003 unless otherwise specified. Following the adoption of the Order and prior to the full implementation of the Watershed URMP, the Copermittees shall at a minimum collectively implement the provisions and commitments of the proposed DAMP submitted in September 2000.

L. SUBMITTAL OF WATERSHED URMP DOCUMENT

The written account of the overall watershed program to be conducted by each Copermittee during the remaining life of this Order is referred to as the "Watershed URMP Document". The Watershed URMP is conducted concurrently with the Jurisdictional URMP.[9]

1. The Watershed URMP document shall state how the member Copermittees within each watershed will develop and implement the requirements of the Watershed URMP section J. of this Order. The Watershed URMP document shall include:

   (1) A completed watershed map
   (2) A water quality assessment of the San Juan Creek Watershed Management Area within Orange County and watershed monitoring needed
   (3) Prioritization of water quality problems within Orange County in the San Diego Region
   (4) Recommended activities (short and long term) to be conducted jointly by the Copermittees and a timeline for implementation
   (5) Individual Copermittee implementation responsibilities and time schedules for implementation
   (6) A description of watershed public participation mechanisms
   (7) A description of watershed education mechanisms
   (8) A description of the mechanism and implementation schedule for watershed-based land use planning
   (9) A strategy for assessing the short-term effectiveness of the Watershed URMP
   (10) A strategy for assessing the long-term effectiveness of the Watershed URMP
   (11) A program to address common interest areas and homeowners associations

2. The Principal Permittee(s) shall submit the Watershed URMP document to the SDRWQCB by August 13, 2003.

3. Universal Reporting Requirements.

   All Watershed URMP submittals shall include an executive summary, introduction, conclusion, recommendations, and signed certified statement. Each Copermittee shall submit a signed certified statement covering its responsibilities in the Watershed URMP Document. The Principal Permittee(s) shall submit a signed certified statement referring to its responsibilities in the Watershed URMP Document and the section covering common activities conducted collectively by the Copermittees as produced by the Principal Permittee(s).

[9] As the Copermittees jointly revise and implement the submitted proposed DAMP and each Copermittee revises and implements its jurisdictional level program to satisfy the requirements of this Order, it is expected that many activities will be conducted on both a jurisdictional level (e.g., enforcement of local ordinances and permits) and a watershed level. Implementation of the Watershed URMP is not meant to replace, but to expand and complement implementation of the Jurisdictional URMP. For this reason, it is necessary to report management activities on both levels. This can be accomplished either by submitting both a Jurisdictional URMP Annual Report and a Watershed URMP Annual Report or by submitting a single Watershed URMP Annual Report that contains two separate sections (i.e., watershed activities and jurisdictional activities). Information need only be reported once (to the extent something is covered in the Watershed URMP Annual Report, it need not be covered again the Jurisdictional URMP Annual Report).

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M. SUBMITTAL OF WATERSHED URMP ANNUAL REPORT

1. Each Watershed URMP Annual Report shall be a documentation of the activities conducted by watershed member Copermittees during the previous annual reporting period to meet the requirements of all components of the Watershed URMP section of this Order. Each Watershed URMP Annual Report shall, at a minimum, contain the following:

   a. Comprehensive description of all activities conducted by the watershed member Copermittees to meet all requirements of each component of Watershed URMP section J. of this Order
   b. A section covering common activities conducted collectively by the Copermittees, to be produced by the Principal Permittee(s)
   c. Public participation mechanisms utilized during the Watershed URMP implementation process;
   d. Mechanism for watershed-based land use planning;
   e. Assessment of effectiveness of Watershed URMP;
   f. Proposed revisions to the Watershed URMP;
   g. A summary of watershed effort related data not included in the annual monitoring report (e.g., special investigations); and
   h. Identification of water quality improvements or degradation.

2. The Principal Permittee(s) shall submit the Watershed URMP Annual Report to the SDRWQCB prior to November 9, 2004 and prior to every November 9th thereafter. The reporting period for these annual reports shall be the previous fiscal year. For example, the report submitted prior to November 9, 2004 shall cover the reporting period July 1, 2003 to June 30, 2004.

3. Universal Reporting Requirements

   All Watershed URMP submittals shall include an executive summary, introduction, conclusion, recommendations, and signed certified statement. Each Copermittee shall submit a signed certified statement covering its responsibilities in the Watershed URMP Annual Report. The Principal Permittee(s) shall submit a signed certified statement referring to its responsibilities in the Watershed URMP Annual Report and the section covering common activities conducted collectively by the Copermittees as produced by the Principal Permittee(s).

N. PROGRAM MANAGEMENT

1. The Copermittees shall implement the Program Management activities and commitments as described in section 2 (Program Management) of the proposed DAMP.

O. PRINCIPAL PERMITTEE RESPONSIBILITIES

Within 90 days of adoption of this Order, the Copermittees shall designate the Principal Permittee(s) and notify the SDRWQCB of the name(s) of the Principal Permittee(s). The Principal Permittee(s) may require the Copermittees to reimburse the Principal Permittee(s) for reasonable costs incurred while performing coordination responsibilities and other related tasks. The Principal Permittee(s) shall, at a minimum:

1. Be responsible for implementing or coordinating the implementation of the Program Management activities and commitments described in section 2 (Program Management) of the proposed DAMP.

2. Serve as liaison(s) between the Copermittees and the SDRWQCB on general permit issues.

3. Coordinate permit activities among the Copermittees and facilitate collaboration on the development and implementation of programs required under this Order;

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4. Coordinate the joint development by all of the Copermittees of standardized format(s) for all reports required under this Order (e.g., annual reports, monitoring reports, fiscal analysis reports, and program effectiveness reports, etc.). The standardized reporting format(s) shall be used by all Copermittees and shall include protocols for electronic reporting. The Principal Permittee(s) shall submit the standardized format(s) to the SDRWQCB as part of the unified Jurisdictional URMP document no later than **365 days after adoption** of this Order.

5. Integrate individual Copermittee documents and reports required under this Order into single unified documents and reports for submittal to the SDRWQCB as described below. If a reporting date falls on a non-working day or State holiday, then the report is to be submitted on the following working day.

   a. Unified Jurisdictional URMP Document – The Principal Permittee(s) shall submit the unified Jurisdictional URMP document in its entirety (including the model SUSMP) to the SDRWQCB within 365 days of the adoption of this Order.

      The Principal Permittee(s) shall be responsible for producing the sections of the unified Jurisdictional URMP document submittals covering common activities conducted by the Copermittees. The Principal Permittee(s) shall be responsible for the development and production of a stand alone Model SUSMP document meeting the requirements of section F.1.b.(2). of this Order. The Principal Permittee(s) shall also be responsible for collecting and assembling the individual Jurisdictional URMP document submittals covering the activities conducted by each individual Copermittee.

   b. Unified Jurisdictional URMP Annual Reports – The Principal Permittee(s) shall submit unified Jurisdictional URMP Annual Reports to the SDRWQCB prior to November 9th of each year, beginning on **November 9, 2003**. The reporting period for these annual reports shall be the previous fiscal year. For example, the report submitted prior to November 9, 2003 shall cover the reporting period July 1, 2002 to June 30, 2003.

      The Principal Permittee(s) shall be responsible for producing the section of the unified Jurisdictional URMP Annual Reports covering common activities conducted by the Copermittees. The Principal Permittee(s) shall also be responsible for collecting and assembling the individual Jurisdictional URMP Annual Reports covering the activities conducted by each individual Copermittee.

   c. Watershed URMP Document – The Principal Permittee(s) shall prepare and submit the Watershed URMP document to the SDRWQCB by **August 13, 2003** .

   d. Watershed URMP Annual Report - The Principal Permittee(s) shall prepare and submit the Watershed URMP Annual Reports to the SDRWQCB prior to November 9th of each year, beginning on **November 9, 2004**. The reporting period for these annual reports shall be the previous fiscal year. For example, the report submitted prior to November 9, 2004 shall cover the reporting period July 1, 2003 to June 30, 2004.

   e. Receiving Waters Monitoring and Reporting Program - The Principal Permittee(s) shall be responsible for the production and submittal of the Previous Monitoring and Future Recommendations Report. The report shall be submitted to the SDRWQCB within 180 days of adoption of this Order.

   f. Receiving Waters Monitoring and Reporting Program - The Principal Permittee(s) shall be responsible for the development and production of the Receiving Waters Monitoring Program as it is outlined in Attachment B. The Principal Permittee(s) shall submit the Receiving Waters Monitoring Program to the SDRWQCB within 180 days of adoption of this Order.

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g. Receiving Waters Monitoring and Reporting Program – The Principal Permittee(s) shall be responsible for coordinating the joint development by all of the Copermittees of monitoring reporting formats (Section O.4) and for implementing the Receiving Waters Monitoring Program as outlined in Attachment B by August 13, 2002.

h. Receiving Waters Monitoring and Reporting Program - The Principal Permittee(s) shall submit the Receiving Waters Monitoring Annual Report to the SDRWQCB prior to November 9th of each year, beginning on November 9, 2003.

i. Formal Agreements/Standardized Formats - The Principal Permittee(s) shall submit to the SDRWQCB, within 365 days of adoption of this Order, a formal agreement between the Copermittees which provides a management structure for meeting the requirements of this Order (as described in section N.1.). The Principal Permittee(s) shall submit to the SDRWQCB, within 365 days of adoption of this Order, standardized formats for all reports and documents required under this Order.

j. Dry Weather Monitoring - The Principal Permittee(s) shall collectively submit the Copermittees' dry weather monitoring maps and procedures to the SDRWQCB within 365 days of adoption of this Order.

P. RECEIVING WATERS MONITORING AND REPORTING PROGRAM

1. Pursuant to California Water Code section 13267, each Copermittee shall comply with the Receiving Waters Monitoring and Reporting Program for Order No. R9-2002-0001 contained in **Attachment B** of this Order.

2. Each Copermittee shall also comply with standard provisions, reporting requirements, and notifications contained in **Attachment C** of this Order.

Q. TASKS AND SUBMITTAL SUMMARY

The tasks and submittals required under this Order are summarized in Tables 5 and 6 below:

Table 5. Task Summary

Task No.	Task	Permit Section	Completion Date	Frequency
1	Identify discharges not to be prohibited and BMPs required for treatment of discharges not prohibited	B.3.	365 days after adoption of Order	One Time
2	Examine field screening results to identify water quality problems resulting from non-prohibited non-storm water discharges, including follow-up of problems	B.5.	Prior to November 9, 2003	Annually
3	Notify SDRWQCB of discharges causing or contributing to an exceedance of water quality standards	C.2.a.	Immediate	As Needed
4	Establish adequate legal authority to control pollutant discharges into and from MS4	D.1.	365 days after adoption of Order	One Time
5	Assess General Plan to incorporate water quality and watershed protection principles	F.1.a.	365 days after adoption of Order	One Time
6	Include Development Project Requirements in local permits	F.1.b.(1).	365 days after adoption of Order	One Time
7	Develop Model SUSMP	F.1.b.(2).	365 days after adoption of Order	One Time
8	Develop and adopt individual local SUSMP and amended ordinances	F.1.b.(2).	180 days after development of Model SUSMP	One Time
9	Implement individual jurisdictional SUSMP	F.1.b.(2).	180 days after submittal of Model SUSMP to SDRWQCB	Continuous

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Task No.	Task	Permit Section	Completion Date	Frequency
10	Revise environmental review processes	F.1.c.(1).	365 days after adoption of Order	One Time
11	Conduct education program for municipal planning and development review staff, project applicants, developers, contractors, community planning groups, and property owners	F.1.d.(1). And F.1.d.(2).	365 days after adoption of Order	Ongoing
12	Implement all requirements of Construction Component of Jurisdictional URMP	F.2.a. – F.2.j.	365 days after adoption of Order	Ongoing
13	Notify SDRWQCB of non-compliant construction sites that pose a threat to human or environmental health	F.2.i.	Within 24 hours of discovery of noncompliance	As Needed
14	Implement all requirements of Municipal Existing Development Component of Jurisdictional URMP	F.3.a.(1). – F.3.a.(8).	365 days after adoption of Order	Ongoing
15	Implement all requirements of Industrial Existing Development Component of Jurisdictional URMP	F.3.b.(1) – F.3.b.(8)	365 days after adoption of Order	Ongoing
16	Notify SDRWQCB of non-compliant industrial sites that pose a threat to human or environmental health	F.3.b.8.	Within 24 hours of discovery of noncompliance	As Needed
17	Implement all requirements of Commercial Existing Development Component of Jurisdictional URMP	F.3.c.(1) – F.3.c.(5)	365 days after adoption of Order	Ongoing
18	Implement all requirements of Residential Existing Development Component of Jurisdictional URMP	F.3.d.(1) – F.3.d.(4)	365 days after adoption of Order	Ongoing
19	Implement all requirements of Education Component of Jurisdictional URMP	F.4.a. – F.4.c.	365 days after adoption of Order	Ongoing
20	Implement all requirements of Illicit Discharge Detection and Elimination Component of Jurisdictional URMP	F.5.a. – F.5.i.	365 days after adoption of Order	Ongoing
21	Develop a plan to manage urban runoff from common interest areas, private roads, drainage facilities, and other components of the storm water conveyance system, including those managed by homeowners associations.	F.6.	365 days after adoption of Order	One Time
22	Implement all requirements of Public Participation Component of Jurisdictional URMP	F.7.	365 days after adoption of Order	Ongoing
23	Develop strategy for assessment of Jurisdictional URMP effectiveness	F.8.a.	365 days after adoption of Order	One Time
24	Assess Jurisdictional URMP effectiveness	F.8.b.	Prior to November 9, 2003	Annually
25	Develop strategy for fiscal analysis of urban runoff management program	F.9.	365 days after adoption of Order	One Time
26	Conduct fiscal analysis of urban runoff management program in entirety	F.9.	Prior to November 9, 2003	Annually
27	Develop and implement Watershed URMP	J.2.	August 13, 2003	Ongoing
28	Implement Program Management activities and commitments in proposed DAMP	N.1.	Immediately	Ongoing
29	Develop standardized formats for all required reports of this Order	O.4.	365 days after adoption of Order	One Time
30	Develop Receiving Waters Monitoring Document	Attachment B	180 days after adoption of Order	One Time
31	Implement Receiving Waters Monitoring Program	Attachment B	180 days after adoption of Order	Continuous
32	Develop Dry Weather Monitoring Program Document	Attachment E	365 days after adoption of Order	One Time
33	Conduct Dry Weather Monitoring Program	Attachment E	Begins May 1, 2003 Thereafter conducted May 1st to September 30th	Annually
34	Complete NPDES applications for issuance of renewal watershed-based permits	Attachment C	At least 180 days prior to expiration of Order	One Time

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Task No.	Task	Permit Section	Completion Date	Frequency
35	Notify SDRWQCB of any incidence of non-compliance with this Order that poses a threat to human or environmental health.	R.1, B.6 of Attachment C	Within 24 hours of discovery of non-compliance	As Needed
36	Designate Principal Permittee(s) and notify SDRWQCB	O.	90 days after adoption of the Order	One Time

Table 6. Submittal Summary

Submittal No.	Submittal	Permit Section	Completion Date	Frequency
1	Submit identification of discharges not to be prohibited and BMPs required for treatment of discharges not prohibited	B.3.	365 days after adoption of Order	One Time
2	Report on discharges causing or contributing to an exceedance of water quality standards, including description of BMP implementation	C.2.a.	With individual Jurisdictional URMP Annual Reports	As Needed
3	Submit Certified Statement of Adequate Legal Authority	D.2.	365 days after adoption of Order	One Time
4	Submit certified statement if particular high priority construction sites are to be inspected monthly rather than weekly in the rainy season	F.2.g.(2).	365 days after adoption of Order and as needed thereafter	As Needed
5	Submit report on non-compliant construction sites that pose a threat to human or environmental health.	F.2.i.	Within 5 Days of discovery of non-compliance	As Needed
6	Submit report on non-compliant industrial sites that pose a threat to human or environmental health.	F.3.b.8.	Within 5 days of discovery of non compliance	As Needed
7	Submit to Principal Permittee(s) individual Jurisdictional URMP document covering requirements for all Components	H.1.a.	Prior to 365 days after adoption of Order (Principal Permittee(s) specifies date of submittal)	One Time
8	(This space reserved).			
9	Principal Permittee(s) shall submit to SDRWQCB unified Jurisdictional URMP document covering requirements for all Components, including Model SUSMP	H.2.a.	365 days after adoption of Order	One Time
10	(This space reserved).			
11	Submit to SDRWQCB local SUSMP and amended ordinances	F.1.b.(2). and H.1.d.	180 days after development of Model SUSMP	One Time
12	Submit to Principal Permittee(s) individual Jurisdictional URMP Annual Report	I.1.	Prior to November 9, 2003 (Principal Permittee(s) specifies date of submittal)	Annually
13	Principal Permittee(s) shall submit 1st unified Jurisdictional URMP Annual Report to SDRWQCB	I.2.	Prior to November 9, 2003	One Time and Annually Thereafter
14	Submit to Principal Permittee(s) Watershed Specific URMP document	L.1.	Prior to August 13, 2003 (Principal Permittee(s) specifies date of submittal)	One Time
15	Principal Permittee(s) shall submit Watershed URMP document to SDRWQCB	L.2.	August 13, 2003	One Time
16	Principal Permittee(s) shall submit 2nd unified Jurisdictional URMP Annual Report to SDRWQCB	I.2.	Prior to November 9, 2004	One Time
17	(This space reserved).			
18	Principal Permittee(s) shall submit 1st Watershed URMP Annual Report to SDRWQCB	M.2.	Prior to November 9, 2004	One Time and Annually Thereafter
19	Principal Permittee(s) shall submit 3rd unified Jurisdictional URMP Annual Report to SDRWQCB	I.2.	Prior to November 9, 2005	One Time

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Submittal No.	Submittal	Permit Section	Completion Date	Frequency
20	Principal Permittee(s) shall submit 2nd Watershed URMP Annual Report to SDRWQCB	M.2.	Prior to November 9, 2005	One Time
21	Principal Permittee(s) shall submit 4th unified Jurisdictional URMP Annual Report to SDRWQCB	I.2.	Prior to November 9, 2006	One Time
22	Principal Permittee(s) shall submit 3rd Watershed URMP Annual Report to SDRWQCB	M.2.	Prior to November 9, 2006	One Time
23	Principal Permittee(s) shall submit 5th unified Jurisdictional URMP Annual Report to SDRWQCB	I.2.	Prior to November 9, 2007	One Time
24	Principal Permittee(s) shall submit standardized formats for all reports required under this Order	O.4.	365 days after adoption of Order	One Time
25	Principal Permittee(s) submits Receiving Waters Monitoring Program Document	Attachment B	180 days after adoption of Order	One Time
26	Principal Permittee(s) submits Receiving Waters Monitoring Annual Report to SDRWQCB	Attachment B	Prior to November 9, 2003	Annually
27	Submit to Principal Permittee(s) Dry Weather Monitoring Program Document	Attachment E	Prior to 365 days after adoption of Order	One Time
28	Principal Permittee(s) submits collective Dry Weather Monitoring Program Documents	Attachment E	365 days after adoption of Order	One Time
29	Submit to Principal Permittee(s) Dry Weather Monitoring Program results as part of individual Jurisdictional URMP Annual Report	Attachment E	Prior to November 9, 2003, as part of individual Jurisdictional URMP Annual Report	Annually
30	Principal Permittee(s) shall submit NPDES applications for issuance of renewal watershed-based permits	Attachment C	At least 180 days prior to expiration of this Order	One Time
31	Submit reports of any incidence of non-compliance with this Order that poses a threat to human or environmental health.	R.1, B.6 of Attachment C	Within 5 days of discovery of non compliance	As Needed

R. STANDARD PROVISIONS, REPORTING REQUIREMENTS AND NOTIFICATIONS

1. Each Copermittee shall comply with Standard Provisions, Reporting Requirements, and Notifications contained in **Attachment C** of this Order. This includes 24 hour/5day reporting requirements for any instance of non-compliance with this Order as described in section B.6 of Attachment C.

2. All plans, reports and subsequent amendments submitted in compliance with this Order shall be implemented immediately (or as otherwise specified) and shall be an enforceable part of this Order upon submission to the SDRWQCB. All submittals by Copermittees must be adequate to implement the requirements of this Order.

I, John H. Robertus, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Diego Region, on ***February 13, 2002.***

John H. Robertus
Executive Officer

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ATTACHMENT A

BASIN PLAN PROHIBITIONS

California Water Code Section 13243 provides that a Regional Board, in a water quality control plan, may specify certain conditions or areas where the discharge of waste, or certain types of waste is not permitted. The following discharge prohibitions are applicable to any person, as defined by Section 13050(c) of the California Water Code, who is a citizen, domiciliary, or political agency or entity of California whose activities in California could affect the quality of waters of the state within the boundaries of the San Diego Region.

1. 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.

2. The discharge of waste to land, except as authorized by waste discharge requirements or the terms described in California Water Code Section 13264 is prohibited.

3. The discharge of pollutants or dredged or fill material to waters of the United States except as authorized by an NPDES permit or a dredged or fill material permit (subject to the exemption described in California Water Code §13376) is prohibited.

4. Discharges of recycled water to lakes or reservoirs used for municipal water supply or to inland surface water tributaries thereto are prohibited, unless this Regional Board issues a NPDES permit authorizing such a discharge; the proposed discharge has been approved by the State Department of Health Services and the operating agency of the impacted reservoir; and the discharger has an approved fail-safe long-term disposal alternative.

5. The discharge of waste to inland surface waters, except in cases where the quality of the discharge complies with applicable receiving water quality objectives, is prohibited. Allowances for dilution may be made at the discretion of the Regional Board. Consideration would include streamflow data, the degree of treatment provided and safety measures to ensure reliability of facility performance. As an example, discharge of secondary effluent would probably be permitted if streamflow provided 100:1 dilution capability.

6. The discharge of waste in a manner causing flow, ponding, or surfacing on lands not owned or under the control of the discharger is prohibited, unless the discharge is authorized by the Regional Board.

7. The dumping, deposition, or discharge of waste directly into waters of the state, or adjacent to such waters in any manner which may permit its being transported into the waters, is prohibited unless authorized by the Regional Board.

8. Any discharge to a storm water conveyance system that is not composed entirely of "*storm water*" is prohibited unless authorized by the Regional Board. [The federal regulations, 40 CFR 122.26 (b) (13), define storm water as storm water runoff, snow melt runoff, and surface runoff and drainage. 40 CFR 122.26 (b) (2) defines an illicit discharge as any discharge to a storm water conveyance system that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from fire fighting activities. [§122.26 amended at 56 FR 56553, November 5, 1991; 57 FR 11412, April 2, 1992].

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9. The unauthorized discharge of treated or untreated sewage to waters of the state or to a storm water conveyance system is prohibited.

10. The discharge of industrial wastes to conventional septic tank/subsurface disposal systems, except as authorized by the terms described in California Water Code Section 13264, is prohibited.

11. The discharge of radioactive wastes amenable to alternative methods of disposal into the waters of the state is prohibited.

12. The discharge of any radiological, chemical, or biological warfare agent into waters of the state is prohibited.

13. The discharge of waste into a natural or excavated site below historic water levels is prohibited unless the discharge is authorized by the Regional Board.

14. The discharge of sand, silt, clay, or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity or discoloration in waters of the state or which unreasonably affect, or threaten to affect, beneficial uses of such waters is prohibited.

15. The discharge of treated or untreated sewage from vessels to Mission Bay, Oceanside Harbor, Dana Point Harbor, or other small boat harbors is prohibited.

16. The discharge of untreated sewage from vessels to San Diego Bay is prohibited.

17. The discharge of treated sewage from vessels to portions of San Diego Bay that are less than 30 feet deep at mean lower low water (MLLW) is prohibited.

18. The discharge of treated sewage from vessels, which do not have a properly functioning US Coast Guard certified Type I or Type II marine sanitation device, to portions of San Diego Bay that are greater than 30 feet deep at mean lower low water (MLLW) is prohibited.

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ATTACHMENT B

RECEIVING WATERS MONITORING AND REPORTING PROGRAM FOR ORDER NO. R9-2002-0001

B.1 Receiving Waters Monitoring Program

The Copermittees shall collaborate to develop, implement, and report annually on a Receiving Waters Monitoring Program for Orange County within the San Diego Region. The primary objectives of the Receiving Waters Monitoring and Reporting Program include:

- Assessing compliance with Order No. R9-2002-0001;
- Measuring the effectiveness of Urban Runoff Management Plans;
- Assessing the chemical, physical, and biological impacts to receiving waters resulting from urban runoff; and
- Assessing the overall health and evaluating long-term trends in receiving water quality.

Order No. R9-2002-0001 may be modified by the SDRWQCB Executive Officer without further public notice to direct the Copermittees to participate in comprehensive regional monitoring activities in the Southern California Bight in lieu of specific Order R9-2002-0001 receiving waters monitoring requirements during the term of this Order.

B.2 Receiving Waters Monitoring Program Document

Within **180** days of the adoption of this Order the Copermittees shall submit to the SDRWQCB a Receiving Waters Monitoring Program document, subject to SDRWQCB review, that incorporates the following components:

a. Previous Monitoring and Future Recommendations Technical Report; and
b. Receiving Waters Monitoring Program

B.2.a. Previous Monitoring and Future Recommendations Technical Report

The Copermittees shall collaborate to prepare a technical report that provides analysis, interpretation, and summary of all previous wet weather monitoring results from programs conducted in the watersheds within the San Diego Region under the First Term Permit, the Second Term Permit, and the Orange County Water Quality Monitoring Program (99-04 Plan) currently being implemented by the Copermittees. The report shall also provide recommendations for the Receiving Waters Monitoring Program to comply with the objectives listed in Attachment B.1 above and incorporates the specific receiving waters monitoring requirements of Attachment B.2.b. At a minimum, the report shall:

(1) Summarize the cumulative findings of all previous wet weather monitoring;
(2) Identify detectable trends in water quality data and receiving water quality, based on the cumulative previous wet weather monitoring findings;
(3) Interpret the cumulative previous wet weather monitoring findings;
(4) Describe the monitoring design, sampling and analytical methods employed in the 99-04 Plan within the San Diego Region;
(5) Describe the identification of Critical Aquatic Resources and Warm Spots in the 99-04 Plan within the San Diego Region and how these will be addressed in the Receiving Waters Monitoring Program;
(6) Draw conclusions regarding the cumulative previous wet weather monitoring findings;

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(7) Describe how the monitoring data collected under the previous monitoring programs, including the 99-04 Plan, have been utilized by the Copermittees in the implementation of the 1993 DAMP under Order No. 96-03;
(8) Describe how the monitoring data collected under this Order will be utilized in the implementation of the Jurisdictional and Watershed Urban Runoff Management Plans;
(9) Provide recommendations for future monitoring activities in the San Diego Region (i.e. number and location of sampling stations, frequency of sampling, parameters to be analyzed, methods and materials to be used, and a rationale for each) that achieves the objectives listed in section B.1 and incorporates the specific program requirements of section B.2.b of this Attachment; and
(10) Include an executive summary, introduction, conclusion, and summary of recommendations.

B.2.b. Receiving Waters Monitoring Program

The Copermittees shall collaborate to review and revise the existing 99-04 Plan utilizing the findings of the Previous Monitoring and Future Recommendations Technical Report. The revised 99-04 Plan shall incorporate the specific requirements of this section for Orange County within the San Diego Region and henceforth referred to under this Order as the Receiving Waters Monitoring Program. The Receiving Waters Monitoring Program shall at a minimum include, satisfy, or exceed the following requirements:

(1) The Receiving Waters Monitoring shall be conducted during each reporting period under the Order. A reporting period is defined as October 1st to September 30th of any year. The first reporting period under this Order is October 1, 2002 to September 30, 2003.
(2) Both the annual and long-term objectives of the Receiving Waters Monitoring Program shall be clearly stated and reported annually and shall focus on the primary objectives of the program listed in Attachment B.1.
(3) The monitoring program design, implementation, analysis, assessment, and reporting shall be conducted annually on a watershed basis for each of the six hydrologic units in the San Juan Creek Watershed Management Area within Orange County (Orange County Coastal Streams – Laguna, Aliso Creek Watershed, Dana Point Watershed, San Juan Creek Watershed, Orange County Coastal Streams – San Clemente, and San Mateo Creek) as defined in the Water Quality Control Plan for the San Diego Region (9) and Watershed Management Chapter for the San Diego Region.
(4) Monitoring results shall be assessed and reported annually on a watershed basis as a single report by the Copermittees consisting of one common section and six watershed sections. Monitoring, analysis, assessment, and reporting shall satisfy the requirements of specified below for each watershed as applicable.
(5) Describe how the Copermittees may collaborate with other agencies or organizations conducting similar monitoring, such as the Southern California Coastal Water Research Project (SCCWRP), including the possibility of participating in coordinated comprehensive regional monitoring in the Southern California Bight under this Order.
(6) The Receiving Waters Monitoring Program document shall be submitted to the SDRWQCB for review and comment no later than 180 days following the adoption of this Order.
(7) Implementation of the Receiving Waters Monitoring Program shall begin no later than August 13, 2002.
(8) The Receiving Waters Monitoring Program shall incorporate the components listed below and shall address the primary objectives of the Receiving Waters Monitoring Program:
    (a) Urban Stream Bioassessment
    (b) Long Term Mass Loading

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(c) Coastal Storm Drain Outfall Monitoring
(d) Ambient Coastal Receiving Waters Monitoring

B.2.b.8.a Urban Stream Bioassessment Monitoring

1. The Copermittees shall collaborate to develop and implement an urban stream bioassessment monitoring program. At a minimum, the program shall consist of station identification, sampling, monitoring, and analysis of data for 12 bioassessment stations in order to determine the biological and physical integrity of urban streams within the County of Orange. In addition to the urban stream bioassessment stations, three reference bioassessment stations shall be identified, sampled, monitored, and analyzed. The selection, sampling, monitoring, and analysis of bioassessment stations shall meet the following requirements:

   a. Each urban stream bioassessment station shall be selected using the following criteria. Each urban stream bioassessment station shall:

      (1) be located within the jurisdiction of a Copermittee; or
      (2) be located within one of the six watersheds described above; and
      (3) be representative of urban stream conditions within one of the six watersheds specified in Section J, Table 4 of this Order; and
      (4) meet the physical criteria of the California Stream Bioassessment Procedure[1]; and
      (5) to the extent feasible, coincide with the location of an already existing monitoring station used by the California Department of Fish and Game in the conduct of the SDRWQCB's Ambient Bioassessment Program.

   b. Each bioassessment station shall be monitored twice annually, in May and October of each year, beginning in October 2002[2]. A minimum of three replicate samples shall be collected at each station during each sampling event.

   c. Sampling, laboratory, quality assurance, and analysis procedures shall follow the standardized procedures set forth in the California Department of Fish and Game's California Stream Bioassessment Procedure (CSBP). Analysis procedures shall include comparison between station mean values for various biological metrics. Sampling, laboratory, quality assurance, and analytical procedures shall follow the standardized "Non-Point Source Bioassessment Sampling Procedures" for professional bioassessment set forth in the CSBP. In the event that the CSBP "Point-Source Professional Bioassessment Procedure" is performed in place of the "Non Point Source Bioassessment Sampling Procedure," justification and documentation of the procedure shall be submitted with the report. Results of the Urban Stream Bioassessment Monitoring shall be reported annually as part of the overall Receiving Waters Monitoring and Reporting Program for Order No. R9-2002-0001. Reporting of the bioassessment data shall follow the format of the San Diego Regional Water Quality Control Board 1999 Biological Assessment Annual Report[3]. The report shall include:

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[1] California Stream Bioassessment Procedure (Protocol Brief for Biological and Physical/Habitat Assessment in Wadeable Streams), California Department of Fish and Game – Aquatic Bioassessment Laboratory, May 1999.

[2] Bioassessment sampling shall be performed in May and October each year.

[3] San Diego Regional Water Quality Control Board ,1999 Biological Assessment Annual Report. A Water Quality Inventory Series: Biological and Physical/Habitat Assessment of California Water Bodies. California Department of Fish and Game Office of Spill Prevention and Response, Water Pollution Control Laboratory. December 1999.

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(1) All physical, chemical and biological data collected in the assessment;
(2) Photographic documentation of assessment and reference stations;
(3) Documentation of quality assurance and control procedures;
(4) Analysis that includes calculation of the metrics used in both the CSBP and the 1999 Annual Report.
(5) The assessment shall utilize a regional index of biological integrity when it becomes available.
(6) The report shall provide interpretation for comparisons of mean biological and habitat assessment metric values between assessment and reference stations.
(7) Electronic data formatted to California Department of Fish and Game Aquatic Bioassessment Laboratory specifications for inclusion in the Statewide Access Bioassessment database.

d. A professional environmental laboratory or Copermittee staff shall perform all sampling, laboratory, quality assurance, and analytical procedures. While valuable, data collected by volunteer monitoring organizations shall not be submitted in place of professional assessments.

e. Reference stations shall be selected following the recommendations in the 1999 Annual Report, Hughes (1995)[4] and Barbour et. al. (1999)[5]. Reference stations shall be evaluated annually by the Copermittees for suitability and the results included in the annual report. New reference stations will be selected as needed by the Copermittees.

2. The Copermittees shall design and implement a program to conduct standardized toxicity testing at urban stream bioassessment stations where the bioassessment data indicates significant impairment. When findings indicate the presence of toxicity, a Toxicity Identification Evaluation (TIE) shall be conducted to determine the cause(s) of the toxicity.

B.2.b.8.b Long Term Mass Loading

For purposes of evaluating long-term trends and assessing the effectiveness of urban runoff management programs, the Copermittees shall continue to implement the mass loading monitoring conducted under the 99-04 Plan in Orange County within the San Diego Region. The mass loading monitoring component shall, however, be revised as necessary to ensure adequate coverage of the San Diego Region and to specify that when findings or observations indicate the possible presence of toxicity, a Toxicity Identification Evaluation (TIE) shall be conducted to determine the cause(s) of the toxicity.

B.2.b.8.c. Coastal Storm Drain Outfall Monitoring

The Copermittees shall collaborate to develop and implement a monitoring program for discharges of urban runoff from coastal storm drain outfalls. The program shall meet the following requirements:

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4 Hughes, R. M. (1995) Defining Acceptable Biological Status by Comparing with Reference Conditions in Biological Assessment and Criteria: Tools for Water Resource Planning and Decision Making, Wayne S. Davis and Thomas P. Simon eds. Lewis Publishers, Boca Raton, LA.

5 Barbour, M.T. , J Gerritsen, B.D. Synder, and J.B. Stribling (1999) Rapid Bioassessment Protocols For Use in Streams and Wadeable Rivers: Periphyton, Benthic Macroinvertebrates, and Fish. Second Edition. EPA 841-B-99-002.

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1. The program shall include rationale and criteria for selection of storm drain outfalls to be monitored.

2. The program shall include collection of samples for analysis of total coliform, fecal coliform, and enterococci, in addition to any other indicators or pathogens identified by the Copermittees.

3. Samples shall be collected at both the storm drain outfall and in the surf zone (at ankle to knee water depths) directly in front of the outfall.

4. Samples shall be collected during both dry and wet weather periods.

5. Exceedances of public health standards for bacteria must be reported to the County of Orange Health Care Agency, Regulatory Health Services, Environmental Health, Ocean Recreation Protection Program as soon as possible by the Copermittees.

B.2.b.8.d. Ambient Coastal Receiving Water Monitoring

The Copermittees shall collaborate to develop and implement a program to assess the overall health of the coastal receiving waters and monitor the impact of urban runoff on ambient receiving water quality. This monitoring shall include Dana Cove, the creek and stream mouths, the Pacific Ocean coastline of Orange County within the San Diego region, and all Clean Water Act section 303(d) water bodies or other environmentally sensitive areas as defined in F.1.b.(2)(a)vi of this Order.

B.3 Implementation of the Receiving Waters Monitoring Program

Upon approval by the SDRWQCB the Copermittees shall implement the Receiving Waters Monitoring Program.

B.4 Interim Implementation of the 99-04 Plan

Until approval of the Receiving Waters Monitoring Program by the SDRWQCB, the Copermittees shall continue to implement the 99-04 Plan as described in Appendix K of the proposed DAMP.

B.5 Submittal of Receiving Waters Monitoring Annual Reports

The Principal Permittee shall submit the Receiving Waters Monitoring Annual Report to the SDRWQCB prior to November 9th of each year, beginning on November 9, 2003.

B.6 Monitoring Annual Report Requirements

a. Monitoring reports shall provide the data/results, methods of evaluating the data, graphical summaries of the data, and an explanation/discussion of the data for each monitoring program component listed above.

b. Monitoring reports shall include an analysis of the findings of each monitoring program component listed above. The analysis shall identify and prioritize water quality problems. Based on the identification and prioritization of water quality problems, the analysis shall identify potential sources of the problems, and recommend future monitoring and BMP implementation measures for identifying and addressing the sources. The analysis shall also include an evaluation of the effectiveness of existing control measures.

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c. Monitoring reports shall include identification and analysis of any long-term trends in storm water or receiving water quality.

d. Monitoring reports shall provide an estimation of total pollutant loads (wet weather loads plus dry weather loads) due to urban runoff for each of the watersheds specified in Section J, Table 4 of Order No. R9-2002-0001.

e. Monitoring reports shall for each monitoring program component listed above, include an assessment of compliance with applicable water quality standards.

f. All monitoring reports shall use a standard report format and shall include the following:

1. A stand alone comprehensive executive summary addressing all sections of the monitoring report;
2. Comprehensive interpretations and conclusions; and
3. Recommendations for future actions.

g. All monitoring reports submitted to the Principal Permittee or the SDRWQCB shall contain the certified perjury statement described in Standard Reporting Requirements in Attachment C section B.9.d.

h. A committee (consisting of no less than three members) shall review all monitoring reports prior to submittal to the SDRWQCB. All review comments shall also be submitted to the SDRWQCB.

i. All monitoring reports shall be submitted in both electronic and paper formats.

j. All monitoring reports shall describe monitoring station locations by latitude and longitude coordinates, frequency of sampling, quality assurance/quality control procedures and sampling and analysis protocols.

k. Monitoring programs and reports shall comply with Section B.7 of Attachment B, as well as Attachment C.

B.7 Standard Monitoring Requirements

a. All monitoring activities shall meet the following requirements:

1. Monitoring and Records [40 CFR 122.41(j)(1)]

Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

2. Monitoring and Records [40 CFR 122.41(j)(2)] [California Water Code § 13383(a)]

The discharger 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 Order, and records of all data used to complete the application for this permit, for a period of at least three years from the date of the sample, measurement, report or application. This period may be extended by request of the SDRWQCB at any time.

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3. Monitoring and Records [40 CFR 122.21(j)(3)]

Records of monitoring information shall include the information requested in Attachment B and the following:

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. Monitoring and Records [40 CFR 122.21(j)(4)]

Monitoring results must be conducted according to test procedures approved under 40 CFR part 136 unless other test procedures have been specified in this Order.

5. Monitoring and Records [40 CFR 122.21(j)(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 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.

6. Monitoring and Records [40 CFR 122.41(k)(2)]

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.

7. Monitoring Reports [40 CFR 122.41(l)(4)

Monitoring results shall be reported at the intervals specified elsewhere in this Order.

8. Monitoring Reports [40 CFR 122.41(l)(4)(ii)]

If the discharger monitors any pollutant more frequently than required by the permit using test procedures approved under 40 CFR part 136, 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 SDRWQCB.

9. Monitoring Reports [40 CFR 122.41(l)(4)(iii)]

Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the SDRWQCB in the Order.

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ATTACHMENT C

STANDARD PROVISIONS REPORTING REQUIREMENTS, AND NOTIFICATIONS

A. STANDARD PROVISIONS

1. Duty To Comply [40 CFR 122.41(a)(1)]
   The discharger 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 Clean Water Act within the time provided in the regulations that establish these standards or prohibitions or standards for sewage sludge use or disposal, even if this Order has not yet been modified to incorporate the requirement.

2. Need to Halt or Reduce Activity Not a Defense [40 CFR 122.41(c)]
   It shall not be a defense for the 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. Upon reduction, loss, or failure of a treatment facility, the discharger shall, to the extent necessary to maintain compliance with this Order, control production or all discharges, or both, until the facility is restored or an alternative method of treatment is provided. This provision applies, for example, when the primary source of power of a treatment facility fails, is reduced, or is lost.

3. Duty to Mitigate [40 CFR 122.41(d)]
   The discharger shall take all reasonable steps to minimize or prevent any discharge or prevent any discharge or sludge use or disposal in violation of this Order which has a reasonable likelihood of adversely affecting human health or the environment.

4. Proper Operation and Maintenance [40 CFR 122.41(e)]
   The discharger 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 discharger to achieve compliance with the conditions of this Order. 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 the discharger only when the operation is necessary to achieve compliance with the conditions of this Order.

5. Permit Actions [40 CFR 122.41(f)] [California Water Code § 13381]
   This Order may be modified, revoked and reissued, or terminated for cause including, but not limited to, the following:

   a. Violation of any terms or conditions of this Order;
   b. Obtaining this Order by misrepresentation or failure to disclose fully all relevant facts;
   c. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge; or
   d. A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination.

   The filing of a request by the discharger for modification, revocation and reissuance, or termination of this Order, or a notification of planned changes or anticipated noncompliance does not stay any condition of this Order.

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6. Property Rights [40 CFR 122.41(g)] [California Water Code §13263(g)]
This Order does not convey any property rights of any sort or any exclusive privilege. The requirements prescribed herein do not authorize the commission of any act causing injury to persons or property, nor protect the discharger from liabilities under federal, state, or local laws, nor create a vested right for the discharger to continue the waste discharge.

7. Inspection and Entry [40 CFR 122.41(i)] [California Water Code § 13267(c)]
The discharger shall allow the SDRWQCB, or an authorized SDRWQCB representative, or an authorized representative of the USEPA (including an authorized contractor acting as a representative of the SDRWQCB or USEPA), upon presentation of credentials and other documents as may be required by law, to:

   a. Enter upon the discharger's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this Order;
   b. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this Order;
   c. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this Order; and
   d. Sample or monitor at reasonable times, for the purposes of assuring compliance with this Order or as otherwise authorized by the Clean Water Act or California Water Code, any substances or parameters at any location.

8. Bypass of Treatment Facilities [40 CFR 122.41(m)]

   a. Definitions

      (1) "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility.

      (2) "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.

   b. Bypass not Exceeding Limitations

      The discharger may allow any bypass to occur which does not cause effluent limitations of this Order or the concentrations of pollutants set forth in Ocean Plan Table A or Table B to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs c. and d. of this provision.

   c. Notice

      (1) Anticipated bypass. If the discharger 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.
      (2) Unanticipated bypass. The discharger shall submit notice of an unanticipated bypass as required in section B.7 of Attachment C.

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d. Prohibition of Bypass

Bypass is prohibited, and the SDRWQCB may take enforcement action against the discharger for bypass, unless:

(1) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(2) 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

(3) The discharger submitted notices as required under paragraph c. of this section. The SDRWQCB may approve an anticipated bypass, after considering its adverse effects, if the SDRWQCB determines that it will meet the three conditions listed above in paragraph d.(1) of this section.

9. Upset [40 CFR 122.41(n)]

a. Definition "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based effluent limitations because of factors beyond the reasonable control of the discharger. 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.

b. 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 c. of this section are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

c. Conditions Necessary for a Demonstration of Upset A discharger who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

(1) An upset occurred and that the discharger can identify the cause(s) of the upset;
(2) The permitted facility was at the time being properly operated;
(3) The discharger submitted notice of the upset as required in section B.7 of Attachment C of this Order; and
(4) The discharger complied with any remedial measures required under Provision A.5. of Attachment C of this Order.

d. Burden of Proof In any enforcement proceeding the discharger seeking to establish the occurrence of an upset has the burden of proof.

10. Other Effluent Limitations and Standards [40 CFR 122.44(b)(1)]
If any toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under Section 307(a) of the Clean Water Act for a toxic pollutant which is present in the discharge and that standard or prohibition is more stringent than any limitation on the pollutant in this Order, the SDRWQCB may institute proceedings under these regulations to modify or revoke and reissue the Order to conform to the toxic effluent standard or prohibition.

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11. The discharger shall take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with this Order, including such accelerated or additional monitoring as may be necessary to determine the nature and impact of the noncomplying discharge.

12. The provisions of this Order are severable, and if any provision of this Order, or the application of any provision of this Order to any circumstances, is held invalid, the application of such provision to other circumstances, and the remainder of this Order, shall not be affected thereby.

13. The discharger shall comply with any interim effluent limitations as established by addendum, enforcement action, or revised waste discharge requirements which have been, or may be, adopted by this SDRWQCB.

B. REPORTING REQUIREMENTS

1. Duty to Reapply [40 CFR 122.41(b)] This Order expires on **February 13, 2007**. If the discharger wishes to continue any activity regulated by this Order after the expiration date of this Order, the discharger must apply for and obtain new waste discharge requirements. The discharger must file a Report of Waste Discharge in accordance with Title 23, California Code of Regulations not later than **180 days** in advance of the expiration date of this Order as application for issuance of new waste discharge requirements.

2. Duty to Provide Information [40 CFR 122.41(h)] The discharger shall furnish to the SDRWQCB, SWRCB, or USEPA, within a reasonable time, any information which the SDRWQCB, SWRCB, or USEPA may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this Order, or to determine compliance with this Order. The discharger shall also furnish to the SDRWQCB, SWRCB, or USEPA, upon request, copies of records required to be kept by this Order.

3. Planned Changes [40 CFR 122.41(l)(1)] The discharger shall give notice to the SDRWQCB as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when:

   a. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source in 40 CFR Part 122.29(b);

   b. 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 this Order, nor to notification requirements under 40 CFR 122.42(a)(l); or

   c. The alteration or addition results in a significant change in the discharger's sludge use or disposal practices, and such alteration, addition, or change may justify the application of conditions in this Order that are different from or absent in the existing Order, 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.

4. Anticipated Non-Compliance [40 CFR 122.41(l)(2)] The discharger shall give advance notice to the SDRWQCB of any planned changes in the permitted facility or activity which may result in noncompliance with the requirements of this Order.

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5. Transfers [40 CFR 122.41(l)(3)] This Order is not transferable to any person except after notice to the SDRWQCB. The SDRWQCB may require modification or revocation and reissuance of this Order to change the name of the discharger and incorporate such other requirements as may be necessary under the Clean Water Act or the California Water Code in accordance with the following:

   a. Transfers by Modification [40 CFR 122.61(a)]
   Except as provided in paragraph b. of this reporting requirement, this Order may be transferred by the discharger to a new owner or operator only if this Order has been modified or revoked and reissued, or a minor modification made to identify the new discharger and incorporate such other requirements as may be necessary under the Clean Water Act or California Water Code.

   b. Automatic Transfers [40 CFR 122.61(b)]
   As an alternative to transfers under paragraph a. of this reporting requirement, any NPDES permit may be automatically transferred to a new discharger if:

      (1) The current discharger notifies the SDRWQCB at least 30 days in advance of the proposed transfer date in paragraph b.(2) of this reporting requirement;

      (2) The notice includes a written agreement between the existing and new dischargers containing a specific date for transfer of permit responsibility, coverage, and liability between them; and

      (3) The SDRWQCB does not notify the existing discharger and the proposed new discharger of his or her intent to modify or revoke and reissue the Order. A modification under this subparagraph may also be a minor modification under 40 CFR Part 122.63. If this notice is not received, the transfer is effective on the date specified in the agreement mentioned in paragraph b.(2) of this reporting requirement.

6. Twenty-four Hour Reporting [40 CFR 122.41(l)(6)]
Each Copermittee shall develop and submit criteria by which to evaluate events of non-compliance to determine whether they pose a threat to human or environmental health. These criteria shall be submitted in the Jurisdictional Urban Runoff Management Program Document and Annual Reports for SDRWQCB review. Using these criteria the discharger shall report any noncompliance with this Order or any noncompliance that may endanger human health or environmental health. Any information shall be provided orally to the SDRWQCB within **24 hours** from the time the discharger becomes aware of the circumstances. A written description of any noncompliance shall be submitted to the SDRWQCB within **five days** of such an occurrence and 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 recurrence of the noncompliance. The following shall be included as information which must be reported within 24 hours under this reporting requirement:

   a. Any unanticipated bypass which exceeds any effluent limitation in this Order;

   b. Any discharge of treated or untreated wastewater, including reclaimed or recycled wastewater, resulting from pipeline breaks, obstruction, surcharge or any other circumstance;

   c. Any discharge or spill of raw or potable water not authorized by this order or resulting from pipeline breaks, obstruction, surcharge or any other circumstance;

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d. Any upset which exceeds any effluent limitation in this Order;

e. Any spill or discharge of non-storm water not authorized by this Order. Non-storm water discharges not prohibited by the Copermittees pursuant to Section B of this Order need not be reported under this section; and

f. Any violation of this Order.

7. Other Non-Compliance [40 CFR 122.41(l)(7)]
The discharger shall report all instances of noncompliance not reported elsewhere under other sections of this Order at the time annual reports are submitted. The reports shall contain the information listed in part B.6 of Attachment C of this Order.

8. Other Information [40 CFR 122.41(l)(8)]
Where the discharger becomes aware that it failed to submit any relevant facts in a Report of Waste Discharge, or submitted incorrect information in a Report of Waste Discharge, or in any report to the SDRWQCB, it shall promptly submit such facts or information.

9. Signatory Requirements [40 CFR 122.41(k)(1) and 40 CFR 122.22]
All applications, reports, or information submitted to the SDRWQCB shall be signed and certified.

a. All Reports of Waste Discharge shall be signed as follows:

(1) For a corporation: by a responsible corporate officer. For the purpose of this section, a responsible corporate officer means: (a) a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation; or (b) the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

(2) For a partnership or sole proprietorship: by a general partner or the proprietor, respectively; or

(3) For a municipality, State, Federal or other public agency: by either a principal executive officer or ranking elected official. For purposes of this section, a principal executive officer of a Federal agency includes: (a) the chief executive officer of the agency; or (b) a senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., Regional Administrators of USEPA).

b. All reports required by this Order, and other information requested by the SDRWQCB shall be signed by a person described in paragraph a. of this reporting requirement,

or by a duly authorized representative of that person. A person is a duly authorized representative only if:

(1) The authorization is made in writing by a person described in paragraph a. of this reporting requirement;

(2) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of

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plant 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,

(3) The written authorization is submitted to the SDRWQCB.

c. If an authorization under paragraph b. of this reporting requirement is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of paragraph b. of this reporting requirement must be submitted to the SDRWQCB prior to or together with any reports, information, or applications to be signed by an authorized representative.

d. Any person signing a document under paragraph a. or b. of this reporting requirement 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 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.

10. Except for data determined to be confidential under 40 CFR Part 2, all reports prepared in accordance with the terms of this Order shall be available for public inspection at the offices of the SDRWQCB. As required by the Clean Water Act, Reports of Waste Discharge, this Order, and effluent data shall not be considered confidential.

11. The discharger shall submit reports and provide notifications as required by this Order to the following:

DAVE GIBSON
NORTHERN WATERSHED PROTECTION UNIT
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION
9174 SKY PARK COURT, SUITE 100
SAN DIEGO CA 92123-4340
Telephone: (858) 467-4387 Fax: (858) 571-6972

EUGENE BROMLEY
US ENVIRONMENTAL PROTECTION AGENCY
REGION IX
PERMITS ISSUANCE SECTION (W-5-1)
75 HAWTHORNE STREET
SAN FRANCISCO CA 94105

12. Unless otherwise directed, the discharger shall submit three copies of each report required under this Order to the SDRWQCB and one copy to USEPA.

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C. NOTIFICATIONS

1. California Water Code Section 13263(g)
   No discharge of waste into the waters of the state, whether or not such discharge is made pursuant to waste discharge requirements, shall create a vested right to continue such discharge. All discharges of waste into waters of the state are privileges, not rights.

2. The SDRWQCB has, in prior years, issued a limited number of individual NPDES permits for non-storm water discharges to municipal storm water conveyance systems. The SDRWQCB or SWRCB may in the future, upon prior notice to the Copermittee(s), issue an NPDES permit for any non-storm water discharge (or class of non-storm water discharges) to a municipal storm water conveyance system. Copermittees may prohibit any non-storm water discharge (or class of non-storm water discharges) to a municipal storm water conveyance system that is authorized under such separate NPDES permits.

3. Enforcement Provisions [40 CFR 122.41(a)(2)] [California Water Code §§ 13385 and 13387]
   The Clean Water Act provides that any person who violates section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any condition or limitation of this Order, 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 of this Order, is subject to criminal penalties of $2,500 to $25,000 per day of violation, or imprisonment of not more than one 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 two 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 three 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 six years, or both. Any person who knowingly violates section 301, 302, 303, 306, 307, 308, 318 or 405 of the Act, or any condition or limitation of this Order, and who knows at that time that he or she 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 Clean Water Act, 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.

4. Except as provided in Standard Provisions A.10. and A.11. in Attachment C of this Order, nothing in this Order shall be construed to relieve the discharger from civil or criminal penalties for noncompliance.

5. Nothing in this Order shall be construed to preclude the institution of any legal action or relieve the discharger from any responsibilities, liabilities, or penalties to which the discharger is or may be subject to under Section 311 of the Clean Water Act.

6. Nothing in this Order shall be construed to preclude institution of any legal action or relieve the discharger from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority preserved by Section 510 of the Clean Water Act.

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7. This Order shall become effective on **February 13, 2002**, provided the USEPA Regional Administrator has no objection. If the Regional Administrator objects to its issuance, this Order shall not become effective until such objection is withdrawn.

8. This Order supersedes Order No. 96-03 upon the effective date of this Order.

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ATTACHMENT D

GLOSSARY

Beneficial Uses - The uses of water necessary for the survival or well being of man, plants, and wildlife. These uses of water serve to promote the tangible and intangible economic, social, and environmental goals "Beneficial Uses" of the waters of the State that may be protected against 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. Existing beneficial uses are uses that were attained in the surface or ground water on or after November 28, 1975; and potential beneficial uses are uses that would probably develop in future years through the implementation of various control measures. "Beneficial Uses" are equivalent to "Designated Uses" under federal law. [California Water Code Section 13050(f)].

Best Available Technology (BAT) – BAT is the acronym for best available technology economically achievable. BAT is the technology-based standard established by congress in CWA section 402(p)(3)(A) for industrial dischargers of storm water. Technology-based standards establish the level of pollutant reductions that dischargers must achieve, typically by treatment or by a combination of treatment and best management practices, or BMPs. For example, secondary treatment (or the removal of 85% suspended solids and BOD) is the BAT for suspended solid and BOD removal from a sewage treatment plant. BAT generally emphasizes treatment methods first and pollution prevention and source control BMPs secondarily.

The best economically achievable technology that will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Environmental Protection Agency Administrator. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the permitting authority deems appropriate.

Best Conventional Technology (BCT) – BCT is an acronym for Best Conventional Technology. BCT is the treatment techniques, processes and procedure innovations, operating methods that eliminate amounts of chemical, physical, and biological characteristics of pollutant constituents to the degree of reduction attainable through the application of the best management practices to the maximum extent practicable.

Best Management Practices - Best Management Practices (BMPs) are defined in 40 CFR 122.2 as 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. In the case of municipal storm water permits, BMPs are typically used in place of numeric effluent limits.

Bioaccumulate - The progressive accumulation of contaminants in the tissues of organisms through any route including respiration, ingestion, or direct contact with contaminated water, sediment, pore water, or dredged material to a higher concentration than in the surrounding environment. Bioaccumulation occurs with exposure and is independent of the tropic level.

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Bioassessment - The use of biological community information to evaluate the biological integrity of a water body and its watershed. With respect to aquatic ecosystems, bioassessment is the collection and analysis of samples of the benthic macroinvertebrate community together with physical/habitat quality measurements associated with the sampling site and the watershed to evaluate the biological condition (i.e. biological integrity) of a water body.

Bioconcentration – A process by which there is a net accumulation of a chemical directly from water into aquatic organisms resulting from simultaneous uptake and elimination by gill or epithelial tissue. Bioconcentration differs from bioaccumulation in that bioaccumulation refers to the progressive concentration of contaminants in the tissues of organisms through multiple pathways.

Biocriteria - Under the Clean Water Act, numerical values or narrative expressions that define a desired biological condition for a water body that are legally enforceable. The U.S. EPA defines biocriteria as: "numerical values or narrative expressions that describe the reference biological integrity of aquatic communities inhabiting waters of a given designated aquatic life use...(that)...describe the characteristics of water body segments least impaired by human activities."

Biological Integrity - Defined in Karr J.R. and D.R. Dudley. 1981. Ecological perspective on water quality goals. Environmental Management 5:55-68 as: "A balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of natural habitat of the region." Also referred to as ecosystem health.

Biomagnication – The transfer and progressive increase in tissue concentrations of a contaminant along the food chain. Because some pollutants can be transferred to higher trophic levels, carnivores at the top of the food chain, such as predatory fish, birds, and mammals (including humans), obtain most of their pollution burden from aquatic ecosystems by ingestion. Thus, although such pollutants may only be present in receiving waters in low concentrations, they can have a significant impact to the integrity of the ecosystem through biomagnification.

Clean Water Act Section 402(p) - [33 USC 1342(p)] is the federal statute requiring municipal and industrial dischargers to obtain NPDES permits for their discharges of storm water.

Clean Water Act Section 303(d) Water Body - is an impaired water body in which water quality does not meet applicable water quality standards and/or is not expected to meet water quality standards, even after the application of technology based pollution controls required by the CWA. The discharge of urban runoff to these water bodies by the Copermittees is significant because these discharges can cause or contribute to violations of applicable water quality standards.

Contamination - As defined in the Porter-Cologne Water Quality Control Act, contamination is "an impairment of the quality of waters of the state by waste to a degree which creates a hazard to the 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."

Designated Waste - Designated waste is defined as a "nonhazardous waste which consists of pollutants which, under ambient environmental conditions at the waste management unit, could be released at concentrations in excess of applicable water quality objectives, or which could cause degradation of waters of the state." [CCR Title 27, Chapter 3, Subchapter 2, Article 2, Section 20210; WC Section 13173]

Effluent Limitations - Limitations on the volume of each waste discharge, and the quantity and concentrations of pollutants in the discharge. The limitations are designed to ensure that the

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discharge does not cause water quality objectives to be exceeded in the receiving water and does not adversely affect beneficial uses.

Effluent limitations are limitations of the quantity and concentrations of pollutants in a discharge. The limitations are designed to ensure that the discharge does not cause water quality objectives to be exceeded in the receiving water and does not adversely affect beneficial uses. In other words, an effluent limit is the maximum concentration of a pollutant that a discharge can contain. To meet effluent limitations, the effluent typically must undergo one or more forms of treatment to remove pollutants in order to lower the pollutant concentration below the limit. Effluent limits are typically numeric (e.g., 10 mg/l), but can also be narrative (e.g., no toxics in toxic amounts).

Erosion – When land is diminished or warn 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.

Grading - The cutting and/or filling of the land surface to a desired slope or elevation.

Hazardous Waste - Hazardous waste is defined as "any waste which, under Section 600 of Title 22 of this code, is required to be managed according to Chapter 30 of Division 4.5 of Title 22 of this code." [CCR Title 22, Division 4.5, Chapter 11, Article 1]

Illicit Discharge - 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 form the municipal separate storm sewer) and discharges resulting from fire fighting activities.

Inert Waste - Inert waste is defined as one that "does not contain hazardous waste or soluble pollutants at concentrations in excess of applicable water quality objectives, and does not contain significant quantities of decomposable waste." [CCR Title 27, Chapter 3, Subchapter 2, Article 2, Section 20230]

MEP – MEP is the acronym for Maximum Extent Practicable. MEP is the technology-based standard established by Congress in CWA section 402(p)(3)(B)(iii) that municipal dischargers of storm water (MS4s) must meet. Technology-based standards establish the level of pollutant reductions that dischargers must achieve, typically by treatment or by a combination of treatment and best management practices (BMPs). MEP generally emphasizes pollution prevention and source control BMPs primarily (as the first line of defense) in combination with treatment methods serving as a backup (additional line of defense). MEP considers economics and is generally, but not necessarily, less stringent than BAT. A definition for MEP is not provided either in the statute or in the regulations. Instead the 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 Urban Runoff Management Plan. Their total collective and individual activities conducted pursuant to the Urban Runoff Management 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 system maintenance). In the absence of a proposal acceptable to the SDRWQCB, the SDRWQCB defines MEP.

In a memo dated February 11, 1993, entitled "Definition of Maximum Extent Practicable," Elizabeth Jennings, Senior Staff Counsel, SWRCB addressed the achievement of the MEP standard as follows:

> *"To achieve the MEP standard, municipalities must employ whatever Best Management Practices (BMPs) are technically feasible (i.e., are likely to be effective) and are not cost*

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prohibitive. The major emphasis is on technical feasibility. Reducing pollutants to the MEP means choosing effective BMPs, and rejecting applicable BMPs only where other effective BMPs will serve the same purpose, or the BMPs would not be technically feasible, or the cost would be prohibitive. In selecting BMPs to achieve the MEP standard, the following factors may be useful to consider:

a. *Effectiveness: Will the BMPs address a pollutant (or pollutant source) of concern?*
b. *Regulatory Compliance: Is the BMP in compliance with storm water regulations as well as other environmental regulations?*
c. *Public Acceptance: Does the BMP have public support?*
d. *Cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefits to be achieved?*
e. *Technical Feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc?*

The final determination regarding whether a municipality has reduced pollutants to the maximum extent practicable can only be made by the Regional or State Water Boards, and not by the municipal discharger. If a municipality reviews a lengthy menu of BMPs and chooses to select only a few of the least expensive, it is likely that MEP has not been met. On the other hand, if a municipal discharger employs all applicable BMPs except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit derived, it would have met the standard. Where a choice may be made between two BMPs that should provide generally comparable effectiveness, the discharger may choose the least expensive alternative and exclude the more expensive BMP. However, it would not be acceptable either to reject all BMPs that would address a pollutant source, or to pick a BMP base solely on cost, which would be clearly less effective. In selecting BMPs the municipality must make a serious attempt to comply and practical solutions may not be lightly rejected. In any case, the burden would be on the municipal discharger to show compliance with its permit. After selecting a menu of BMPs, it is the responsibility of the discharger to ensure that all BMPs are implemented."

Municipal Storm Water Conveyance System – (See Municipal Separate Storm Sewer System or MS4).

Municipal Separate Storm Sewer System (MS4) – MS4 is an acronym for Municipal Separate Storm Sewer System. A Municipal Separate Storm Sewer System is a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, natural drainage features or channels, modified natural channels, 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 designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designated or used for collecting of conveying storm water; (iii) Which is not a combined sewer; (iv) Which is not part of the Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

Historic and current development make use of natural drainage patterns and features as conveyances for urban runoff. Urban streams used in this manner are part of the municipalities MS4 regardless of whether they are natural, man-made, or partially modified features. In these cases, the urban stream is both an MS4 and a receiving water.

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National Pollution Discharge Elimination System (NPDES) - These permits pertain to the discharge of waste to surface waters only. All State and Federal NPDES permits are also WDRs.

Non-hazardous Solid Waste - Non-hazardous solid waste means all putrescible and nonputrescible solid, semi-sold, 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, manure, vegetable or animal solid and semi-sold wastes and other discarded solid or semi-solid waste; provided that such wastes do not contain wastes which must be managed as hazardous wastes, or wastes which contain soluble pollutants in concentration which exceed applicable water quality objectives or could cause degradation of wasters of the state." [CCR Title 27, Chapter 3, Subchapter 2, Article 2, Section 20220]

Non Point Source (NPS) – Non point source refers to diffuse, widespread sources of pollution. These sources may be large or small, but are generally numerous throughout a watershed. Non Point Sources include but are not limited to urban, agricultural, or industrial areas, roads, highways, construction sites, communities served by septic systems, recreational boating activities, timber harvesting, mining, livestock grazing, as well as physical changes to stream channels, and habitat degradation. NPS pollution can occur year round any time rainfall, snowmelt, irrigation, or any other source of water runs over land or through the ground, picks up pollutants from these numerous, diffuse sources and deposits them into rivers, lakes, and coastal waters or introduces them into ground water.

Non-Storm Water - Non-storm water consists of all discharges to and from a storm water conveyance system that do not originate from precipitation events (i.e., all discharges from a conveyance system other than storm water). Non-storm water includes illicit discharges, non-prohibited discharges, and NPDES permitted discharges. An illicit discharge is defined at 40 CFR 122.26(b)(2) as any discharge to a municipal storm water conveyance system that is not composed entirely of storm water except discharges pursuant to a separate NPDES permit and discharges resulting from emergency fire fighting activities.

Nuisance - As defined in the Porter-Cologne Water Quality Control Act a nuisance is "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."

Numeric effluent limitations - The typical method by which effluent limits are prescribed for pollutants in waste discharge requirements implementing the federal NPDES regulations. When numeric effluent limits are met at the "end-of-pipe", the effluent discharge generally will not cause water quality standards to be exceeded in the receiving waters (i.e., water quality standards will also be met).

Person - A person is defined as an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof. [40 CFR 122.2].

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.

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Pollution - As defined in the Porter-Cologne Water Quality Control Act, pollution is "the alteration of the quality of the waters of the State by waste, to a degree that unreasonably affects the either of the following: A) The waters for beneficial uses; or 2) Facilities that serve these beneficial uses." Pollution may include contamination.

Pollutant - A pollutant is broadly defined 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.

Pollution Prevention - Pollution prevention is defined as practices and processes that reduce or eliminate the generation of pollutants, in contrast to source control, treatment, or disposal.

Post-Construction BMPs - A subset of BMPs including structural and non-structural controls which detain, retain, filter, or educate to prevent the release of pollutants to surface waters during the final functional life of development.

Pre-Development Runoff Conditions - The 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-induces land activities occurred. This definition pertains to redevelopment as well as initial development.

Receiving Water Limitations - Waste discharge requirements issued by the SDRWQCB typically include both: (1) "Effluent Limitations" (or "Discharge Limitations") that specify the technology-based or water-quality-based effluent limitations; and (2) "Receiving Water Limitations" that specify the water quality objectives in the Basin Plan as well as any other limitations necessary to attain those objectives. In summary, the "Receiving Water Limitations" provision is the provision used to implement the requirement of CWA section 301(b)(1)(C) that NPDES permits must include any more stringent limitations necessary to meet water quality standards.

Sediment - Soil, sand, and minerals washed from land into water. Sediment resulting from anthropogenic sources (i.e. human induced land disturbance activities) is considered a pollutant. This Order regulates only the discharges of sediment from anthropogenic sources and does not regulate naturally occurring sources of sediment. Sediment can destroy fish-nesting areas, clog animal habitats, and cloud waters so that sunlight does not reach aquatic plants.

Storm Water - "Storm water" is as defined urban runoff and snowmelt runoff consisting only of those discharges which originate from precipitation events. Storm water is that portion of precipitation that flows across a surface to the storm drain system or receiving waters. Examples of this phenomenon include: the water that flows off a building's roof when it rains (runoff from an impervious surface); the water that flows into streams when snow on the ground begins to melt (runoff from a semi-pervious surface); and the water that flows from a vegetated surface when rainfall is in excess of the rate at which it can infiltrate into the underlying soil (runoff from a pervious surface). When all factors are equal, runoff increases as the perviousness of a surface decreases. During precipitation events in urban areas, rain water picks up and transports pollutants through storm water conveyance systems, and ultimately to waters of the United States.

Toxicity - Adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies). The water quality objectives for toxicity provided in the Water Quality Control Plan, San Diego Basin, Region 9, (Basin Plan), state in part... *"All waters shall be free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life....The survival of aquatic life in surface waters subjected to a waste*

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discharge or other controllable water quality factors, shall not be less than that for the same water body in areas unaffected by the waste discharge".... Urban runoff discharges from MS4s are considered toxic when (1) the toxic effect observed in an acute toxicity test exceeds zero Toxic Units Acute (Tua=0); or (2) the toxic effect observed in a chronic toxicity test exceeds one Toxic Unit Chronic (Tuc=1). Urban runoff discharges from MS4s often contain pollutants that cause toxicity.

Total Maximum Daily Load (TMDL) - The TMDL is the maximum amount of a pollutant that can be discharged into a water body from all sources (point and non-point) and still maintain water quality standards. Under Clean Water Act section 303(d), TMDLs must be developed for all water bodies that do not meet water quality standards after application of technology-based controls.

Urban Runoff - Urban runoff is defined 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).

Waste - As defined in California Water Code Section 13050(d), "waste includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal."

Article 2 of CCR Title 23, Chapter 15 (Chapter 15) contains a waste classification system which applies to solid and semi-solid waste which cannot be discharged directly or indirectly to water of the state and which therefore must be discharged to land for treatment, storage, or disposal in accordance with Chapter 15. There are four classifications of waste (listed in order of highest to lowest threat to water quality): hazardous waste, designated waste, nonhazardous solid waste, and inert waste.

Water Quality Objective - Numerical or narrative limits on constituents or characteristics of water designated to protect designated beneficial uses of the water. [California Water Code Section 13050 (h)]. California's water quality objectives are established by the State and Regional Water Boards in the Water Quality Control Plans.

As stated in the Porter-Cologne Requirements for discharge (CWC 13263): "(Waste discharge) 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 objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241."

A more comprehensive list of legal authority containing water quality objectives applicable to this Order can be found in Finding 37 and in Section VII Directives Discussion Underlying Broad Legal Authority for Order R9-2002-0001 pp. 76-78.

Numeric or narrative limits for pollutants or characteristics of water designed to protect the beneficial uses of the water. In other words, a water quality objective is the maximum concentration of a pollutant that can exist in a receiving water and still generally ensure that the beneficial uses of the receiving water remain protected (i.e., not impaired). Since water quality objectives are designed specifically to protect the beneficial uses, when the objectives are violated the beneficial uses are, by definition, no longer protected and become impaired. This is a fundamental concept under the Porter Cologne Act. Equally fundamental is Porter Cologne's definition of pollution. A condition of pollution exists when the water quality needed to support designated beneficial uses has become unreasonably affected or impaired; in other words, when

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the water quality objectives have been violated. These underlying definitions (regarding beneficial use protection) are the reason why all waste discharge requirements implementing the federal NPDES regulations require compliance with water quality objectives. (Water quality objectives are also called water quality criteria in the Clean Water Act.)

Water Quality Standards - are defined 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.

Waters of the State - Any water, surface or underground, including saline waters within the boundaries of the State [California Water Code Section 13050 (e)]. The definition of the Waters of the State is broader than that for the Waters of the United States in that all water in the State is considered to be a Waters of the State regardless of circumstances or condition. Under this definition, a Municipal Separate Storm Sewer System (MS4) is always considered to be a Waters of the State.

Waters of the United States - Waters of the United States can be broadly defined as navigable surface waters and all tributary surface waters to navigable surface waters. Groundwater is not considered to be a Waters of the United States.

As defined in the 40 CFR 122.2, the Waters of the U.S. are defined as: **"(a) All 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;** (b) All interstate waters, including interstate "wetlands;" (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for industrial purposes by industries in interstate commerce; (d) All impoundments of waters otherwise defined as waters of the United States under this definition; **(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;** (f) The territorial seas; and (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with the EPA."

Watershed - That geographical area which drains to a specified point on a water course, usually a confluence of streams or rivers (also known as drainage area, catchment, or river basin).

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ATTACHMENT E

DRY WEATHER MONITORING PROGRAM SPECIFICATIONS - URBAN RUNOFF

E.1 Dry Weather Monitoring Program

Each Copermittees shall review and revise as necessary its Dry Weather Monitoring Program to comply with section F.5 of this Order. The Dry Weather Monitoring Program for each Copermittee shall meet or exceed the specifications of this Attachment. The objectives of the Dry Weather Monitoring Program are:

- Assessing compliance with Order No. R9-2002-0001;
- Detect and eliminate illicit discharges and illegal connections to the MS4; and
- Characterize urban runoff within the MS4 system with respect to water quality constituents that may cause or contribute to exceedances of receiving water quality objectives when discharged to receiving waters.

E.2 Dry Weather Monitoring Program Document

Based upon a review of its Detection/Elimination of Illegal Discharges and Illicit Connections Program, each Copermittee shall revise or develop a Dry Weather Monitoring Program Document that meets or exceeds the specifications listed in section E.4 of this Attachment. The Dry Weather Monitoring Program shall be designed and implemented to address the objectives listed in section E.1 of this Attachment. Each Copermittee shall submit its Dry Weather Monitoring Program to the Principal Permittee as part of its Jurisdictional Urban Runoff Management Program Document on the date prescribed by the Principal Permittee. The Principal Permittee shall collectively submit the dry weather monitoring maps and procedures to the SDRWQCB within **365** days of adoption of this Order.

E.3 Implementation of the Dry Weather Monitoring Program

Each Copermittee shall implement its Dry Weather Monitoring Program by May 1, 2003. Following the adoption of this Order and prior to implementation of the Dry Weather Monitoring Program under the Jurisdictional URMP, each Copermittee shall continue to implement the Illicit Discharge and Illegal Connection programs and commitments described in the Orange County Water Quality Monitoring Program (99-04 Plan) and the proposed Drainage Area Management Plan (DAMP).

E.4 Dry Weather Monitoring Program Specifications

Each Copermittee shall develop or revise its Dry Weather Monitoring Program to meet or exceed the following requirements:

a. Develop MS4 Map: Each Copermittee shall develop or obtain an up-to-date labeled map of its entire municipal separate storm sewer system (MS4) and the corresponding drainage watersheds within its jurisdiction. The use of a Geographic Information System (GIS) is highly recommended, but not required. The accuracy of the MS4 map shall be confirmed and updated at least annually during monitoring activities.

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b. Monitoring Stations: Based upon a review of its past Dry Weather Monitoring Programs, each Copermittee shall select dry weather monitoring stations within its jurisdiction to be monitored in the Dry Weather Monitoring Program.

(1) Each Copermittee shall develop or revise its program to describe the rationale used to determine the number and locations of stations necessary to comply with the Order.
(2) Each Copermittee shall confirm that each major drainage area within its jurisdiction contains at least one station.
(3) Stations shall be either major outfalls or other outfall points (or any other point of access such as manholes) located throughout the MS4 to provide adequate coverage of the entire MS4 system.
(4) Each Copermittee shall clearly identify each dry weather monitoring station on its MS4 Map as either a separate GIS layer or a map overlay hereafter referred to as a Dry Weather Monitoring Stations Map.

c. Determining Sampling Frequency: Dry weather analytical and field screening monitoring shall be conducted at each identified station at least twice between May 1st and September 30th of each year or as more frequently as the Copermittee determines is necessary to comply with the requirements of Section F.5 of the Order.

(1) Each Copermittee shall develop or revise written procedures that describe the criteria and process used to determine the number and frequency of inspections, field screening and analytical monitoring to be performed.
(2) Any changes in Dry Weather Monitoring inspection or sampling frequency shall be described and reported in detail annually in the Dry Weather Monitoring Report section of the Jurisdictional URMP Annual Report.

d. Develop Dry Weather Analytical Monitoring Procedures: Each Copermittee shall develop or revise written procedures for dry weather analytical and field screening monitoring (consistent with 40 CFR part 136), that shall include field observations, field screening monitoring, and analytical monitoring.

(1) The Dry Weather Monitoring Program shall be designed to emphasize frequent, geographically widespread inspections, monitoring, and follow up investigations to detect illicit discharges and illegal connections. At a minimum, the procedures must be based on or incorporate the following guidelines and criteria:
(a) At each site inspected or sampled, record general information such as time since last rain, quantity of last rain, site descriptions (i.e., conveyance type, dominant watershed land uses), flow estimation (i.e., width of water surface, approximate depth of water, approximate flow velocity, flow rate), and visual observations (e.g., odor, color, clarity, floatables, deposits/stains, vegetation condition, structural condition, and biology).
(b) If flow or ponded runoff is observed at a station and there has been at least seventy-two (72) hours of dry weather, shall make observations and collect at least one (1) set of grab samples for field screening and/or analytical testing that meets or exceeds the requirements of section E.4.d.1.d (Field Screening Parameters) or E.4.d.1.e (Analytical Monitoring Parameters).
(c) Perform field screening analysis on all sites with ponded or flowing water and at a minimum collect samples at no less than 25% of these sites for analytical testing.
(d) Field Screening Monitoring Parameters: At a minimum, conduct field screening analysis of the following constituents:
(1) Specific conductance (calculate estimated Total Dissolved Solids).
(2) Turbidity
(3) pH

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(4) Reactive Phosphorous
(5) Nitrate Nitrogen
(6) Ammonia Nitrogen
(7) Phenol
(8) Surfactants (MBAS)

(e) Analytical Monitoring Parameters: At a minimum, collect samples for analytical laboratory analysis of the following constituents:
(1) Total Hardness
(2) Oil and Grease
(3) Diazinon and Chlorpyrifos
(4) Cadmium (Dissolved)
(5) Copper (Dissolved)
(6) Lead (Dissolved)
(7) Zinc (Dissolved)
(8) Enterococcus Bacteria
(9) Total Coliform Bacteria
(10) Fecal Coliform Bacteria

(f) If the station is dry (no flowing or ponded runoff), make and record all applicable observations and select another station from the list of alternate stations for monitoring.

(2) The Dry Weather Monitoring Program shall include criteria for dry weather inspection, analytical and field screening monitoring results whereby exceedance of the criteria will require follow-up investigations to be conducted to identify the source causing the exceedance of the criteria.
(3) Dry weather analytical and field screening monitoring stations identified to exceed dry weather monitoring criteria for any constituents shall continue to be screened in subsequent years.
(4) The Dry Weather Monitoring Program shall include procedures for source identification follow up investigations in the event of exceedance of dry weather analytical and field screening monitoring result criteria. These procedures shall be consistent with procedures required in section F.5.c. of this Order.
(5) The Dry Weather Monitoring Program shall include procedures to eliminate detected illicit discharges and connections. These procedures shall be consistent with each Copermittee's Illicit Discharge and Elimination component of its Jurisdictional Urban Runoff Management Plan as discussed in section F.5 of this Order.
(6) During monitoring, the accuracy of its MS4 map and shall be confirmed. Correct any inaccuracies in either the MS4 map or the Dry Weather Monitoring Stations Map and resubmit the corrected maps in the next annual report.

E.5 Summarize and Report Dry Weather Monitoring Results

As part of its individual Jurisdictional URMP Annual Report, each Copermittee shall summarize and report on its Dry Weather Monitoring Program results. The data shall be presented in tabular and graphical form. The reporting shall include all inspection, field screening, and analytical monitoring results. Each Copermittee shall also report all follow up and elimination activities for potential illicit discharges and connections undertaken by the Copermittee during that year. Dry weather analytical monitoring reports shall comply with all monitoring and standard reporting requirements in Attachments B and C of Order R9-2002-0001. The Principal Permittee shall submit to the SDRWQCB the individual Dry Weather Monitoring reports as part of the unified Jurisdictional URMP Annual Report prior to November 9, 2003, and every year thereafter.

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California Regional Water Quality Control Board
San Diego Region

Waste Discharge Requirements for Discharges of Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watershed of the County of Orange, The Incorporated Cities of Orange County, and The Orange County Flood Control District Within the San Diego Region

Order No. R9-2009-0002
NPDES NO. CAS0108740

December 16, 2009

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To request copies of the Orange County Municipal Storm Water Permit, please contact Ben Neill, Water Resources Control Engineer at (858) 467 – 2983, bneill@waterboards.ca.gov

Documents also are available at: http://www.waterboards.ca.gov/sandiego

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WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES OF RUNOFF FROM THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s) DRAINING THE WATERSHED OF THE COUNTY OF ORANGE, THE INCORPORATED CITIES OF ORANGE COUNTY, AND THE ORANGE COUNTY FLOOD CONTROL DISTRICT WITHIN THE SAN DIEGO REGION

Adopted by the
California Regional Water Quality Control Board
San Diego Region
on December 16, 2009

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STATE OF CALIFORNIA

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San Diego Region

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Wayne Rayfield	Water Quality
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This permit was prepared under the direction of

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The California Regional Water Quality Control Board, San Diego Region (hereinafter Regional Board), finds that:

A. BASIS FOR THE ORDER

1. This Order is based on the federal Clean Water Act (CWA), the Porter-Cologne Water Quality Control Act (Division 7 of the Water Code, 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 Resources Control Board (State Board), the Water Quality Control Plan for the San Diego Basin adopted by the Regional Board, the California Toxics Rule, and the California Toxics Rule Implementation Plan.

2. This Order reissues National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0108740, which was first adopted by the Regional Board on July 16, 1990 (Order No. 90-38), and then reissued on August 8, 1996 (Order No. 96-03) and February 13, 2002 (Order No. R9-2002-01). On August 21, 2006, in accordance with Order No. R9-2002-01, the County of Orange, as the Principal Copermittee, submitted a Report of Waste Discharge (ROWD) for reissuance of the municipal separate storm sewer system (MS4) Permit.

3. This Order is consistent with the following precedential Orders adopted by the State Water Resources Control Board (State Board) addressing MS4 NPDES Permits: Order 99-05, Order WQ-2000-11, Order WQ 2001-15, Order WQO 2002-0014, and Order WQ-2009-0008 (*SWRCB/OCC FILE A-1780).*

4. The Fact Sheet / Technical Report for the Order No. R9-2009-0002, NPDES No. CAS0108740, Waste Discharge Requirements for Discharges of Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of Orange, the Incorporated Cities of Orange County, and the Orange County Flood Control District Within the San Diego Region includes cited regulatory and legal references and additional explanatory information and data 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 into these findings.

B. REGULATED PARTIES

1. Each of the persons in Table 1 below, hereinafter called Copermittees or dischargers, owns or operates an MS4, through which it discharges runoff into waters of the United States within the San Diego 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

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violation of a water quality standard; or (4) an MS4 which is a significant contributor of pollutants to waters of the United States (waters of the U.S).

Table 1. Municipal Copermittees

1. City of Aliso Viejo	8. City of Mission Viejo
2. City of Dana Point	9. City of Rancho Santa Margarita
3. City of Laguna Beach	10. City of San Clemente
4. City of Laguna Hills	11. City of San Juan Capistrano
5. City of Laguna Niguel	12. County of Orange
6. City of Laguna Woods	13. Orange County Flood Control District
7. City of Lake Forest	

C. DISCHARGE CHARACTERISTICS

1. Runoff discharged from an MS4 contains waste, as defined in the California Water Code (CWC), and pollutants that adversely affect the quality of the waters of the State. The discharge of runoff from an MS4 is a "discharge of pollutants from a point source" into waters of the U.S. as defined in the CWA.

2. MS4 storm water and non-storm water discharges are likely to contain pollutants that cause or threaten to cause a violation of water quality standards, as outlined in the Regional Board's Water Quality Control Plan for the San Diego Basin (Basin Plan). Storm water and non-storm water discharges from the MS4 are subject to the conditions and requirements established in the San Diego Basin Plan for point source discharges. These surface water quality standards must be complied with at all times, irrespective of the source and manner of discharge.

3. The most common categories of pollutants in runoff include 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 (decaying vegetation, animal waste); detergents; and trash.

4. The discharge of pollutants and/or increased flows from MS4s may cause or threaten to cause the concentration of pollutants to exceed applicable receiving water quality objectives and/or impair or threaten to impair designated beneficial uses resulting in a condition of pollution (i.e., unreasonable impairment of water quality for designated beneficial uses), contamination, or nuisance.

5. Pollutants in runoff can threaten and adversely affect human health. Human illnesses have been clearly linked to recreating near storm drains flowing to coastal waters. Also, runoff pollutants in receiving waters can bioaccumulate in the tissues of invertebrates and fish, which may be eventually consumed by humans.

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6. Runoff discharges from MS4s often contain pollutants that cause toxicity to aquatic organisms (i.e., adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies). Toxic pollutants impact the overall quality of aquatic systems and beneficial uses of receiving waters.

7. The Copermittees discharge runoff into lakes, drinking water reservoirs, rivers, streams, creeks, bays, estuaries, coastal lagoons, the Pacific Ocean, and tributaries thereto within one of the eleven hydrologic units (San Juan Hydrologic Unit) comprising the San Diego Region as shown in Tables 2a and 2b. Some of the receiving water bodies have been designated as impaired by the Regional Board and the United States Environmental Protection Agency (USEPA) in 2006 pursuant to CWA section 303(d). Also shown in the Tables are the watershed management areas (WMAs) as defined in the Regional Board report, Watershed Management Approach, January 2002.

Table 2a. Common Watersheds and CWA Section 303(d) Impaired Waters

Regional Board Watershed Management Area (WMA)	**Hydrologic Area (HA) or Hydrologic Subarea (HSA) of the San Juan Hydrologic Unit**	**Major Receiving Water Bodies**	**303(d) Pollutant(s)/stressor or Water Quality Effect[1]**
Laguna Coastal Streams	Laguna HA, excluding Aliso HSA and Dana Point HSA	Laguna Canyon Creek, Pacific Ocean	Bacterial indicators Sediment toxicity
Aliso Creek	Aliso HSA	Aliso Creek, English Canyon, Pacific Ocean	Toxicity Phosphorus Bacterial indicators Benzo[b]fluoranthene Dieldrin Sediment Toxicity
Dana Point Coastal Streams	Dana Point HSA	Dana Point Harbor, Salt Creek, Pacific Ocean	Bacterial indicators
San Juan Creek	Mission Viejo HA	San Juan Creek, Trabuco Creek, Oso Creek, Canada Gobernadora, Bell Canyon, Verdugo Canyon, Pacific Ocean	Bacterial indicators DDE Chloride Sulfates Total dissolved solids

[1] The listed 303(d) pollutant(s) do not necessarily reflect impairment of the entire corresponding WMA or all corresponding major surface water bodies. The specific impaired portions of each WMA are listed in the State Water Resources Control Board's 2006 Section 303(d) List of Water Quality Limited Segments.

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Table 2a. Common Watersheds and CWA Section 303(d) Impaired Waters

Regional Board Watershed Management Area (WMA)	Hydrologic Area (HA) or Hydrologic Subarea (HSA) of the San Juan Hydrologic Unit	Major Receiving Water Bodies	303(d) Pollutant(s)/stressor or Water Quality Effect[1]
San Clemente Coastal Streams	San Clemente HA	Prima Deshecha, Segunda Deshecha, Pacific Ocean	Bacterial indicators Phosphorus Turbidity
San Mateo Creek	San Mateo HA	San Mateo Creek, Christianitos Creek, Pacific Ocean	

Table 2b. Common Watersheds and Municipalities

Municipality	Laguna Coastal Streams	Aliso Creek	Dana Point Coastal Streams	San Juan Creek	San Clemente Coastal Streams	San Mateo Creek
Aliso Viejo	☑	☑				
Dana Point			☑	☑		
Laguna Beach	☑	☑				
Laguna Hills *		☑		☑		
Laguna Niguel		☑	☑	☑		
Laguna Woods *		☑				
Lake Forest *		☑				
Mission Viejo		☑		☑		
Rancho Santa Margarita				☑		
San Clemente					☑	☑
San Juan Capistrano				☑		
County of Orange *	☑	☑	☑	☑	☑	☑
Orange County Flood Control District *	☑	☑	☑	☑	☑	
* Municipality also includes areas within watersheds of the Santa Ana Regional Board that are outside the scope of this Order						

8. Trash is a persistent pollutant which can enter receiving waters from the MS4 resulting in accumulation and transport in receiving waters over time. Trash poses a serious threat to the Beneficial Uses of the receiving waters, including, but not limited to, human health, rare and endangered species, navigation and human recreation.

9. The Copermittees' water quality monitoring data submitted to date documents persistent violations of Basin Plan water quality objectives for various runoff-related pollutants (fecal coliform bacteria, total suspended solids, turbidity, metals, etc.) at

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various watershed monitoring stations. Persistent toxicity has also been observed at some watershed monitoring stations. In addition, bioassessment data indicates that the majority of urbanized receiving waters have Poor to Very Poor Index of Biotic Integrity ratings. In sum, the above findings indicate that runoff discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in Orange County.

10. When natural vegetated pervious ground cover is converted to impervious surfaces such as paved highways, streets, rooftops, and parking lots, the natural absorption and infiltration abilities of the land are lost. Therefore, runoff leaving a developed area is significantly greater in runoff volume, velocity, and peak flow rate than pre-development runoff from the same area. Runoff durations can also increase as a result of flood control and other efforts to control peak flow rates. Increased volume, velocity, rate, and duration of runoff, and decreased natural clean sediment loads, greatly accelerate the erosion of downstream natural channels. Significant declines in the biological integrity and physical habitat of streams and other receiving waters have been found to occur with as little as a 3-5 percent conversion from natural to impervious surfaces. The increased runoff characteristics from new development must be controlled to protect against increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

11. Development creates new pollution sources as human population density increases and brings with it proportionately higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, household hazardous wastes, pet wastes, trash, etc. which can either be washed or directly dumped into the MS4. As a result, the runoff leaving the developed urban area is significantly greater in pollutant load than the pre-development runoff from the same area. These increased pollutant loads must be controlled to protect downstream receiving water quality.

12. Development and urbanization especially threaten environmentally sensitive areas (ESAs), such as water bodies designated as supporting a RARE beneficial use (supporting rare, threatened or endangered species) and CWA 303(d)-impaired water bodies. Such areas have a much lower capacity to withstand pollutant shocks than might be acceptable in other areas. In essence, development that is ordinarily insignificant in its impact on the environment may become significant in a particularly sensitive environment. Therefore, additional control to reduce storm water pollutants from new and existing development may be necessary for areas adjacent to or discharging directly to an ESA.

13. Although dependent on several factors, the risks typically associated with properly managed infiltration of runoff (especially from residential land use areas) are not significant. The risks associated with infiltration can be managed by many techniques, including (1) designing landscape drainage features that promote infiltration of runoff, but do not "inject" runoff (injection bypasses the natural processes of filtering and transformation that occur in the soil); (2) taking reasonable

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steps to prevent the illegal disposal of wastes; (3) protecting footings and foundations; (4) ensuring that each drainage feature is adequately maintained in perpetuity; and (5) pretreatment.

14. Non-storm water (dry weather) discharge from the MS4 is not considered a storm water (wet weather) discharge and therefore is not subject to regulation under the Maximum Extent Practicable (MEP) standard from CWA 402(p)(3)(B)(iii), which is explicitly for "Municipal ... *Stormwater Discharges* (emphasis added)" from the MS4. Non-storm water discharges, per CWA 402(p)(3)(B)(ii), are to be effectively prohibited. Such dry weather non-storm water discharges have been shown to contribute significant levels of pollutants and flow in arid, developed Southern California watersheds and are to be effectively prohibited under the Clean Water Act.

15. Non-storm water discharges to the MS4 granted an influent exception [i.e., which are exempt from the effective prohibition requirement set forth in CWA section 402(p)(3)(B)(ii)] under 40 CFR 122. 26 are included withinthis Order. Any exempted discharges identified by Copermittees as a source of pollutants are subsequently required to be *addressed* (emphasis added) as illicit discharges through prohibition and incorporation into existing IC/ID programs. The Copermittees have identified landscape irrigation, irrigation water and lawn water, previously exempted discharges, as a source of pollutants and conveyance of pollutants to waters of the United States.

D. RUNOFF MANAGEMENT PROGRAMS

1. General

a. This Order specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in storm water runoff to the maximum extent practicable (MEP). However, since MEP is a dynamic performance standard, which evolves over time as runoff management knowledge increases, the Copermittees' runoff management programs must continually be assessed and modified to incorporate improved programs, control measures, best management practices (BMPs), etc. in order to achieve the evolving MEP standard. Absent evidence to the contrary, this continual assessment, revision, and improvement of runoff management program implementation is expected to ultimately achieve compliance with water quality standards in the Region.

b. The Copermittees have generally been implementing the jurisdictional runoff management programs required pursuant to Order No. 2002-01 since February 13, 2003. Prior to that, the Copermittees were regulated by Order No. 96-03 since August 8, 1996. Runoff discharges, however, continue to cause or contribute to violations of water quality standards as evidenced by the Copermittees monitoring results.

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c. This Order contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in storm water runoff to the MEP and achieve water quality standards. Some of the new or modified requirements, such as the revised Watershed Runoff Management Program section, are designed to specifically address high priority water quality problems. Other new or modified requirements address program deficiencies that have been noted during audits, report reviews, and other Regional Board compliance assessment activities.

d. Updated Jurisdictional Runoff Management Plans (JRMPs) and Watershed Runoff Management Plans (WRMPs), which describe the Copermittees' runoff management programs in their entirety, are needed to guide the Copermittees' runoff management efforts and aid the Copermittees in tracking runoff management program implementation. It is practicable for the Copermittees to update the JRMPs and WRMPs within one year, since significant efforts to develop these programs have already occurred.

e. Pollutants can be effectively reduced in storm water runoff by the application of a combination of pollution prevention, source control, and treatment control BMPs. Pollution prevention is the reduction or elimination of pollutant generation at its source and is the best "first line of defense." Source control BMPs (both structural and non-structural) minimize the contact between pollutants and flows (e.g., rerouting run-on around pollutant sources or keeping pollutants on-site and out of receiving waters). Treatment control BMPs remove pollutants that have been mobilized by wet-weather or dry-weather flows.

f. Runoff needs to be addressed during the three major phases of urban development (planning, construction, and use) in order to reduce the discharge of pollutants from storm water to the MEP, effectively prohibit non-storm water discharges and protect receiving waters. Development which is not guided by water quality planning policies and principles can unnecessarily result in increased pollutant load discharges, flow rates, and flow durations which can negatively impact receiving water beneficial uses. Construction sites without adequate BMP implementation result in sediment runoff rates which greatly exceed natural erosion rates of undisturbed lands, causing siltation and impairment of receiving waters. Existing development generates substantial pollutant loads which are discharged in runoff to receiving waters.

g. Annual reporting requirements included in this Order are necessary to meet federal requirements and to evaluate the effectiveness and compliance of the Copermittees' programs.

h. This Order establishes Storm Water Action Levels (SALs) for selected pollutants based on USEPA Rain Zone 6 (arid southwest) Phase I MS4 monitoring data for pollutants in storm water. The SALs were computed as the 90th percentile of the data set, utilizing the statistical based population approach, one of three

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approaches recommended by the California Water Board's Storm Water Panel in its report, 'The Feasibility of Numerical Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities (June 2006). SALs are identified in Section D of this Order. Copermittees shall implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water from the permitted areas so as not to exceed the SALs. Exceedance of SALs may indicate inadequacy of programmatic measures and BMPs required in this Order.

2. **Development Planning**

a. The Standard Storm Water Mitigation Plan (SSMP) requirements contained in this Order are consistent with Order WQ-2000-11 adopted by the State Water Resources Control Board (State Board) on October 5, 2000. In the precedential order, the State Board found that the design standards, which essentially require that runoff generated by 85 percent of storm events from specific development categories be infiltrated or treated, reflect the MEP standard. The order also found that the SSMP requirements are appropriately applied to the majority of the Priority Development Project categories contained in Section D.1 of this Order. The State Board also gave Regional Water Quality Control Boards the needed discretion to include additional categories and locations, such as retail gasoline outlets (RGOs), in SSMPs.

b. Controlling runoff pollution by using a combination of onsite source control and site design BMPs augmented with treatment control BMPs before the runoff enters the MS4 is important for the following reasons: (1) Many end-of-pipe BMPs (such as diversion to the sanitary sewer) are typically ineffective during significant storm events. Whereas, onsite source control BMPs can be applied during all runoff conditions; (2) End-of-pipe BMPs are often incapable of capturing and treating the wide range of pollutants which can be generated on a sub-watershed scale; (3) End-of-pipe BMPs are more effective when used as polishing BMPs, rather than the sole BMP to be implemented; (4) End-of-pipe BMPs do not protect the quality or beneficial uses of receiving waters between the pollutant source and the BMP; and (5) Offsite end-of-pipe BMPs do not aid in the effort to educate the public regarding sources of pollution and their prevention.

c. Use of Low-Impact Development (LID) site design BMPs at new development, redevelopment and retrofit projects can be an effective means for minimizing the impact of storm water runoff discharges from the development projects on receiving waters. LID is a site design strategy with a goal of maintaining or replicating the pre-development hydrologic regime through the use of design techniques. LID site design BMPs help preserve and restore the natural hydrologic cycle of the site, allowing for filtration and infiltration which can greatly reduce the volume, peak flow rate, velocity, and pollutant loads of storm water runoff. Current runoff management, knowledge, practices and technology have

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resulted in the use of LID BMPs as an acceptable means of meeting the storm water MEP standard.

d. Retail Gasoline Outlets (RGOs) are significant sources of pollutants in storm water runoff. RGOs are points of convergence for motor vehicles for automotive related services such as repair, refueling, tire inflation, and radiator fill-up and consequently produce significantly higher loadings of hydrocarbons and trace metals (including copper and zinc) than other developed areas.

e. Industrial sites are significant sources of pollutants in runoff. Pollutant concentrations and loads in runoff from industrial sites are similar or exceed pollutant concentrations and loads in runoff from other land uses, such as commercial or residential land uses. As with other land uses, LID site design, source control, and treatment control BMPs are needed at industrial sites in order to meet the MEP standard. These BMPs are necessary where the industrial site is larger than 10,000 square feet. The 10,000 square feet threshold is appropriate, since it is consistent with requirements in other Phase I NPDES storm water regulations throughout California.

f. If not properly designed or maintained, certain BMPs implemented or required by municipalities for runoff management may create a habitat for vectors (e.g. mosquitoes and rodents). Proper BMP design and maintenance to avoid standing water, however, can prevent the creation of vector habitat. Nuisances and public health impacts resulting from vector breeding can be prevented with close collaboration and cooperative effort between municipalities, the Orange County Vector Control District, and the California Department of Public Health during the development and implementation of runoff management programs.

g. The increased volume, velocity, frequency and discharge duration of storm water runoff from developed areas has the potential to greatly accelerate downstream erosion, impair stream habitat in natural drainages, and negatively impact beneficial uses. Development and urbanization increase pollutant loads in storm water runoff and the volume of storm water runoff. Impervious surfaces can neither absorb water nor remove pollutants and thus lose the purification and infiltration provided by natural vegetated soil. Hydromodification measures for discharges to hardened channels are needed for the future restoration of the hardened channels to their natural state, thereby restoring the chemical, physical, and biological integrity and Beneficial Uses of local receiving waters.

3. **Construction and Existing Development**

a. 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, each Copermittee is responsible for enforcing its local permits, plans, and ordinances, and the Regional Board is

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responsible for enforcing the General Construction Activities Storm Water Permit, State Board Order 99-08 DWQ, NPDES No. CAS000002 (General Construction Permit) and the General Industrial Activities Storm Water Permit, State Board Order 97-03 DWQ, NPDES No. CAS000001 (General Industrial Permit) and any reissuance of these permits. NPDES municipal regulations require that municipalities develop and implement measures to address runoff from industrial and construction activities. Those measures may require the implementation of additional BMPs than are required under the statewide general permits for activities subject to both State and local regulation.

b. Identification of sources of pollutants in runoff (such as municipal areas and activities, industrial and commercial sites/sources, construction sites, and residential areas), development and implementation of BMPs to address those sources, and updating ordinances and approval processes are necessary for the Copermittees to ensure that discharges of pollutants from its MS4 in storm water are reduced to the MEP and that non-storm water discharges are not occurring. Inspections and other compliance verification methods are needed to ensure minimum BMPs are implemented. Inspections are especially important at high risk areas for pollutant discharges.

c. Historic and current development makes use of natural drainage patterns and features as conveyances for runoff. Urban streams used in this manner are part of the municipalities MS4 regardless of whether they are natural, anthropogenic, or partially modified features. In these cases, the urban stream is both an MS4 and receiving water.

d. As operators of the MS4s, the Copermittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or control. These discharges may cause or contribute to a condition of contamination or a violation of water quality standards.

e. Waste and pollutants which are deposited and accumulate in MS4 drainage structures will be discharged from these structures to waters of the U.S. unless they are removed. These discharges may cause or contribute to, or threaten to cause or contribute to, a condition of pollution in receiving waters. For this reason, pollutant discharges from storm water into MS4s must be reduced using a combination of management measures, including source control, and an effective MS4 maintenance program must be implemented by each Copermittee.

f. Enforcement of local runoff related ordinances, permits, and plans is an essential component of every runoff management program and is specifically required in the federal storm water regulations and this Order. Each Copermittee is individually responsible for adoption and enforcement of ordinances and/or policies, implementation of identified control measures/BMPs needed to prevent

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or reduce pollutants in storm water runoff, and for the allocation of funds for the capital, operation and maintenance, administrative, and enforcement expenditures necessary to implement and enforce such control measures/BMPs under its jurisdiction. Education is an important aspect of every effective runoff management program and the basis for changes in behavior at a societal level. Education of municipal planning, inspection, and maintenance department staffs is especially critical to ensure that in-house staffs understand how their activities impact water quality, how to accomplish their jobs while protecting water quality, and their specific roles and responsibilities for compliance with this Order. Public education, designed to target various urban land users and other audiences, is also essential to inform the public of how individual actions affect receiving water quality and how adverse effects can be minimized.

g. Public participation during the development of runoff management programs is necessary to ensure that all stakeholder interests and a variety of creative solutions are considered.

h. Retrofitting existing development with storm water treatment controls, including LID, is necessary to address storm water discharges from existing development that may cause or contribute to a condition of pollution or a violation of water quality standards. Although SSMP BMPs are required for redevelopment, the current rate of redevelopment will not address water quality problems in a timely manner. Cooperation with private landowners is necessary to effectively identify, implement and maintain retrofit projects for the preservation, restoration, and enhancement of water quality.

4. **Watershed Runoff Management**

a. Since runoff within a watershed can flow from and through multiple land uses and political jurisdictions, watershed-based runoff management can greatly enhance the protection of receiving waters. Such management provides a means to focus on the most important water quality problems in each watershed. By focusing on the most important water quality problems, watershed efforts can maximize protection of beneficial use in an efficient manner. Effective watershed-based runoff management actively reduces pollutant discharges and abates pollutant sources causing or contributing to watershed water quality problems. Watershed-based runoff management that does not actively reduce pollutant discharges and abate pollutant sources causing or contributing to watershed water quality problems can necessitate implementation of the iterative process outlined in section A.3 of the Tentative Order. Watershed management of runoff does not require Copermittees to expend resources outside of their jurisdictions. Watershed management requires the Copermittees within a watershed to develop a watershed-based management strategy, which can then be implemented on a jurisdictional basis.

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b. Some runoff issues, such as general education and training, can be effectively addressed on a regional basis. Regional approaches to runoff management can improve program consistency and promote sharing of resources, which can result in implementation of more efficient programs.

c. It is important for the Copermittees to coordinate their water quality protection and land use planning activities to achieve the greatest protection of receiving water bodies. Copermittee coordination with other watershed stakeholders, especially the State of California Department of Transportation, the United States Department of Defense, and water and sewer districts, is also important.

E. STATUTE AND REGULATORY CONSIDERATIONS

1. The Receiving Water Limitations (RWL) language specified in this Order is consistent with language recommended by the USEPA and established in State Board Water Quality Order 99-05, *Own Motion Review of the Petition of Environmental Health Coalition to Review Waste Discharge Requirements Order No. 96-03, NPDES Permit No. CAS0108740*, adopted by the State Board on June 17, 1999. The RWL in this Order require compliance with water quality standards, which for storm water discharges is to be achieved through an iterative approach requiring the implementation of improved and better-tailored BMPs over time. Compliance with receiving water limits based on applicable water quality standards is necessary to ensure that MS4 discharges will not cause or contribute to violations of water quality standards and the creation of conditions of pollution.

2. The Water Quality Control Plan for the San Diego Basin (Basin Plan), identifies the following beneficial uses for surface waters in Orange County: Municipal and Domestic Supply (MUN)[2], Agricultural Supply (AGR), Industrial Process Supply (PROC), Industrial Service Supply (IND), Ground Water Recharge (GWR), Contact Water Recreation (REC1), Non-contact Water Recreation (REC2), Warm Freshwater Habitat (WARM), Cold Freshwater Habitat (COLD), Wildlife Habitat (WILD), Rare, Threatened, or Endangered Species (RARE), Freshwater Replenishment (FRSH), Hydropower Generation (POW), and Preservation of Biological Habitats of Special Significance (BIOL). The following additional beneficial uses are identified for coastal waters of Orange County: Navigation (NAV), Commercial and Sport Fishing (COMM), Estuarine Habitat (EST), Marine Habitat (MAR), Aquaculture (AQUA), Migration of Aquatic Organisms (MIGR), Spawning, Reproduction, and/or Early Development (SPWN), and Shellfish Harvesting (SHELL).

3. This Order is in conformance with State Board Resolution No. 68-16, *Statement of Policy with Respect to Maintaining High Quality Waters in California*, and the federal Antidegradation Policy described in 40 CFR 131.12.

[2] Subject to exceptions under the "Sources of Drinking Waters" Policy (Resolution No. 89-33)

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4. Section 6217(g) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) requires coastal states with approved coastal zone management programs to address non-point pollution impacting or threatening coastal water quality. CZARA addresses five sources of non-point pollution: agriculture, silviculture, urban, marinas, and hydromodification. This NPDES permit addresses the management measures required for the urban category, with the exception of septic systems. The adoption and implementation of this NPDES permit relieves the Copermittee from developing a non-point source plan, for the urban category, under CZARA. The Regional Board addresses septic systems through the administration of other programs.

5. Section 303(d)(1)(A) of the CWA requires that "Each state must identify those waters within its boundaries for which the effluent limitations...are not stringent enough to implement any water quality standard (WQS) applicable to such waters." The CWA also requires states to establish a priority ranking of impaired water bodies known as Water Quality Limited Segments and to establish Total Maximum Daily Loads (TMDLs) for such waters. This priority list of impaired water bodies is called the Section 303(d) List. The current Section 303(d) List was approved by the State Board on October 25, 2006. On June 28, 2007 the 2006 303(d) list for California was given final approval by the United States Environmental Protection Agency (USEPA).

6. This Order 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 Order implements federally mandated requirements under federal Clean Water Act section 402. (33 U.S.C. § 1342(p)(3)(B).) Second, the local agency Copermittees' obligations under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental and new dischargers who are issued NPDES permits for storm water and non-storm water discharges. Third, the local agency Copermittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order. Fourth, the Copermittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in federal Clean Water Act section 301, subdivision (a) (33 U.S.C. § 1311(a)) and in lieu of numeric restrictions on their storm water discharges. Fifth, the local agencies' 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. Likewise, the provisions of this Order to implement total maximum daily loads (TMDLs) are federal mandates. The federal Clean Water Act requires TMDLs to be developed for water bodies that do not meet federal water quality standards. (33 U.S.C. sec. 1313(d).) Once the U.S. Environmental Protection Agency or a state develops a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions of any applicable wasteload allocation. (40 C.F.R. sec. 122.44(d)(1)(vii)(B).)

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7. Runoff treatment and/or mitigation must occur prior to the discharge of runoff into receiving waters. Treatment BMPs must not be constructed in waters of the U.S. or State unless the runoff flows are sufficiently pretreated to protect the values and functions of the water body. Federal regulations at 40 CFR 131.10(a) state that in no case shall a state adopt waste transport or waste assimilation as a designated use for any waters of the U.S. Authorizing the construction of an runoff treatment facility within a water of the U.S., or using the water body itself as a treatment system or for conveyance to a treatment system, would be tantamount to accepting waste assimilation as an appropriate use for that water body. Furthermore, the construction, operation, and maintenance of a pollution control facility in a water body can negatively impact the physical, chemical, and biological integrity, as well as the beneficial uses, of the water body. Without federal authorization (e.g., pursuant to Clean Water Act Section 404), waters of the U.S. may not be converted into, or used as, waste treatment or conveyance facilities. Similarly, waste discharge requirements pursuant to California Water Code Section 13260 are required for the conversion or use of waters of the State as waste treatment or conveyance facilities. Diversion from waters of the U.S./State to treatment facilities and subsequent return to waters of the U.S. is allowable, provided that the effluent complies with applicable NPDES requirements.

8. The issuance of waste discharge requirements and an NPDES permit for the discharge of runoff from MS4s to waters of the U.S. is exempt from the requirement for preparation of environmental documents under the California Environmental Quality Act (CEQA) (Public Resources Code, Division 13, Chapter 3, section 21000 et seq.) in accordance with the CWC section 13389.

9. Multiple water bodies in Orange County have been identified as impaired and placed on the 303(d) list. In 2004, Bacteria Impaired Waters TMDL Project II included six bacteria impaired shorelines in Dana Point Harbor and San Diego Bay: Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park, B Street, G Street Pier, Tidelands Park, and Chula Vista Marina in San Diego Bay. Since then, only Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay can be confirmed as still impaired by indicator bacteria. On June 11, 2008 the Regional Board adopted a Basin Plan amendment to incorporate *Bacteria Impaired Waters TMDL Project II for San Diego Bay and Dana Point Harbor Shorelines*. On June 16, 2009, the State Board approved the Basin Plan amendment. This action meets requirements of section 303(d) of the Clean Water Act (CWA). The Basin Plan amendment process is authorized under section 13240 of the Water Code. The State's Office of Administrative Law (OAL) approved the TMDLs on September 15, 2009. The effective date of the TMDLs is the date of OAL approval. USEPA approved the TMDLs on October 26, 2009.

10. Storm water discharges from developed and developing areas in Orange County are significant sources of certain pollutants that cause, may be causing, threatening to cause or contributing to water quality impairment in the waters of Orange County.

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Furthermore, as delineated in the CWA section 303(d) list in Table 3, the Regional Board has found that there is a reasonable potential that municipal storm water and non-storm water discharges from MS4s cause or may cause or contribute to an excursion above water quality standards for the following pollutants: Indicator Bacteria, Phosphorous, Toxicity and Turbidity. In accordance with CWA section 303(d), the Regional Board is required to establish Total Maximum Daily Loads (TMDLs) for these pollutants to these waters to eliminate impairment and attain water quality standards. Therefore, certain early pollutant control actions and further pollutant impact assessments by the Copermittees are warranted and required pursuant to this Order.

Table 3. 2006 Section 303(d) Listed Waterbodies in So. Orange County

Waterbody Pollutant	
Aliso Creek	Indicator Bacteria, Phosphorus, Toxicity
Aliso Creek Mouth	Indicator Bacteria
Dana Point Harbor	Indicator Bacteria
English Canyon Creek	Benzo[b]fluoranthene, Dieldrin, Sediment Toxicity
Laguna Canyon Channel	Sediment Toxicity
Oso Creek (at Mission Viejo Golf Course)	Chloride, Sulfates, Total Dissolved Solids
Pacific Ocean Shoreline, Aliso HSA	Indicator Bacteria
Pacific Ocean Shoreline, Dana Point HSA	Indicator Bacteria
Pacific Ocean Shoreline, Laguna Beach HSA	Indicator Bacteria
Pacific Ocean Shoreline, Lower San Juan HSA	Indicator Bacteria
Pacific Ocean Shoreline, San Clemente HA	Indicator Bacteria
Pacific Ocean Shoreline, San Joaquin Hills HSA	Indicator Bacteria
Prima Deshecha Creek	Phosphorus, Turbidity
San Juan Creek	DDE, Indicator Bacteria
San Juan Creek (mouth)	Indicator Bacteria
Segunda Deshecha Creek	Phosphorus, Turbidity

11. This Order incorporates only those MS4 Waste Load Allocations (WLAs) developed in TMDLs that have been adopted by the Regional Water Board and have been approved by the State Board, Office of Administrative Law and U.S. EPA. Approved TMDL WLAs are to be addressed using water quality-based effluent limitations (WQBELs) calculated as numeric limitations (either in the receiving waters and/or at the point of MS4 discharge) and/or as BMPs. In most cases, the numeric limitation must be achieved to ensure the adequacy of the BMP program. Waste load

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allocations for storm water and non-storm water discharges have been included within this Order only if the TMDL has received all necessary approvals. This Order establishes WQBELs and conditions consistent with the requirements and assumptions of the WLAs in the TMDLs as required by 40 CFR 122.44(d)(1)(vii)(B).

A TMDL is the total amount of a particular pollutant that a water body can receive and still meet Water Quality Standards (WQSs), which are comprised of Water Quality Objectives (WQOs), Beneficial Uses and the States Policy on Maintaining High Quality Waters[3]. The WQOs serve as the primary basis for protecting the associated Beneficial Use. The Numeric Target of a TMDL interprets and applies the numeric and/or narrative WQOs of the WQSs as the basis for the WLAs. This Order addresses TMDLs through Water Quality Based Effluent Limitations (WQBELs) that must be consistent with the assumptions and requirements of the WLA[4]. Federal guidance[5] states that when adequate information exists, storm water permits are to incorporate numeric water quality based effluent limitations. In most cases, the numeric target(s) of a TMDL are a component of the WQBELs. When the numeric target is based on one or more numeric WQOs, the numeric WQOs and underlying assumptions and requirements will be used in the WQBELs as numeric effluent limitations by the end of the TMDL compliance schedule, unless additional information is required. When the numeric target interprets one or more narrative WQOs, the numeric target may assess the efficacy and progress of the BMPs in meeting the WLAs and restoring the Beneficial Uses by the end of the TMDL compliance schedule.

This Order fulfills a component of the TMDL Implementation Plan adopted by this Regional Board on June 11, 2008 for indicator bacteria in Baby Beach by establishing WQBELs expressed as both BMPs to achieve the WLAs and as numeric limitations[6] for the City of Dana Point and the County of Orange. The establishment of WQBELs expressed as BMPs should be sufficient to achieve the WLA specified in the TMDL. The Waste Load Allocations (WLAs) and Numeric Targets are the necessary metrics to ensure that the BMPs achieve appropriate concentrations of bacterial indicators in the receiving waters.

[3] State Water Resources Control Board, Resolution No. 68-16
[4] 40 CFR 122.44(d)(1)(vii)(B)
[5] USEPA, *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits,* 61 FR 43761, August 26, 1996
[6] The Waste Load Allocations are defined in Resolution No. R9-2008-0027, A Resolution to Adopt an Amendment to the *Water Quality Control Plan for the San Diego Basin (9)* to Incorporate Total Maximum Daily Loads for Indicator Bacteria, Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay.

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12. This Order requires each Copermittee to effectively prohibit all types of unauthorized discharges of non-storm water into its MS4. However, historically pollutants have been identified as present in dry weather non-storm water discharges from the MS4s through 303(d) listings, monitoring conducted by the Copermittees under Order No. R9-2002-0001, and there are others expected to be present in dry weather non-storm water discharges because of the nature of these discharges. This Order includes action levels for pollutants in non-storm water, dry weather, discharges from the MS4 designed to ensure that the requirement to effectively prohibit all types of unauthorized discharges of non-storm water in the MS4 is being complied with. Action levels in the Order are based upon numeric or narrative water quality objectives and criteria as defined in the Basin Plan, the Water Quality Control Plan for Ocean Waters of California (Ocean Plan), and the State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP). An exceedance of an action level requires specified responsive action by the Copermittees. This Order describes what actions the Copermittees must take when an exceedance of an action level is observed. Exceedances of non-storm water action levels do not alone constitute a violation of this Order but could indicate non-compliance with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4 or other prohibitions established in this Order. Failure to undertake required source investigation and elimination action following an exceedance of 2a non-storm water action level (NAL or action level) is a violation of this Order. The Regional Board recognizes that use of action levels will not necessarily result in detection of all unauthorized sources of non-storm water discharges because there may be some discharges in which pollutants do not exceed established action levels. However, establishing NALs at levels appropriate to protect water quality standards is expected to lead to the identification of significant sources of pollutants in dry weather non-storm water discharges.

13. In addition to federal regulations cited in the Fact Sheet / Technical Report for the Order NO. R9-2009-0002, monitoring and reporting required under Order No. R9-2009-0002 is required pursuant to authority under CWC section 13383.

F. PUBLIC PROCESS

1. The Regional Board has notified the Copermittees, all known interested parties, and the public of its intent to consider adoption of an Order prescribing waste discharge requirements that would serve to renew an NPDES permit for the existing discharge of runoff.

2. The Regional Board has held public hearings on April 11, 2007, February 13, 2008, July 1, 2009, and November 18, 2009 and heard and considered all comments pertaining to the terms and conditions of this Order.

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IT IS HEREBY ORDERED that the Copermittees, in order to meet the provisions contained in Division 7 of the California Water Code (CWC) and regulations adopted thereunder, and the provisions of the Clean Water Act (CWA) and regulations adopted thereunder, must each comply with the following:

A. PROHIBITIONS AND RECEIVING WATER LIMITATIONS

1. Discharges into and from municipal separate storm sewer systems (MS4s) in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in waters of the state are prohibited.

2. Storm water discharges from MS4s containing pollutants which have not been reduced to the maximum extent practicable (MEP) are prohibited.[7]

3. Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses, water quality objectives developed to protect beneficial uses, and the State policy with respect to maintaining high quality waters) are prohibited.

   a. Each Copermittee must comply with section A.3 and section A.4 as it applies to Prohibition 5 in Attachment A of this Order through timely implementation of control measures and other actions to reduce pollutants in storm water discharges in accordance with this Order, including any modifications. If exceedance(s) of water quality standards persist notwithstanding implementation of this Order, the Copermittee must assure compliance with section A.3 and section A.4 as it applies to Prohibition 5 in Attachment A of this Order by complying with the following procedure:

      (1) Upon a determination by either the Copermittee or the Regional Board that storm water MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard, the Copermittee must notify the Regional Board within 30 days and thereafter submit a 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 exceedance of water quality standards. The report may be incorporated in the Annual Report unless the Regional Board directs an earlier submittal. The report must include an implementation schedule. The Regional Board may require modifications to the report;

[7] This prohibition does not apply to MS4 discharges which receive subsequent treatment to reduce pollutants to the MEP prior to entering receiving waters (e.g., low flow diversions to the sanitary sewer).

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(2) Submit any modifications to the report required by the Regional Board within 30 days of notification;

(3) Within 30 days following approval of the report described above by the Regional Board, the Copermittee must revise its Jurisdictional Runoff Management Program and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required; and

(4) Implement the revised Jurisdictional Runoff Management Program and monitoring program in accordance with the approved schedule.

b. The Copermittee must repeat the procedure set forth above to comply with the receiving water limitations for continuing or recurring exceedances of the same water quality standard(s) unless directed to do otherwise by the Regional Board Executive Officer.

c. Nothing in section A.3 must prevent the Regional Board from enforcing any provision of this Order while the Copermittee prepares and implements the above report.

4. In addition to the above prohibitions, discharges from MS4s are subject to all Basin Plan prohibitions cited in Attachment A to this Order.

B. NON-STORM WATER DISCHARGES

1. Each Copermittee must effectively prohibit all types of non-storm water discharges into its MS4 unless such discharges are either authorized by a separate National Pollutant Discharge Elimination System (NPDES) permit; or not prohibited in accordance with sections B.2 and B.3 below.

2. The following categories of non-storm water discharges are not prohibited unless a Copermittee or the Regional Board identifies the discharge category as a source of pollutants to waters of the U.S. Where the Copermittee(s) have identified a category as a source of pollutants, the category shall be addressed as an illicit discharge and prohibited through ordinance, order or similar means. The Regional Board may identify categories of discharge that either requires prohibition or other controls. For such a discharge category, the Copermittee, under direction of the Regional Board, must either prohibit the discharge category or develop and implement appropriate control measures to prevent the discharge of pollutants to the MS4 and report to the Regional Board pursuant to Section K.1 and K.3 of this Order.

a. Diverted stream flows;
b. Rising ground waters;
c. Uncontaminated ground water infiltration [as defined at 40 CFR 35.2005(20)] to

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MS4s;
- **d.** Uncontaminated pumped ground water[8];
- **e.** Foundation drains[8];
- **f.** Springs;
- **g.** Water from crawl space pumps[8];
- **h.** Footing drains[8];
- **i.** Air conditioning condensation;
- **j.** Flows from riparian habitats and wetlands;
- **k.** Water line flushing[9,10];
- **l.** Discharges from potable water sources not subject to NPDES Permit No. CAG679001, other than water main breaks;
- **m.** Individual residential car washing; and
- **n.** Dechlorinated swimming pool discharges[11].

3. Emergency fire fighting flows (i.e., flows necessary for the protection of life or property) do not require BMPs and need not be prohibited. As part of the Jurisdictional Runoff Management Plan (JRMP), each Copermittee must develop and implement a program to address pollutants from non-emergency fire fighting flows (i.e., flows from controlled or practice blazes and maintenance activities) identified by the Copermittee to be significant sources of pollutants to waters of the United States.

a. Building fire suppression system maintenance discharges (e.g. sprinkler line flushing) contain waste. Therefore, such discharges are to be prohibited by the Copermittees as illicit discharges through ordinance, order, or similar means.

4. Each Copermittee must examine all dry weather effluent analytical monitoring results collected in accordance with section F.4 of this Order and Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2009-0002 to identify water quality problems which may be the result of any non-prohibited discharge category(ies) identified above in section B.2. Follow-up investigations must be conducted as necessary to identify and control, pursuant to section B.2, any non-prohibited discharge category(ies) listed above.

[8] Requires enrollment under Order R9-2008-002. Discharges into the MS4 require authorization from the owner and operator of the MS4 system.
[9] This exemption does not include fire suppression sprinkler system maintenance and testing discharges. Those discharges may be regulated under Section B.3.
[10] Requires enrollment under Order R9-2002-0020.
[11] Including saline swimming pool discharges directly to a saline water body.

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C. NON-STORM WATER DRY WEATHER ACTION LEVELS

1. Each Copermittee, beginning no later than May 1, 2011, shall implement the non-storm water dry weather action level (NAL) monitoring as described in Attachment E of this Order.

2. In response to an exceedance of an NAL, each Copermittee must investigate and identify the source of the exceedance in a timely manner. However, if any Copermittee identifies exceedances of NALs that prevent them from adequately conducting source investigations in a timely manner, then the Copermittees may submit a prioritization plan and timeline that identifies the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the Copermittees must submit an action report dependant on the source of the pollutant exceedance as follows:

   a. If the Copermittee identifies the source of the exceedance as natural (non-anthropogenically influenced) in origin and in conveyance into the MS4; then the Copermittee shall report their findings and documentation of their source investigation to the Regional Board within fourteen days of the source identification.

   b. If the Copermittee identifies the source of the exceedance as an illicit discharge or connection, then the Copermittees must eliminate the discharge to their MS4 and report the findings, including any enforcement action(s) taken, and documentation of the source investigation to the Regional Board within fourteen days of the source identification. If the Copermittee is unable to eliminate the source of discharge within fourteen days, then the Copermittee must submit, as part of their action report, their plan and timeframe to eliminate the source of the exceedance. Those dischargers seeking to continue such a discharge must become subject to a separate NPDES permit prior to continuing any such discharge.

   c. If the Copermittee identifies the source of the exceedance as an exempted category of non-storm water discharge, then the Copermittees must determine if this is an isolated circumstance or if the category of discharges must be addressed through the prevention or prohibition of that category of discharge as an illicit discharge. The Copermittee must submit their findings in including a description of the steps taken to address the discharge and the category of discharge, to the Regional Board for review with the next subsequent annual report. Such description shall include relevant updates to or new ordinances, orders, or other legal means of addressing the category of discharge. The Copermittees must also submit a summary of their findings with the Report of Waste Discharge.

   d. If the Copermittee identifies the source of the exceedance as a non-storm water discharge in violation or potential violation of an existing separate NPDES permit

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(e.g. the groundwater dewatering permit), then the Copermittee must report, within three business days, the findings to the Regional Board including all pertinent information regarding the discharger and discharge characteristics.

e. If the Copermittee is unable to identify the source of the exceedance after taking and documenting reasonable steps to do so, then the Copermittee must identify the pollutant as a high priority pollutant of concern in the tributary subwatershed, perform additional focused sampling and update their programs within a year to reflect this priority. The Copermittee's annual report shall include these updates to their programs including, where applicable, updates to their watershed workplans (Section G.2), retrofitting consideration (Section F.3.d) and program effectiveness work plans (Section J.4).

f. The Copermittees or any interested party, may evaluate existing NALs and propose revised NALs for future Board consideration.

3. An exceedance of an NAL does not alone constitute a violation of the provisions of this Order, but an exceedance of an NAL may indicate lack of compliance with the requirement that Copermittees effectively prohibit all types of unauthorized non-storm water discharges into the MS4 or other prohibitions set forth in Sections A and B of this Order. Failure to timely implement required actions specified in this Order following an exceedance of an NAL constitutes a violation of this Order. However, neither compliance with NALs nor compliance with required actions following observed exceedances, excuses any non-compliance with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4s or any non-compliance with the prohibitions in Sections A and B of this Order. NALs provide an assessment of the effectiveness of the prohibition of non-storm water discharges and of the appropriateness of exempted non-storm water discharges. During any annual reporting period in which one or more exceedances of NALs have been documented the Copermittee must submit with their next scheduled annual report, a report describing whether and how the observed exceedances did or did not result in a discharge form the MS4 that caused, or threatened to cause or contribute to a condition of pollution, contamination, or nuisance in the receiving waters.

4. Monitoring of effluent will occur at the end-of-pipe prior to discharge into the receiving waters, with a focus on Major Outfalls, as defined in 40 CFR 122.26(B 5-6) and Attachment E of this Order. The Copermittees must develop their monitoring plans to sample a representative percentage of major outfalls and identified stations within each hydrologic subarea. At a minimum, outfalls that exceed any NALs once during any year must be monitored in the subsequent year. Any station that does not exceed an NAL for 3 years may be replaced with a different station.

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5. Each Copermittee shall monitor for the non-storm water dry weather action levels, which are incorporated into this Order as follows:

   a. Action levels for discharges to inland surface waters:

Table 4.a.1: General Constituents

Parameter	Units	AMAL	MDAL	Instantaneous Maximum	Basis
Fecal Coliform	MPN/ 100 ml	200[A] 400[B]	-		BPO
Enterococci	MPN/ 100 ml	33	-	104[C]	BPO/OP
Turbidity NTU		-	20		BPO
pH	Units	Within limit of 6.5 to 8.5 at all times			BPO
Dissolved Oxygen	mg/L	Not less than 5.0 in WARM waters and not less than 6.0 in COLD waters			BPO
Total Nitrogen	mg/L	-	1.0	See MDEL	BPO
Total Phosphorus	mg/L	-	0.1	See MDEL	BPO
Methylene Blue Active Substances mg/L		-	0.5	See MDEL	BPO

A – Based on a minimum of not less than five samples for any 30-day period
B – No more than 10 percent of total samples may exceed 400 per 100 ml during any 30 day period
C – This Value has been set to Ocean Plan Criteria for Designated Beach Areas
BPO – Basin Plan Objective OP – Ocean Plan
MDAL – Maximum Daily Action Level AMAL – Average Monthly Action Level

Table 4.a.2: Priority Pollutants

		Freshwater (CTR)		Saltwater (CTR)	
Parameter	Units	MDAL	AMAL	MDAL	AMAL
Cadmium ug/L		*	*	16	8
Copper ug/L		*	*	5.8	2.9
Chromium III	ug/L	*	*	-	-
Chromium VI (hexavalent)	ug/L	16	8.1	83	41
Lead ug/L		*	*	14	2.9
Nickel ug/L		*	*	14	6.8
Silver ug/L		*	*	2.2	1.1
Zinc ug/L		*	*	95	47

CTR – California Toxic Rule
* - Action Levels developed on a case-by-case basis (see below)

The NALs for Cadmium, Copper, Chromium (III), Lead, Nickel, Silver and Zinc will be developed on a case-by-case basis because the freshwater criteria are based on site-specific water quality data (receiving water hardness). For these priority pollutants, the following equations (40 CFR 131.38.b.2) will be required:

Cadmium (Total Recoverable) = exp(0.7852[ln(hardness)] -2.715)
Chromium III (Total Recoverable) = exp(0.8190[ln(hardness)] + .6848)
Copper (Total Recoverable) = exp(0.8545[ln(hardness)] - 1.702)
Lead (Total Recoverable) = exp(1.273[ln(hardness)] - 4.705)

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Nickel (Total Recoverable) = exp(.8460[ln(hardness)] + 0.0584)
Silver (Total Recoverable) = exp(1.72[ln(hardness)] - 6.52)
Zinc (Total Recoverable) = exp(0.8473[ln(hardness)] + 0.884)

b. Action levels for discharges to bays, harbors and lagoons/estuaries:

Table 4.b: General Constituents

Parameter	Units	AMAL	MDAL	Instantaneous Maximum	Basis
Total Coliform	MPN/100 ml	1,000	-	10,000	BPO
Fecal Coliform	MPN/100 ml	200[A],400[B] -			BPO
Enterococci MPN/100	ml	35	-	104[C]	BPO
Turbidity NTU		75	-	225	OP
pH	Units	Within limit of 6.0 to 9.0 at all times			OP
Priority Pollutants	ug/L	See limitations in Table 4.a.2			

A – Based on a minimum of not less than five samples for any 30-day period
B – No more than 10 percent of total samples may exceed 400 per 100 ml during any 30 day period
C – Designated Beach Areas
OP – California Ocean Plan 2005 BPO – Basin Plan Objective
MDAL – Maximum Daily Action Level AMAL – Average Monthly Action Level

c. Action levels for discharges to the surf zone:

Table 4.c: General Constituents

Parameter	Units	AMAL	MDAL	Instantaneous Maximum	Basis
Total Coliform	MPN/100 ml	1,000	-	10,000 1,000[A]	OP
Fecal Coliform	MPN/100 ml	200[B] -		400	OP
Enterococci MPN/100	ml	35	-	104[C]	OP

A – Total coliform density shall not exceed 1,000 per 100 ml when the ratio of fecal/total coliform exceeds 0.1
B – During any 30 day period
C – Designated Beach Areas
OP – California Ocean Plan 2005

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D. STORM WATER ACTION LEVELS

1. Beginning Year 3 after Order adoption date, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the United States that exceed the Storm Water Action Levels (SALs) for the pollutants listed in Table 5 (below) will require each Copermittee to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutants(s) to the MEP standard. The Copermittees must utilize the exceedance information when adjusting and executing annual work plans, as required by this Order. Copermittees shall take the magnitude, frequency, and number of constituents exceeding the SAL(s), in addition to receiving water quality data and other information, into consideration when reacting to SAL exceedances in an iterative manner. Failure to appropriately consider and react to SAL exceedances in an iterative manner creates a presumption that the Copermittee(s) have not complied with the MEP standard.

Table 5. Storm Water Action Levels

Pollutant Action	Level
Turbidity (NTU)	126
Nitrate & Nitrite total (mg/L)	2.6
P total (mg/L)	1.46
Cd total (µg/L) 3.0	–
Cu total (µg/L) 127	
Pb total (µg/L) 250	
Ni total (µg/L) 54	
Zn total (µg/L) 976	

2. The end-of-pipe assessment points for the determination of SAL compliance are all major outfalls, as defined in 40 CFR 122.26(b)(5) and (b)(6). The Copermittees must develop their monitoring plans to sample a representative percent of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceed SALs must be monitored in the subsequent year. Any station that does not exceed an SAL for 3 years may be replaced with a different station. SAL samples must be 24 hour time weighted composites.

3. The absence of SAL exceedances does not relieve the Copermittees from implementing all other required elements of this Permit.

4. This Permit does not regulate natural sources and conveyances of constituents listed in Table 5. To be relieved of the requirements to prioritize pollutant/watershed combinations for BMP updates and to continue monitoring a station, the Copermittee must demonstrate that the likely and expected cause of the SAL exceedance is not anthropogenic in nature.

5. The SALs will be reviewed and updated at the end of every permit cycle. The data collected pursuant to D.2 above can be used to create SALs based upon local data.

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It is the goal of the SALs, through the iterative and MEP process, to have outfall storm water discharges meet all applicable water quality standards.

E. LEGAL AUTHORITY

1. Each Copermittee must establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means. Nothing herein shall authorize a Co-Permittee or other discharger regulated under the terms of this order to divert, store or otherwise impound water if such action is reasonably anticipated to harm downstream water right holders in the exercise of their water rights. This legal authority must, at a minimum, authorize the Copermittee to:

   a. Control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to its MS4 and control the quality of runoff from industrial and construction sites. This requirement applies both to industrial and construction sites which have coverage under the statewide general industrial or construction storm water permits, as well as to those sites which do not. Grading ordinances must be updated and enforced as necessary to comply with this Order;
   b. Prohibit all identified illicit discharges not otherwise allowed pursuant to section B.2;
   c. Prohibit and eliminate illicit connections to the MS4;
   d. Control the discharge of spills, dumping, or disposal of materials other than storm water to its MS4;
   e. Require compliance with conditions in Copermittee ordinances, permits, contracts or orders (i.e., hold dischargers to its MS4 accountable for their contributions of pollutants and flows);
   f. Utilize enforcement mechanisms to require compliance with Copermittee storm water ordinances, permits, contracts, or orders;
   g. Control the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements among Copermittees. Control of the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements with other owners of the MS4 such as the State of California Department of Transportation, the United States Department of Defense, or Native American Tribes is encouraged;
   h. Carry out all inspections, surveillance, and monitoring necessary to determine compliance and noncompliance with local ordinances and permits and with this Order, including the prohibition on illicit discharges to the MS4. This means the Copermittee must have authority to enter, monitor, inspect, take measurements, review and copy records, and require regular reports from industrial facilities discharging into its MS4, including construction sites;
   i. Require the use of BMPs to prevent or reduce the discharge of pollutants into MS4s from storm water to the MEP; and

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j. Require documentation on the effectiveness of BMPs implemented to reduce the discharge of storm water pollutants to the MS4 to the MEP.

2. Each Copermittee must submit within 365 days of adoption of this Order, a statement certified by its chief legal counsel that the Copermittee has taken the necessary steps to obtain and maintain full legal authority to implement and enforce each of the requirements contained in 40 CFR 122.26(d)(2)(i)(A-F) and this Order except for the updated requirements for low impact development and hydromodification in section F.1. Each Copermittee must submit as part of its updated SSMP, a statement certified by its chief legal counsel that the Copermittee has taken the necessary steps to obtain and maintain full legal authority to implement and enforce the low impact development and hydromodification requirements in section F.1. These statements must include:

   a. Identification of all departments within the jurisdiction that conduct runoff related activities, and their roles and responsibilities under this Order. Include an up to date organizational chart specifying these departments and key personnel.
   b. Citation of runoff related ordinances and the reasons they are enforceable;
   c. Identification of the local administrative and legal procedures available to mandate compliance with runoff related ordinances and therefore with the conditions of this Order;
   d. A description of how runoff related ordinances are implemented and appealed; and
   e. Description of whether the municipality can issue administrative orders and injunctions or if it must go through the court system for enforcement actions.

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F. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM (JRMP)

Each Copermittee must implement all requirements of section F of this Order no later than 365 days after adoption of the Order, unless otherwise specified in this Order. Prior to 365 days after adoption of the Order, each Copermittee must at a minimum implement its Jurisdictional RMP document, as the document was developed and amended to comply with the requirements of Order No. R9-2002-001.
Each Copermittee must develop and implement an updated JRMP for its jurisdiction. Each updated JRMP must meet the requirements of section F of this Order, reduce the discharge of storm water pollutants from the MS4 to the MEP, and prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.

1. DEVELOPMENT PLANNING COMPONENT

Each Copermittee must implement a program which meets the requirements of this section and (1) reduces Development Project discharges of storm water pollutants from the MS4 to the MEP; (2) prevents Development Project discharges from the MS4 from causing or contributing to a violation of water quality standards; (3) prevents illicit discharges into the MS4; and (4) manages increases in runoff discharge rates and durations from Development Projects that are likely to cause increased erosion of stream beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

a. GENERAL PLAN

Each Copermittee must revise as needed its General Plan or equivalent plan (e.g., Comprehensive, Master, or Community Plan) for the purpose of providing effective water quality and watershed protection principles and policies that direct land-use decisions and require implementation of consistent water quality protection measures for all development and redevelopment projects.

b. ENVIRONMENTAL REVIEW PROCESS

Each Copermittee must revise as needed its current environmental review processes to accurately evaluate water quality impacts and cumulative impacts and identify appropriate measures to avoid, minimize and mitigate those impacts for all Development Projects.

c. APPROVAL PROCESS CRITERIA AND REQUIREMENTS FOR ALL DEVELOPMENT PROJECTS

For all proposed Development Projects, each Copermittee during the planning process, and prior to project approval and issuance of local permits, must prescribe the necessary requirements so that Development Project discharges of storm water pollutants from the MS4 will be reduced to the MEP, will not cause or

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contribute to a violation of water quality standards, and will comply with Copermittee's ordinances, permits, plans, and requirements, and with this Order. Performance Criteria: Discharges from each approved development project must be subject to the following management measures:

(1) Source control BMPs that reduce storm water pollutants of concern in runoff, including prevention of illicit discharges into the MS4; prevention of irrigation runoff; storm drain system stenciling or signage; properly designed outdoor material storage areas; properly designed outdoor work areas; and properly designed trash storage areas;

(2) The following LID BMPs listed below shall be implemented at all Development Projects where applicable and feasible.

(a) Conserve natural areas, including existing trees, other vegetation, and soils.
(b) Construct streets, sidewalks, or parking lot aisles to the minimum widths necessary, provided that public safety is not compromised.
(c) Minimize the impervious footprint of the project.
(d) Minimize soil compaction to landscaped areas.
(e) Minimize disturbances to natural drainages (e.g., natural swales, topographic depressions, etc.)
(f) Disconnect impervious surfaces through distributed pervious areas.

(3) Buffer zones for natural water bodies, where feasible. Where buffer zones are infeasible, require project proponent to implement other buffers such as trees, access restrictions, etc;

(4) Measures necessary so that grading or other construction activities meet the provisions specified in section F.2 of this Order; and

(5) Submittal of proof of a mechanism under which ongoing long-term maintenance of all structural post-construction BMPs will be conducted.

(6) Infiltration and Groundwater Protection

To protect groundwater quality, each Copermittee must apply restrictions to the use of treatment control BMPs that are designed to primarily function as centralized infiltration devices (such as large infiltration trenches and infiltration basins). Such restrictions must be designed so that the use of such infiltration treatment control BMPs must not cause or contribute to an exceedance of groundwater quality objectives. At a minimum, each treatment control BMP designed to primarily function as a centralized infiltration device must meet the restrictions below, unless it is demonstrated that a restriction is not necessary to protect groundwater quality. The Copermittees may collectively or individually develop alternative restrictions on the use of

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treatment control BMPs which are designed to primarily function as centralized infiltration devices. Alternative restrictions developed by the Copermittees can partially or wholly replace the restrictions listed below. The restrictions are not intended to be applied to small infiltration systems dispersed throughout a development project.

(a) Runoff must undergo pretreatment such as sedimentation or filtration prior to infiltration;

(b) All dry weather flows containing significant pollutant loads must be diverted from infiltration devices and treated through other BMPs;

(c) Pollution prevention and source control BMPs must be implemented at a level appropriate to protect groundwater quality at sites where infiltration treatment control BMPs are to be used;

(d) Infiltration treatment control BMPs must be adequately maintained so that they remove storm water pollutants to the MEP;

(e) The vertical distance from the base of any infiltration treatment control BMP to the seasonal high groundwater mark must be at least 10 feet. Where groundwater basins do not support beneficial uses, this vertical distance criteria may be reduced, provided groundwater quality is maintained;

(f) The soil through which infiltration is to occur must have physical and chemical characteristics (such as appropriate cation exchange capacity, organic content, clay content, and infiltration rate) which are adequate for proper infiltration durations and treatment of runoff for the protection of groundwater beneficial uses;

(g) Infiltration treatment control BMPs must not be used for areas of industrial or light industrial activity; areas subject to high vehicular traffic (25,000 or greater average daily traffic on main roadway or 15,000 or more average daily traffic on any intersecting roadway); automotive repair shops; car washes; fleet storage areas (bus, truck, etc.); nurseries; and other high threat to water quality land uses and activities as designated by each Copermittee unless first treated or filtered to remove pollutants prior to infiltration and a comprehensive site-specific evaluation has been conducted; and

(h) Infiltration treatment control BMPs must be located a minimum of 100 feet horizontally from any water supply wells.

(7) Where feasible, landscaping with native or low water species shall be preferred in areas that drain to the MS4 or to waters of the United States.

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d. Standard Storm Water Mitigation Plans (SSMPs) – Approval Process Criteria and Requirements for Priority Development Projects

Within two years of adoption of this Order, the Copermittees must submit an updated model SSMP, to the Regional Board's Executive Officer for a 30 day public review and comment period. The Regional Board's Executive Officer has the discretion to determine the necessity of a public hearing. Within 180 days of determination that the Model SSMP is in compliance with this Permit's provisions, each Copermittee must update their own local SSMP, and amended ordinances consistent with the model SSMP, and shall submit both (local SSMP and amended ordinances) to the Regional Board. The model SSMP must meet the requirements of section F.1.d of this Order to (1) reduce Priority Development Project discharges of storm water pollutants from the MS4 to the MEP, and (2) prevent Priority Development Project runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.[12]

(1) Definition of Priority Development Project (PDP):

Priority Development Projects are:

(a) All new Development Projects that fall under the project categories or locations listed in section F.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 and the existing development and/or the redevelopment project falls under the project categories or locations listed in section F.1.d.(2). Where redevelopment results in an increase of less than fifty percent of the impervious surfaces of a previously existing development, and the existing development was not subject to SSMP requirements, the numeric sizing criteria discussed in section F.1.d.(6) applies only to the addition or replacement, and not to the entire development. Where redevelopment results in an increase of more than fifty percent of the impervious surfaces of a previously existing development, the numeric sizing criteria applies to

[12] Updated SSMP and hydromodification requirements must apply to all priority projects or phases of priority projects which have not yet begun grading or construction activities at the time any updated SSMP or hydromodification requirement commences. If lawful prior approval of a project exists, whereby application of an updated SSMP or hydromodification requirement to the project is illegal, the updated SSMP or hydromodification requirement need not apply to the project. Updated Development Planning requirements set forth in Sections F.1. (a) through (h) of this Order must apply to all projects or phases of projects, unless, at the time any updated Development Planning requirement commences, the projects or project phases meet any one of the following conditions: (i) the project or phase has begun grading or construction activities; or (ii) a Copermittee determines that lawful prior approval rights for a project or project phase exist, whereby application of the Updated Development Planning requirement to the project is legally infeasible. Where feasible, the Permittees must utilize the SSMP and hydromodification update periods to ensure that projects undergoing approval processes include application of the updated SSMP and hydromodification requirements in their plans.

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the entire development.

(c) One acre threshold: In addition to the Priority Development Project Categories identified in section F.1.d.(2), Priority Development Projects must also include all other pollutant-generating Development Projects that result in the disturbance of one acre or more of land within three years of adoption of this Order.[13] As an alternative to this one-acre threshold, the Copermittees may collectively identify a different threshold, provided the Copermittees' threshold is at least as inclusive of Development Projects as the one-acre threshold.

(2) Priority Development Project Categories

Where a new Development Project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SSMP requirements.

(a) New development projects that create 10,000 square feet or more of impervious surfaces (collectively over the entire project site) including commercial, industrial, residential, mixed-use, and public projects. This category includes development projects on public or private land which fall under the planning and building authority of the Copermittees.

(b) 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.

(c) 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 must meet all SSMP requirements except for structural treatment BMP and numeric sizing criteria requirement F.1.d.(6) and hydromodification requirement F.1.h.

(d) 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.

(e) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges

[13] Pollutant generating Development Projects are those projects that generate pollutants at levels greater than natural background levels.

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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 percent 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.

(f) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to 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.

(g) 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.

(h) 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.

(3) Pollutants of Concern

As part of its local SSMP, each Copermittee must implement an updated procedure for identifying pollutants of concern for each Priority Development Project. The procedure must address, at a minimum: (1) Receiving water quality (including pollutants for which receiving waters are listed as impaired under CWA section 303(d)); (2) Land-use type of the Development Project and pollutants associated with that land use type; and (3) Pollutants expected to be present on site.

(4) Low Impact Development BMP Requirements

Each Copermittee must require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss.

(a) The following LID BMPs must be implemented:

(i) Each Copermittee must require LID BMPs or make a finding of infeasibility for each Priority Development Project in accordance with the LID waiver program in Section F.1.d.(8);

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(ii) Each Copermittee must incorporate formalized consideration, such as thorough checklists, ordinances, and/or other means, of LID BMPs into the plan review process for Priority Development Projects;

(iii) The review of each Priority Development Project must include an assessment of potential collection of storm water for on-site or off-site reuse opportunities;

(iv) The review of each Priority Development Project must include an assessment of techniques to infiltrate, filter, store, evaporate, or retain runoff close to the source of runoff; and

(v) Within 2 years after adoption of this Order, each Copermittee must review its local codes, policies, and ordinances and identify barriers therein to implementation of LID BMPs. Following the identification of these barriers to LID implementation, where feasible, the Copermittee must take, by the end of the permit cycle, appropriate actions to remove such barriers.

(b) The following LID BMPs must be implemented at all Priority Development Projects where technically feasible as required below:

(i) Maintain or restore natural storage reservoirs and drainage corridors (including depressions, areas of permeable soils, swales, and ephemeral and intermittent streams.

(ii) Projects with landscaped or other pervious areas must, where feasible, drain runoff from impervious areas (rooftops, parking lots, sidewalks, walkways, patios, etc) into pervious areas prior to discharge to the MS4. The amount of runoff from impervious areas that is to drain to pervious areas shall not exceed the total capacity of the project's pervious areas to infiltrate or treat runoff, taking into consideration the pervious areas' geologic and soil conditions, slope, and other pertinent factors.

(iii) Projects with landscaped or other pervious areas must, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate or treat runoff from impervious areas, prior to discharge to the MS4. Soil compaction for these areas shall be minimized. The amount of the impervious areas that are to drain to pervious areas must be based upon the total size, soil conditions, slope, and other pertinent factors.

(iv) Projects with low traffic areas and appropriate soil conditions must construct walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such as pervious concrete, porous asphalt, unit pavers, and granular materials.

(c) To protect ground water resources any infiltration LID BMPs must comply with Section F.1.(c)(6).

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(d) LID BMPs sizing criteria:

(i) LID BMPs shall be sized and designed to ensure onsite retention without runoff, of the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Map[14] ("design capture volume");

(ii) If onsite retention LID BMPs are technically infeasible per section F.1.d.(7)(b), LID biofiltration BMPs may treat any volume that is not retained onsite by the LID BMPs. The LID biofiltration BMPs must be designed for an appropriate surface loading rate to prevent erosion, scour and channeling within the BMP. Due to the flow through design of biofiltration BMPs, the total volume of the BMP, including pore spaces and prefilter detention volume, must be sized to hold at least 0.75 times the design storm volume that is not retained onsite by LID retention BMPs;

(iii) If it is shown to be technically infeasible to treat the remaining volume up to and including the design capture volume using LID BMPs (retention or biofiltration), the project must implement conventional treatment control BMPs in accordance with Section F.1.d.(6) below and must participate in the LID waiver program in Section F.1.d.(7).

(e) All LID BMPs shall be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies.

(5) Source Control BMP Requirements

Each Copermittee must require each Priority Development Project to implement source control BMPs. The source control BMPs to be required must:

(a) Prevent illicit discharges into the MS4;
(b) Minimize storm water pollutants of concern in runoff;
(c) Eliminate irrigation runoff;
(d) Include storm drain system stenciling or signage;
(e) Include properly designed outdoor material storage areas;
(f) Include properly designed outdoor work areas;
(g) Include properly designed trash storage areas;
(h) Include water quality requirements applicable to individual priority project categories.

[14] The isopluvial map is available from the County of Orange. The map can also be found as Figure A-1 Exhibit 7.II in the Model WQMP (September 2003), page 5 of 57 at http://www.ocwatersheds.com/documents/2003_DAMP_Exhibit_7_II_Model_WQMP_Attachments.pdf

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(6) Treatment Control BMP Requirements[15]

Each Copermittee must require each Priority Development Project to implement treatment control BMPs that meet the following requirements:

(a) All treatment control BMPs for a single Priority Development Project must collectively be sized to comply with the following numeric sizing criteria:

(i) Volume-based treatment control BMPs must be designed to mitigate (infiltrate, filter, or treat) the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Isopluvial Map[16]; or

(ii) Flow-based treatment control BMPs must be designed to mitigate (infiltrate, filter, or treat) either: a) the maximum flow rate of runoff produced from a rainfall intensity of 0.2 inch of rainfall per hour, for each hour of a storm event; or b) the maximum flow rate of runoff produced by the 85th percentile hourly rainfall intensity (for each hour of a storm event), as determined from the local historical rainfall record, multiplied by a factor of two.

(b) Treatment control BMPs for all Priority Development Projects must mitigate (treat through infiltration, settling, filtration or other unit processes) the required volume or flow of runoff from all developed portions of the project, including landscaped areas.

(c) All treatment control BMPs must be located so as to remove pollutants from runoff prior to its discharge to any waters of the U.S. Multiple Priority Development Projects may use shared treatment control BMPs as long as construction of any shared treatment control BMP is completed prior to the use or occupation of any Priority Development Project from which the treatment control BMP will receive runoff.

(d) All treatment control BMPs for Priority Development Projects must, at a minimum:

(i) Be ranked with high or medium pollutant removal efficiency for the project's most significant pollutants of concern, as the pollutant removal efficiencies are identified in the Copermittees' Model

[15] This section only applies to those PDPs not implementing LID capable of meeting the design storm criteria for the entire site and meeting technical infeasibility eligibility. Low-Impact Development (LID) and other site design BMPs that are correctly designed to effectively remove pollutants from runoff are considered treatment control BMPs.

[16] The isopluvial map is available from the County of Orange. The map can also be found as Figure A-1 Exhibit 7.II in the Model WQMP (September 2003), page 105 of 157 at http://www.ocwatersheds.com/StormWater/PDFs/2003_DAMP/2003_DAMP_Section_7_New_Development_Significant_Redevelopment.pdf.

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SSMP. Treatment control BMPs with a low removal efficiency ranking must only be approved by a Copermittee when a feasibility analysis has been conducted which exhibits that implementation of treatment control BMPs with high or medium removal efficiency rankings are infeasible for a Priority Development Project or portion of a Priority Development Project.

(ii) Be correctly sized and designed so as to remove storm water pollutants to the MEP.

(e) Target removal of pollutants of concern from runoff.

(f) Be implemented close to pollutant sources, and prior to discharging into waters of the U.S.

(g) Not be constructed within a waters of the U.S. or waters of the State.

(h) Include proof of a mechanism under which ongoing long-term maintenance will be conducted to ensure proper maintenance for the life of the project. The mechanisms may be provided by the project proponent or Copermittee.

(i) Be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies.

(7) Low Impact Development (LID) BMP Waiver Program

The Copermittees must develop, collectively or individually, a LID waiver program for incorporation into local SSMPs, which would allow a Priority Development Project to substitute implementation of all or a portion of required LID BMPs in section F.1.d(4) with implementation of treatment control BMPs and a mitigation project, payment into an in-lieu funding program, and/or watershed equivalent BMP(s) consistent with Section F.1.d.(11). The Copermittees shall submit the LID waiver program as part of their updated model SSMP. At a minimum, the program must meet the requirements below:

(a) Prior to implementation, the LID waiver program must clearly exhibit that it will not allow PDPs to result in a net impact (after consideration of any mitigation and in-lieu payments) from pollutant loadings over and above the impact caused by projects meeting LID requirements;

(b) For each PDP participating, a technical feasibility analysis must be included demonstrating that it is technically infeasible to implement LID BMPs that comply with the requirements of Section F.1.(d)(4). The

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Copermittee(s) must develop criteria for the technical feasibility analysis including a cost benefit analysis, examination of LID BMPs considered and alternatives chosen. Each PDP participating must demonstrate that LID BMPs were implemented as much as feasible given the site's unique conditions. Analysis must be made of the pollutant loading for each project participating in the LID substitution program. The estimated impacts from not implementing the required LID BMPs in section F.1.d.(4) must be fully mitigated. Technical infeasibility may result from conditions including, but not limited to:

(i) Locations that cannot meet the infiltration and groundwater protection requirements in section F.1.c.(6). Where infiltration is technically infeasible, the project must still examine the feasibility of other onsite retention LID BMPs;
(ii) Smart growth and infill or redevelopment locations where the density and/or nature of the project would create significant difficulty for compliance with the onsite volume retention requirements; and
(iii) Other site, geologic, soil or implementation constraints identified in the Copermittees updated local SSMP document.

(c) The LID waiver program must include mechanisms to verify that each Priority Development Project participating in the program is in compliance with all applicable SSMP requirements;

(d) The LID waiver program must develop and implement a review process verifying that the BMPs to be implemented meet the designated design criteria. The review process must also verify that each Priority Development Project participating in the program is in compliance with all applicable SSMP requirements.

(e) The LID waiver program must include performance standards for treatment control BMPs specified in compliance with section F.1.(d)(6).

(f) Each PDP that participates in the LID waiver program must mitigate for the pollutant loads expected to be discharged due to not implementing the LID BMPs in section F.1.d.(4). Mitigation projects must be implemented within the same hydrologic subarea as the PDP. Mitigation projects outside of the hydrologic subarea but within the same hydrologic unit may be approved provided that the project proponent demonstrates that mitigation projects within the same hydrologic subarea are infeasible and that the mitigation project will address similar beneficial use impacts as expected from the PDPs pollutant load types and amount. Offsite mitigation projects may include green streets projects, existing development retrofit projects, retrofit incentive programs, regional BMPs and stream restoration. Project applicants seeking to utilize these

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alternative compliance provisions may propose other offsite mitigation projects, which the Copermittees may approve if they meet the requirements of this subpart.

(g) A Copermittee may choose to implement a pollutant credit system as part of the LID waiver program provided that such a credit system clearly exhibits that it will not allow PDPs to result in a net impact from pollutant loadings over and above the impact caused by projects meeting LID requirements. Any credit system that a Copermittee chooses to implement must be submitted to the Executive Officer for review and approval as part of the waiver program.

(h) The LID waiver program shall include a storm water mitigation fund developed by the Copermittee(s) to be used for water quality improvement projects which may serve in lieu of the PDP's required mitigation in section F.1.d.(8)(e). The LID waiver program's storm water mitigation fund shall, at a minimum, identify;

(i) The entity or entities that will manage the storm water mitigation fund (i.e., assume full responsibility);
(ii) The range and types of acceptable projects for which storm water mitigation funds may be expended;
(iii) The entity or entities that will assume full responsibility for each water quality improvement project, including its successful completion; and
(iv) How the dollar amount of storm water mitigation fund contributions will be determined. In-lieu payments must be proportional to the additional pollutant load discharged by not fully implementing LID.

(i) Each Copermittee must notify the Regional Board in their annual report of each PDP choosing to participate in the LID waiver program. The annual report must include the following information:

(i) Name of the developer of the participating PDP;
(ii) Site location;
(iii) Reason for LID waiver including technical feasibility analysis;
(iv) Description of BMPs implemented;
(v) Total amount deposited, if any, into the storm water mitigation fund described in section F.1.d.(8)(f);
(vi) Water quality improvement project(s) proposed to be funded; and
(vii) Timeframe for implementation of water quality improvement projects.

(8) Site Design and Treatment Control BMP Design Standards

As part of its local SSMP, each Copermittee must develop and require Priority

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Development Projects to implement sitting, design, and maintenance criteria for each site design and treatment control BMP listed in its local SSMP to determine feasibility and applicability and so that implemented site design and treatment control BMPs are constructed correctly and are effective at pollutant removal, runoff control, and vector minimization. LID techniques, such as soil amendments, must be incorporated into the criteria for appropriate treatment control BMPs. Development of BMP design worksheets which can be used by project proponents is encouraged.

(9) Implementation Process

As part of its local SSMP, each Copermittee must implement a process to verify compliance with SSMP requirements. The process must identify at what point in the planning process Priority Development Projects will be required to meet SSMP requirements and at a minimum, the Priority Development Project must implement the required post-construction BMPs prior to occupancy and/or the intended use of any portion of that project.. The process must also include identification of the roles and responsibilities of various municipal departments in implementing the SSMP requirements, as well as any other measures necessary for the implementation of SSMP requirements.

(10) Treatment BMP Review

(a) The Copermittees must review and update the BMPs that are listed in their local SSMPs as options for treatment control during the third year of implementation of this Order. At a minimum, the update must include removal of obsolete or ineffective BMPs and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update must also add appropriate LID BMPs to any tables or discussions in the local SSMPs addressing pollutant removal efficiencies of treatment control BMPs. In addition, the update must include review and revision where necessary of treatment control BMP pollutant removal efficiencies.

(b) The update must incorporate findings from BMP effectiveness studies conducted by the Copermittees for projects funded wholly or in part by the State Board or Regional Board.

(c) Each Copermittee must implement a mechanism for annually incorporating findings from local treatment BMP effectiveness studies (e.g., ones conducted by, or on-behalf of, public agencies in Orange County) into SSMP project reviews and permitting

(11) Where a development project, greater than 100 acres in total project size or smaller than 100 acres in size yet part of a larger common plan of

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development that is over 100 acres, has been prepared using watershed and/or sub-watershed based water quality, hydrologic, and fluvial geomorphologic planning principles that implement regional LID BMPs in accordance with the sizing and location criteria of this Order and acceptable to the Regional Board, such standards shall govern review of projects with respect to Section F.1 of this Order and shall be deemed to satisfy this Order's requirements for LID site design, buffer zone, infiltration and groundwater protection standards, source control, treatment control, and hydromodification control standards. Regional BMPs must clearly exhibit that they will not result in a net impact from pollutant loadings over and above the impact caused by capture and retention of the design storm. Regional BMPs may be used provided that the BMPs capture and retain the volume of runoff produced from the 24-hour 85th percentile storm event as defined in section F.1.d.(6)(a)(i) and that such controls are located upstream of receiving waters. Any volume that is not retained by the LID BMPs, up to the design capture volume, must be treated using LID biofiltration. Where regional LID implementation has been shown to be technically infeasible (per section F.1.d.7.b) any volume up to and including the design capture volume, not retained by LID BMPs, nor treated by LID biofiltration, must be treated using conventional treatment control BMPs in accordance with Section F.1.d.(6) and participation in the LID waiver program in Section F.1.d.(7).

e. BMP CONSTRUCTION VERIFICATION

Prior to occupancy and/or intended use of any portion of the Priority Development Project subject to SSMP requirements, each Copermittee must inspect the constructed site design, source control, and treatment control BMPs to verify that they have been constructed and are operating in compliance with all specifications, plans, permits, ordinances, and this Order.

f. BMP MAINTENANCE TRACKING

(1) Each Copermittee must develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance within its jurisdiction since July 2001. LID BMPs implemented on a lot by lot basis at a single family residential home, such as rainbarrels, are not required to be tracked or inventoried. At a minimum, the database must include information on BMP type, location, watershed, date of construction, party responsible for maintenance, maintenance certifications or verifications, inspections, inspection findings, and corrective actions, including whether the site was referred to the Vector Control District.

(2) Each Copermittee must establish a mechanism not only to track post-construction BMPs, but also to ensure that appropriate easements and ownerships are properly recorded in public records and the information is

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conveyed to all appropriate parties when there is a change in project or site ownership.

(3) Each Copermittee must verify that approved post-construction BMPs are operating effectively and have been adequately maintained by implementing the following measures:

(a) An annual inventory of all approved BMPs within the Copermittee's jurisdiction. LID BMPs implemented on a lot by lot basis at a single family residential home, such as rainbarrels, are not required to be tracked or inventoried. The inventory must also include all BMPs approved for Priority Development Projects since July 2001;

(b) The designation of high priority BMPs. High-priority designation must include consideration of BMP size, recommended maintenance frequency, likelihood of operational and maintenance issues, location, receiving water quality, and other pertinent factors;

(c) Verify implementation, operation, and maintenance of BMPs by inspection, self-certification, surveys, or other equally effective approaches with the following conditions:

(i) The implementation, operation, and maintenance of at least 90 percent of approved and inventoried final project public and private SSMPs (a.k.a. WQMPs) must be verified annually. All post-construction BMPs shall be verified within every four year period;
(ii) Operation and maintenance verifications must be required prior to each rainy season;
(iii) All (100 percent) projects with BMPs that are high priority must be inspected by the Copermittee annually prior to each rainy season;
(iv) All (100 percent) public agency projects with BMPs must be inspected by the Copermittee annually;
(v) At least 50 percent of projects with drainage insert treatment control BMPs must be inspected by the Copermittee annually;
(vi) Appropriat e follow-up measures (including re-inspections, enforcement, maintenance, etc.) must be conducted to ensure the treatment BMPs continue to reduce storm water pollutants as originally designed;
(vii) All inspections must verify effective operation and maintenance of the treatment control BMPs, as well as compliance with all ordinances, permits, and this Order; and

(viii) Inspections must note observations of vector conditions, such as mosquitoes. Where conditions are identified as contributing to mosquito production, the Copermittee must notify the Orange County Vector Control District.

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g. Enforcement of Development Sites

Each Copermittee must enforce its storm water ordinance for all Development Projects and at all development sites as necessary to maintain compliance with this Order. Copermittee ordinances or other regulatory mechanisms must include appropriate sanctions to achieve compliance. Sanctions must include the following or their equivalent: Non-monetary penalties, fines, bonding requirements, and/or permit or occupancy denials for non-compliance.

h. Hydromodification Limitations on Increases of Runoff Discharge Rates and Durations[17]

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. The HMP shall be incorporated into the local SSMP and implemented by each Copermittee so that estimated post-project runoff discharge rates and durations shall not exceed pre-development discharge rates and durations. Where the proposed project is located on an already developed site, the pre-project discharge rate and duration shall be that of the pre-developed, naturally occurring condition. The HMP shall be submitted to the Executive Officer within 2 years of permit adoption. The HMP will be made available for public review and comment and the Executive Officer will determine the need for a public hearing.

(1) The HMP must:

(a) Identify a method for assessing susceptibility of channel segments which receive runoff discharges from Priority Development Projects. The geomorphic stability within the channel shall be assessed. A performance standard shall be created that ensures that the geomorphic stability within the channel not be compromised as a result of receiving runoff discharges from Priority Development Projects.

(b) Utilize continuous simulation of the entire rainfall record (or other analytical method proposed by the Copermittees and deemed acceptable

[17] Updated SSMP and hydromodification requirements shall apply to all priority projects or phases of priority projects which have not yet begun grading or construction activities at the time any updates SSMP or hydromodification requirement commences. If a Copermittee determines that lawful prior approval of a project exists, whereby application of an updated SSMP or hydromodification requirement to the project is legally infeasible, the updated SSMP or hydromodification requirement need not apply to the project. The Copermittees shall utilize the SSMP and hydromodification update periods to ensure that projects undergoing approval processes include application of the updated SSMP and hydromodification requirements in their plans.

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by the Regional Board) to identify a range of runoff flows[18] for which priority Development Project post-project runoff flow rates and durations shall not exceed pre-development (naturally occurring) runoff flow rates and durations by more than 10 percent, where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses. In addition, the identified range of runoff flow rates and durations must compensate for the loss of sediment supply due to the development. 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. In the case of an artificially hardened (concrete lined, rip rap, etc.) channel, 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 of a comparable soft-bottomed channel.

(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 (naturally occurring) runoff flow rates and durations by more than 10 percent for the range of runoff flows identified under section F.1.h.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses; (2) do not result in channel conditions which do not meet the channel standard developed under section F.1.h.(1)(a) for channel segments downstream of Priority Development Project discharge points; and (3) compensate for the loss of sediment supply due to development.

(d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent runoff from the projects from increasing and/or continuing unnatural rates of erosion of channel beds and banks, silt pollutants generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

(e) Include a review of pertinent literature.

(f) Identify areas within the San Juan Hydrologic Unit where historic hydromodification has resulted in a negative impact to benthic macroinvertebrate and benthic periphyton by identifying areas with low or very low Index of Biotic Integrity (IBI) scores.

[18] The identified range of runoff flows to be controlled should be expressed in terms of peak flow rates of rainfall events, such as "10% of the pre-development 2-year runoff event up to the pre-project 10-year runoff event."

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(g) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects. This protocol must include the use of the IBI score as a metric for assessing impacts and improvements to downstream watercourses.

(h) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.

(i) 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.

(j) Include technical information supporting any standards and criteria proposed.

(k) 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.

(l) Include a description of pre- and post-project monitoring and other program evaluation, including IBI score, to be conducted to assess the effectiveness of implementation of the HMP.

(m) Include mechanisms for assessing and addressing cumulative impacts within a watershed on channel morphology.

(n) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.

(2) In addition to the hydrologic control measures that must be implemented per section F.1.h.(1)(c), the HMP must include a suite of management measures to be used on Priority Development Projects to protect and restore downstream beneficial uses and prevent or further prevent adverse physical changes to downstream channels. The measures must be based on a prioritized consideration of the following elements in this order:

(a) Hydrologic control measures;
(b) On-site management controls;
(c) Regional controls located upstream of receiving waters; and
(d) In-stream controls.

Where stream channels are adjacent to, or are to be modified as part of a Priority Development Project, management measures must include buffer zones and setbacks. Under no circumstances will in-stream controls include the use of non-naturally occurring hardscape materials such as concrete,

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riprap, gabions, etc. The suite of management measures shall also include stream restoration as a viable option to achieve the channel standard in section F.1.h.(1)(a).

(3) Each individual Copermittee has the discretion to not require Section F.1.h. at Priority Development Projects where the project:

(a) Discharges storm water runoff into underground storm drains discharging directly to bays or the ocean; or
(b) Discharges storm water runoff into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to ocean waters, enclosed bays, estuaries, or water storage reservoirs and lakes.

(4) HMP Reporting and Implementation

(a) Within 2 years of adoption of the Order, the Copermittees shall submit to the Regional Board a draft HMP that has been reviewed by the public, including the analysis that identifies the appropriate limiting range of flow rates per section F.1.h.(1)(b).

(b) Within 180 days of receiving Regional Board comments on the draft HMP, the Copermittees shall submit a final HMP that addressed the Regional Board's comments.

(c) Within 90 days of receiving a finding of adequacy from the Executive Officer, each Copermittee shall incorporate and implement the HMP for all Priority Development Projects.

(d) Prior to approval of the HMP by the Regional Board, the early implementation measures likely to be included in the HMP shall be encouraged by the Copermittees.

(5) Interim Hydromodification Criteria

Within one year of adoption of this Order, each Copermittee must ensure that all Priority Development Projects are implementing the following criteria by comparing the pre-development (naturally occurring) and post-project flow rates and durations using a continuous simulation hydrologic model such as US EPA's Hydrograph Simulation Program-Fortran (HSPF):

(a) For flow rates from 10 percent of the 2-year storm event to the 5 year storm event, the post-project peak flows shall not exceed pre-development (naturally occurring) peak flows.

(b) For flow rates from the 5 year storm event to the 10 year storm event the post-project peak flows may exceed pre-development (naturally

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occurring) flows by up to 10 percent for a 1-year frequency interval.

The interim hydromodification criteria do not apply to Priority Development Projects where the project discharges (1) storm water runoff into underground storm drains discharging directly to bays or the ocean, or (2) storm water runoff into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to ocean waters, enclosed bays, estuaries, or water storage reservoirs and lakes.

Within one year of adoption of this Order, each Copermittee must submit a signed, certification statement to the Regional Board verifying implementation of the interim hydromodification criteria.

(6) No part of section F.1.h shall alleviate the Copermittees responsibilities for implementing Low Impact Development BMPs as required under section F.1.d.(4).

i. Training And Education

(1) Municipal Departments and Personnel Education

Municipal Development Planning: Each Copermittee must implement an education program so that its planning and development review staffs and contractors (and Planning Boards and Elected Officials, if applicable) have an understanding of:

(a) Federal, State, and local water quality laws and regulations applicable to Development Projects;

(b) The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization); and

(c) Methods of minimizing impacts to receiving water quality resulting from development, including:

(i) Storm water management plan development and review;
(ii) Local sensitive water bodies, including 303(d)-impairments and ESAs;
(iii) Methods to control downstream erosion impacts;
(iv) Identification of pollutants of concern;
(v) Site design BMP techniques;
(vi) Source control BMPs;
(vii) Selection of the most effective treatment control BMPs for the pollutants of concern; and
(viii) Public heath concerns related to storm water management infrastructure.

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(2) Project Applicants, Developers, Contractors, Property Owners, and other Responsible Parties

(a) Each Copermittee must implement a New Development / Redevelopment education program using all media as appropriate to:

(i) Measurably increase the knowledge of the target communities regarding MS4s, impacts of runoff on receiving waters, and potential BMP solutions for the target audience; and
(ii) To measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment.

(b) Each Copermittee must educate each target community on the following topics where appropriate:

(i) The importance of educating all construction workers in the field about storm water issues and BMPs though formal or informal training;
(ii) Federal, State, and local water quality laws and regulations applicable to new development and redevelopment activities;
(iii) Site design, source control, pollution prevention, and treatment BMPs;
(iv) General runoff concepts; and
(v) Other topics of local importance, including local water quality conditions, impaired waterbodies and environmentally sensitive areas.

2. CONSTRUCTION COMPONENT

Each Copermittee must implement a construction program which meets the requirements of this section, prevents illicit discharges into the MS4, implements and maintains structural and non-structural BMPs to reduce pollutants in storm water runoff from construction sites to the MS4, reduces construction site discharges of storm water pollutants from the MS4 to the MEP, and prevents construction site discharges from the MS4 from causing or contributing to a violation of water quality standards.

a. Ordinance Update

Within 365 days of adoption of this Order, each Copermittee must review and update its grading ordinances and other ordinances as necessary to achieve full compliance with this Order, including requirements for the implementation of all designated BMPs and other measures.

b. Source Identification

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Each Copermittee must maintain an updated watershed based inventory of all construction sites within its jurisdiction. The use of an automated database system, such as Geographical Information Systems (GIS) is required.

c. Site Planning and Project Approval Process

Each Copermittee must incorporate consideration of potential water quality impacts prior to approval and issuance of construction and grading permits.

(1) Each construction and grading permit must require proposed construction sites to implement designated BMPs and other measures so that illicit discharges into the MS4 are prevented and storm water pollutants discharged from the site will be reduced to the maximum extent practicable and will not cause or contribute to a violation of water quality standards.

(2) Prior to permit issuance, the project proponent's runoff management plan (or equivalent construction BMP plan) must be required to comply, and reviewed to verify compliance, with the local grading ordinance, other applicable local ordinances, and this Order.

(3) Prior to permit issuance, each Copermittee must verify that project proponents subject to California's statewide General NPDES Permit for Storm Water Discharges Associated With Construction Activities, (hereinafter General Construction Permit), have existing coverage under the General Construction Permit.

d. BMP Implementation

(1) Designate BMPs: Each Copermittee must designate a minimum set of BMPs and other measures to be implemented at all construction sites. The designated minimum set of BMPs must include:

(a) Management Measures:

(i) Pollution prevention, where appropriate;
(ii) Development and implementation of a site-specific runoff management plan;
(iii) Minimization of areas that are cleared and graded to only the portion of the site that is necessary for construction;
(iv) Minimization of exposure time of disturbed soil areas;
(v) Minimization of grading during the wet season and correlation of grading with seasonal dry weather periods to the extent feasible;
(vi) Limitation of grading to a maximum disturbed area as determined by each Copermittee before either temporary or permanent erosion controls are implemented to prevent storm water pollution. The Copermittee has the option of temporarily increasing the size of

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disturbed soil areas by a set amount beyond the maximum, if the individual site is in compliance with applicable storm water regulations and the site has adequate control practices implemented to prevent storm water pollution;

(vii) Temporary stabilization and reseeding of disturbed soil areas as rapidly as feasible;

(viii) Wind erosion controls;

(ix) Tracking controls;

(x) Non-stormwater management measures to prevent illicit discharges and control storm water pollution sources;

(xi) Waste management measures;

(xii) Preservation of natural hydrologic features where feasible;

(xiii) Preservation of riparian buffers and corridors where feasible;

(xiv) Evaluation and maintenance of all BMPs, until removed; and

(xv) Retention, reduction, and proper management of all storm water pollutant discharges on site to the MEP standard.

(b) Erosion and Sediment Controls:

(i) Erosion prevention. Erosion prevention is to be used as the most important measure for keeping sediment on site during construction;

(ii) Sediment controls. Sediment controls are to be used as a supplement to erosion prevention for keeping sediment on-site during construction;

(iii) Slope stabilization must be used on all active slopes during rain events regardless of the season and on all inactive slopes during the rainy season and during rain events in the dry season; and

(iv) Permanent revegetation or landscaping as early as feasible.

(c) Designate enhanced BMPs[19] for 303(d) impairments and ESAs: Each Copermittee must implement, or require implementation of, enhanced measures to address the exceptional threat to water quality posed by all construction sites tributary to CWA section 303(d) water body segments impaired for sediment or turbidity. Each Copermittee must also implement, or require implementation of, enhanced, site-specific measures for construction sites within or adjacent to or discharging directly to coastal lagoons, the ocean, or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).

(i) Active Sediment Treatment (AST): Each Copermittee must require implementation of advanced treatment for sediment at construction

[19] Enhanced BMPs are control actions specifically targeted to the pollutant or condition of concern and of higher quality and effectiveness than the minimum control measures otherwise required. Enhanced in this Order means better, not simply more, BMPs.

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sites (or portions thereof) that are determined by the Copermittee to be an exceptional threat to water quality. In evaluating the threat to water quality, the following factors must be considered by the Copermittee:

[a] Soil erosion potential or soil type;
[b] The site's slopes;
[c] Project size and type;
[d] Sensitivity of receiving water bodies;
[e] Proximity to receiving water bodies;
[f] Non-storm water discharges;
[g] Ineffectiveness of other BMPs;
[h] Proximity and sensitivity of aquatic threatened and endangered species of concern;
[i] Known effects of AST chemicals; and
[j] Any other relevant factors.

(d) Implement BMPs: Each Copermittee must implement, or require the implementation of, the designated minimum BMPs and any additional measures necessary to comply with this Order at each construction site within its jurisdiction year round. BMP implementation requirements, however, can vary based on wet and dry seasons. Dry season BMP implementation must plan for and address unseasonal rain events that may occur during the dry season (May 1 through September 30).

e. INSPECTION OF CONSTRUCTION SITES

Each Copermittee must conduct construction site inspections for compliance with its ordinances (grading, storm water, etc.), permits (construction, grading, etc.), and this Order. Priorities for inspecting sites must consider the nature and size of the construction activity, topography, and the characteristics of soils and receiving water quality.

(1) During the wet season, each Copermittee must inspect at least biweekly (every two weeks), all construction sites within its jurisdiction meeting any of the following criteria:

(a) All sites 30 acres or more in size with rough grading or active slopes occurring during the wet season;

(b) All sites one acre or more, and tributary to a CWA section 303(d) water body segment impaired for sediment or within or directly adjacent to, or discharging directly to, the ocean or a receiving water within an ESA; and

(c) Other sites determined by the Copermittees or the Regional Board as a significant threat to water quality. In evaluating threat to water quality, the following factors must be considered: (1) soil erosion potential; (2) site

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slope; (3) project size and type; (4) sensitivity of receiving water bodies; (5) proximity to receiving water bodies; (6) non-storm water discharges; (7) past record of non-compliance by the operators of the construction site; and (8) any other relevant factors.

(2) During the wet season, each Copermittee must inspect at least monthly, all construction sites with one acre or more of soil disturbance not meeting the criteria specified above in section F.2.e.(1).

(3) During the wet season, each Copermittee must inspect construction sites less than one acre in size as needed to ensure compliance with its ordinances and this Order.

(4) Each Copermittee must inspect all construction sites as needed during the dry season. Sites meeting the criteria in section F.2.e.(1) must be inspected at least once in August or September each year.

(5) Re-inspections: Based upon site inspection findings, each Copermittee must implement all follow-up actions (i.e., re-inspection, enforcement) necessary to comply with this Order. Reinspection frequencies must be determined by each Copermittee based upon the severity of deficiencies, the nature of the construction activity, and the characteristics of soils and receiving water quality.

(6) Inspections of construction sites must include, but not be limited to:

(a) Check for coverage under the General Construction Permit (Notice of Intent (NOI) and/or Waste Discharge Identification No.) during initial inspections;
(b) Assessment of compliance with Copermittee ordinances and permits related to runoff, including the implementation and maintenance of designated minimum BMPs;
(c) Assessment of BMP effectiveness;
(d) Visual observations for non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff;
(e) Education and outreach on storm water pollution prevention, as needed; and
(f) Creation of a written or electronic inspection report.

(7) The Copermittees must track the number of inspections for each inventoried construction site throughout the reporting period to verify that each site is inspected at the minimum frequencies required.

f. E NFORCEMENT OF CONSTRUCTION SITES

(1) Each Copermittee must develop and implement an escalating enforcement

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process that achieves prompt corrective actions at construction sites for violations of the Copermittee's water quality protection permit requirements and ordinances. This enforcement process must include authorizing the Copermittee's construction site inspectors to take immediate enforcement actions when appropriate and necessary. The enforcement process must include appropriate sanctions such as stop work orders, non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance.

(2) Each Copermittee must be able to respond to complaints received from third-parties and to ensure the Regional Board that corrective actions have been implemented.

g. REPORTING OF NON-COMPLIANT SITES

(1) In addition to the notification requirements in Attachment B, each Copermittee must notify the Regional Board when the Copermittee issues a stop work order or other high level enforcement to a construction site in its jurisdiction as a result of storm water violations.

(2) Each Copermittee shall annually notify the Regional Board, prior to the commencement of the wet season, of all construction sites with alleged violations. Information may be provided as part of the JRMP annual report if submitted prior to the rainy season. Information provided shall include, but not be limited to, the following:

(a) WDID number if enrolled under the General Construction Permit
(b) Site Location, including address
(c) Current violations or suspected violations

h. TRAINING AND EDUCATION

(1) Municipal Staff and Contractors: Requirements for municipal staff and contractors are described in the Municipal Component section of this Order.

(2) Construction Site Owner / Operator Responsibilities:

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee must implement a program to educate project applicants, developers, contractors, property owners, and other responsible parties. The education program must provide an understanding of the topics listed below, as appropriate for the audience being educated.

(a) The importance of educating all construction workers in the field about storm water issues and BMPs though formal or informal training;

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(b) Federal, State, and local water quality laws and regulations applicable to construction and grading activities;
(c) Site design, source control, pollution prevention, and treatment BMPs;
(d) General runoff concepts; and
(e) Other topics of local importance, including local water quality conditions, impaired waterbodies and environmentally sensitive areas.

3. EXISTING DEVELOPMENT COMPONENT

a. MUNICIPAL

Each Copermittee must implement a municipal program which meets the requirements of this section, prevents illicit discharges into the MS4, reduces municipal discharges of storm water pollutants from the MS4 to the MEP, and prevents municipal discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Source Identification / Inventory

Each Copermittee must maintain an updated watershed-based inventory of municipal areas and activities. The inventory must include the name, address (if applicable), and a description of the area/activity; which pollutants are potentially generated by the area/activity; whether the area/activity is adjacent to an ESA; and identification of whether the area/activity is tributary to a CWA section 303(d) water body segment and generates pollutants for which the water body segment is impaired. The use of an automated database system, such as Geographical Information Systems (GIS) is required when applicable.

(2) General BMP Implementation

(a) Pollution Prevention: Each Copermittee must implement pollution prevention methods in its municipal program and must require their use by appropriate municipal departments, personnel, and contractors, where appropriate.

(b) Designate Minimum BMPs: Each Copermittee must designate a minimum set of BMPs for all municipal areas and activities. The designated minimum BMPs for municipal areas and activities must be area or activity specific as appropriate. BMPs must be designated for special events that are expected to generate significant trash and litter.

(c) Designate BMPs for ESAs and 303(d) Impairments: Each Copermittee must designate enhanced measures for municipal areas and activities tributary to CWA section 303(d) impaired water body segments when an area or activity generates pollutants for which the water body segment is

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impaired. Each Copermittee must also designate additional controls for municipal areas and activities within or directly adjacent to or discharging directly to coastal lagoons, the ocean, or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).

(d) Implement BMPs: Each Copermittee must implement, or require the implementation of, the designated minimum and enhanced BMPs and any additional measures necessary based on its inventory to comply with this Order for each municipal area or activity within its jurisdiction.

(3) BMP Implementation for Management of Pesticides, Herbicides, and Fertilizers

Each Copermittee must implement BMPs to reduce the contribution of storm water pollutants associated with the application, storage, and disposal of pesticides, herbicides and fertilizers from municipal areas and activities to MS4s and receiving waters. Such BMPs must include, at a minimum:

(a) Educational activities, permits, certifications and other measures for municipal applicators and distributors;
(b) Integrated Pest Management (IPM) measures that rely on non-chemical solutions;
(c) The use of native vegetation;
(d) Schedules for irrigation and chemical application; and
(e) The collection and proper disposal of unused pesticides, herbicides, and fertilizers.

(4) BMP implementation for Flood Control Structures

(a) Each Copermittee must implement procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies.
(b) Each Copermittee must include water quality protection measures, where feasible, when retrofitting existing flood control structural devices.
(c) Each Copermittee must evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device. The inventory and evaluation must be completed by and submitted to the Regional Board in the 2nd year JRMP Annual Report.

(5) BMP Implementation for Sweeping of Municipal Areas

Where municipal area sweeping is implemented as an MS4 BMP for municipal roads, streets, highways, and parking facilities, each Copermittee must design and implement the program based on the following criteria:

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(a) Optimize pickup of trash and debris based on land uses, trash collection schedules, seasonal factors (e.g., special events, tourism, etc.) and inspections of municipal areas/activities.

(6) Operation and Maintenance of Municipal Separate Storm Sewer System (MS4) and Structural Controls

(a) Treatment Controls: Each Copermittee must implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce storm water pollutant discharges to or from its MS4s and related drainage structures.

(b) MS4 and Facilities: Each Copermittee must implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities must, at a minimum, include:

(i) Inspection and removal of accumulated waste at least once a year between May 1 and September 30 of each year for all MS4 facilities;
(ii) Additional cleaning as necessary between October 1 and April 30 of each year for facilities that receive or collect high volumes of trash and debris;
(iii) Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less that every other year;
(iv) Open channels must be cleaned of observed anthropogenic litter in a timely manner;
(v) Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed;
(vi) Proper disposal of waste removed pursuant to applicable laws; and
(vii) Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

(7) Infiltration From Sanitary Sewer to MS4/Provide Preventive Maintenance of Both

(a) Each Copermittee must implement controls and measures to prevent and eliminate infiltration of seepage from municipal sanitary sewers to MS4s through thorough, routine preventive maintenance of the MS4. Each Copermittee that operates both a municipal sanitary sewer system and a MS4 must implement controls and measures to prevent and eliminate infiltration of seepage from the municipal sanitary sewers to the MS4s that must include overall sanitary sewer and MS4 surveys and thorough, routine preventive maintenance of both.

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(b) Each Copermittee must implement controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary. Such controls must include:

(i) Adequate plan checking for construction and new development,
(ii) Incident response training for municipal employees that identify sanitary sewer spills;
(iii) Code enforcement inspections;
(iv) MS4 maintenance and inspections;
(v) Interagency coordination with sewer agencies; and
(vi) Proper education of municipal staff and contractors conducting field operations on the MS4 or municipal sanitary sewer (if applicable).

(8) Inspection of Municipal Areas and Activities

(a) At a minimum, each Copermittee must inspect the following high priority municipal areas and activities annually:

(i) Roads, Streets, Highways, and Parking Facilities;
(ii) Flood Management Projects and Flood Control Devices;
(iii) Areas and activities tributary to a CWA section 303(d) impaired water body segment, where an area or activity generates pollutants for which the water body segment is impaired.
(iv) Areas and activities within or adjacent to or discharging directly to coastal lagoons, the ocean, or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order);
(v) Municipal Facilities:
  [a] Active or closed municipal landfills;
  [b] Publicly owned treatment works (including water and wastewater treatment plants) and sanitary sewage collection systems;
  [c] Solid waste transfer facilities;
  [d] Land application sites;
  [e] Corporate yards including maintenance and storage yards for materials, waste, equipment and vehicles; and
  [f] Household hazardous waste collection facilities.
(vi) Municipa l airfields;
(vii) Parks and recreation facilities;
(viii) Special event venues following special events (festivals, sporting events, etc.);
(ix) Power washing; and
(x) Other municipal areas and activities that the Copermittee determines may contribute a significant pollutant load to the MS4.

(b) Other municipal areas and activities must be inspected as needed and in response to water quality data, valid public complaints, and findings from

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municipal or contract staff.

(c) Based upon site inspection findings, each Copermittee must implement all follow-up actions necessary to comply with this Order.

(9) Enforcement of Municipal Areas and Activities

Each Copermittee must enforce its storm water ordinance for all municipal areas and activities as necessary to maintain compliance with this Order.

(10) Training and Education

Each Copermittee must ensure that all municipal personnel and contractors that have responsibilities for selecting, implementing, and evaluating BMPs for municipal areas and activities are adequately trained and educated to perform such tasks.

(a) Municipal Departments and Personnel Education

(i) Municipal Construction Activities: Each Copermittee must 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:

[a] Federal, State, and local water quality laws and regulations applicable to construction and grading activities;
[b] 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);
[c] Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities;
[d] The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application;
[e] Current advancements in BMP technologies;
[f] SSMP Requirements including treatment options, site design, source control, and applicable tracking mechanisms; and
[g] Other topics of local importance, including local water quality conditions, impaired water bodies, environmentally sensitive areas, and public health and disease vector issues associated with runoff.

(ii) Municipal Industrial/Commercial Activities: Each Copermittee must train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at

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least once a year. Training must cover inspection and enforcement procedures, BMP implementation, and review of monitoring data

(iii) Municipal Other Activities: Each Copermittee must 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.

b. C OMMERCIAL □INDUSTRIAL

Each Copermittee must implement a commercial / industrial program that meets the requirements of this section, prevents illicit discharges into the MS4, reduces commercial / industrial discharges of storm water pollutants from the MS4 to the MEP, and prevents commercial / industrial discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Source Identification

(a) Each Copermittee must maintain an updated watershed-based inventory of all industrial and commercial sites/sources within its jurisdiction (regardless of ownership) that could contribute a significant pollutant load to the MS4. The inventory must include the following minimum information for each industrial and commercial site/source: name; address; pollutants potentially generated by the site/source; and identification of whether the site/source is tributary to a Clean Water Act section 303(d) water body segment and generates pollutants for which the water body segment is impaired; and a narrative description including SIC codes which best reflects the principal products or services provided by each facility.

At a minimum, the following sites/sources must be included in the inventory:

(i) Commercial Sites/Sources:

[a] Automobile repair, maintenance, fueling, or cleaning;
[b] Airplane repair, maintenance, fueling, or cleaning;
[c] Boat repair, maintenance, fueling, or cleaning;
[d] Equipment repair, maintenance, fueling, or cleaning;
[e] Automobile and other vehicle body repair or painting;
[f] Mobile automobile or other vehicle washing;
[g] Automobile (or other vehicle) parking lots and storage facilities;
[h] Retail or wholesale fueling;
[i] Pest control services;
[j] Eating or drinking establishments, including food markets;

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[k] Mobile carpet, drape or furniture cleaning;
[l] Cement mixing or cutting;
[m] Masonry;
[n] Painting and coating;
[o] Botanical or zoological gardens and exhibits;
[p] Landscaping;
[q] Nurseries and greenhouses;
[r] Golf courses, parks and other recreational areas/facilities;
[s] Cemeteries;
[t] Pool and fountain cleaning;
[u] Marinas;
[v] Portable sanitary services;
[w] Building material retailers and storage;
[x] Animal facilities;
[y] Mobile pet services;
[z] Power washing services; and
[aa] Other sites and sources with a history of un-authorized discharges to the MS4.

(ii) Industrial Sites/Sources:

[a] Industrial Facilities, as defined at 40 CFR § 122.26(b)(14), including those subject to the General Industrial Permit or other individual NPDES permit;
[b] Operating and closed landfills;
[c] Facilities subject to SARA Title III; and
[d] Hazardous waste treatment, disposal, storage and recovery facilities.

(iii) ESAs and 303(d) Listed Waterbodies: All other commercial or industrial sites/sources tributary to a CWA Section 303(d) impaired water body segment, where the site/source generates pollutants for which the water body segment is impaired. All other commercial or industrial sites/sources within or directly adjacent to or discharging directly to coastal lagoons, the ocean, or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).

(iv) All other commercial or industrial sites/sources that the Copermittee determines may contribute a significant pollutant load to the MS4.

(2) General BMP Implementation

(a) Pollution Prevention: Each Copermittee must require the use of pollution prevention methods by industrial and commercial sites/sources.

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(b) Designate / Update Minimum BMPs: Each Copermittee must designate a minimum set of BMPs for all industrial and commercial sites/sources. Where BMPs have already been designated, each Copermittee must review its existing BMPs for adequacy. The designated minimum BMPs must be specific to facility types and pollutant-generating activities, as appropriate.

(c) Designate Enhanced BMPs for ESAs and 303(d) Impairments: Each Copermittee must designate enhanced measures for industrial and commercial sites/sources tributary to CWA section 303(d) impaired water body segments (where a site/source generates pollutants for which the water body segment is impaired). Each Copermittee must also designate additional controls for industrial and commercial sites/sources within or directly adjacent to or discharging directly to coastal lagoons, the ocean, or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).

(d) Implement BMPs: Each Copermittee must implement, or require the implementation of, the designated minimum and enhanced BMPs and any additional measures necessary based on inspections, incident responses, and water quality data to comply with this Order at each industrial and commercial site/source within its jurisdiction.

(3) <u>BMP Implementation for Mobile Businesses</u>

(a) Each Copermittee must develop and implement a program to reduce the discharge of storm water pollutants from mobile businesses to the MEP and to prohibit non-storm water discharges pursuant to Section B of this Order. Each Copermittee must keep as part of their commercial source inventory a listing of mobile businesses known to operate within its jurisdiction. The program must include:

(i) Development and implementation of minimum standards and BMPs to be required for each of the various types of mobile businesses;
(ii) Development and implementation of an enforcement strategy which specifically addresses the unique characteristics of mobile businesses;
(iii) Notification of those mobile businesses known to operate within the Copermittee's jurisdiction of the minimum standards and BMP requirements and local ordinances;
(iv) Development and implementation of an outreach and education strategy; and
(v) Inspection of mobile businesses as needed to implement the program.

(b) If they choose to, the Copermittees may cooperate in developing and implementing their programs for mobile businesses, including sharing of mobile business inventories, BMP requirements, enforcement action

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information, and education.

(4) Inspection of Industrial and Commercial Sites/Sources

Each Copermittee must conduct industrial and commercial site inspections for compliance with its ordinances, permits, and this Order.

(a) Inspection Procedures: Inspections must include but not be limited to:

(i) Review of BMP implementation plans, if the site uses or is required to use such a plan;

(ii) Review of facility monitoring data, if the site monitors its runoff;

(iii) Check for coverage under the General Industrial Permit (Notice of Intent (NOI) and/or Waste Discharge Identification Number), if applicable;

(iv) Assessment of compliance with Copermittee ordinances and permits related to runoff;

(v) Assessment of BMP implementation, maintenance and effectiveness;

(vi) Visual observations for non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff; and

(vii) Education and training on storm water pollution prevention, as conditions warrant.

(b) Each Copermittee shall annually notify the Regional Board, prior to the commencement of the wet season, of all Industrial Sites and Industrial Facilities subject to the General Industrial Permit or other individual NPDES permit with alleged violations. Information may be provided as part of the JRMP annual report if submitted prior to the rainy season. Information provided shall include, but not be limited to, the following:

(i) WDID number if enrolled under the General Industrial Permit;
(ii) Site Location, including address;
(iii) Current violations or suspected violations; and
(iv) Past Violation history.

(c) Frequencies: At a minimum, 20 percent of the sites inventoried as required in section F.3.b.(1) above (excluding mobile sources and food facilities) must be inspected each year. Mobile businesses must be

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inspected pursuant to the enforcement strategy developed pursuant to section F.3.b.(3). Other inspection frequencies must be based upon findings of the Copermittee's existing program and the following factors:

(i) Type of activity (SIC code);
(ii) Materials used at the facility;
(iii) Wastes generated;
(iv) Pollutant discharge potential;
(v) Non-storm water discharges;
(vi) Size of facility;
(vii) Proximity to receiving water bodies;
(viii) Sensitivity of receiving water bodies;
(ix) Whether the facility is subject to the General Industrial Permit or an individual NPDES permit;
(x) Whether the facility has filed a No Exposure Certification/Notice of Non-Applicability;
(xi) Facility design;
(xii) Total area of the site, area of the site where industrial or commercial activities occur, and area of the site exposed to rainfall and runoff;
(xiii) The facility's compliance history; and
(xiv) Any other relevant factors.

(d) Food Facilities: Each food facility must be inspected annually for compliance with the Copermittee's water quality ordinances and this Order. Each inspection of a food facility must, at a minimum, address the following concerns:

(i) Trash storage and disposal;
(ii) Grease storage and disposal;
(iii) Washwater discharges to the MS4 (e.g., from floor mats, driveways, sidewalks, etc.);
(iv) Identification of outdoor sewer and MS4 connections; and
(v) Education of property managers when grease and/or trash facilities are shared by multiple facilities.

(e) Third-Party Inspections: Each Copermittee may develop and implement a third party inspection program for verifying industrial and commercial site/source compliance with its ordinances, permits, and this Order. To the extent that third party inspections are conducted to fulfill the requirements of this Order, the Copermittee will be responsible for conducting and documenting quality assurance and quality control of the third-party inspections.

(i) Each inspection conducted by a third-party must, at a minimum, result in the following:

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[a] Photo documentation of potential storm water violations identified during the third party inspection;
[b] Reporting to the Copermittee of identified significant potential violations, including imminent or observed illegal discharges, within 24 hours of the third party inspection;
[c] Reporting to the Copermittee of all inspection findings within one week of the inspection being conducted; and
[d] Copermittee follow-up and/or enforcement actions for identified potential storm water violations within two business days of the inspection or potential violation report receipt.

(f) Based upon site inspection findings, each Copermittee must implement all follow-up actions and enforcement necessary to comply with this Order.

(g) To the extent that the Regional Board has conducted an inspection of an industrial site during a particular year, the requirement for the responsible Copermittee to inspect this facility during the same year will be satisfied.

(h) The Copermittees must track the number of inspections for the inventoried industrial and commercial sites/sources throughout the reporting period to verify that the sites/sources are inspected at the minimum frequencies listed in this Order.

(5) Enforcement of Industrial and Commercial Sites/Sources

Each Copermittee must enforce its storm water ordinance for all industrial and commercial sites/sources as necessary to maintain compliance with this Order. Copermittee ordinances or other regulatory mechanisms must include appropriate sanctions to achieve compliance. Sanctions must include the following or their equivalent: Non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance.

(6) Training and Education for Owners and Operators of Commercial and Industrial Activities

(a) Each Copermittee must implement an education program using all media as appropriate to (1) measurably increase the knowledge of owners and operators of commercial and industrial activities regarding MS4s, impacts of 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 storm water pollutant releases and eliminate prohibited non-storm water discharges to MS4s and the environment. At a minimum, the education program must meet the requirements of this section and address the following issues:

(i) Laws, regulations, permits, & requirements;

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(ii) Best management practices;
(iii) General runoff concepts; and

(iv) Other topics, including public reporting mechanisms, water conservation, low-impact development techniques.

(b) BMP Notification: At least twice during the five-year period of this Order, each Copermittee must notify the owner/operator of each inventoried industrial and commercial site/source of the BMP requirements applicable to the site/source.

c. RESIDENTIAL

Each Copermittee must implement a residential program which meets the requirements of this section, prevents illicit discharges into the MS4, reduces residential discharges of storm water pollutants from the MS4 to the MEP, and prevents residential discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Threat to Water Quality Prioritization

Each Copermittee must identify residential areas and activities that pose a high threat to water quality. At a minimum, these must include:

(a) Automobile repair, maintenance, washing, and parking;
(b) Home and garden care activities and product use (pesticides, herbicides, and fertilizers);
(c) Disposal of trash, pet waste, green waste, and household hazardous waste (e.g., paints, cleaning products);
(d) Any other residential source that the Copermittee determines may contribute a significant pollutant load to the MS4;
(e) Any residential areas tributary to a CWA section 303(d) impaired water body, where the residence generates pollutants for which the water body is impaired; and
(f) Any residential areas within or directly adjacent to or discharging directly to a coastal lagoon, the ocean, or other receiving waters within an environmentally sensitive area (as defined in Attachment C of this Order).

(2) BMP Implementation

(a) Pollution Prevention: Each Copermittee must actively encourage the use of pollution prevention methods by residents.

(b) Designate BMPs: Each Copermittee must designate minimum BMPs for high-threat-to-water quality residential areas and activities. The designated minimum BMPs for high-threat-to-water quality residential

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areas and activities must be area or activity specific.

(c) Hazardous Waste BMPs: Each Copermittee must facilitate the proper management and disposal of used oil, toxic materials, and other household hazardous wastes. Such facilitation must include educational activities, public information activities, and establishment of collection sites operated by the Copermittee or a private entity. Curbside collection of household hazardous wastes is encouraged.

(d) Implement BMPs: Each Copermittee must implement, or require implementation of, the designated minimum BMPs and any additional measures necessary to comply with Sections A and B of this Order.

(e) Each Copermittee must implement, or require implementation of, BMPs for residential areas and activities that have not been designated a high threat to water quality, as necessary.

(3) Enforcement of Residential Areas and Activities

Each Copermittee must enforce its storm water ordinance for all residential areas and activities as necessary to maintain compliance with this Order.

(4) Evaluation of Oversight of Residential Areas and Activities

Each Copermittee must annually review the effectiveness of efforts to reduce residential discharges of storm water pollutants from the MS4 and eliminate illicit residential discharges into the MS4. The evaluation must consider findings from monitoring data, municipal employee comments, inspections, complaints, and other appropriate sources.

(5) Common Interest Areas (CIA) / Home Owner Association (HOA) Areas

Each Copermittee must implement measures specifically to ensure that runoff within common interest developments, including areas managed by associations, meets the objectives of this section and Order.

(a) BMP Implementation: Each Copermittee must implement management measures based on a review of pertinent factors, including:

(i) Current maintenance duties and procedures used by CIA/HOA maintenance associations within its jurisdiction;
(ii) Whether streets and storm drains are publicly or privately owned within the CIA/HOA;
(iii) Whether the CIA/HOA area has been identified as a high priority residential area;
(iv) Proximity to 303(d)-listed waterbodies, the ocean, environmentally

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sensitive areas;
(v) Evaluation of water quality monitoring data;
(vi) Evaluation of existing illegal discharge/illicit connection activities;
(vii) Other activities conducted or authorized by the HOA that may pose a significant risk to inland or coastal receiving waters.

(b) Legal Authority and Enforcement: Within one year of adoption of this Order, each Copermittee must review its Municipal Code to determine the most appropriate method to implement and enforce runoff management measures within CIA/HOA areas.

(6) Residential Education Program

(a) Each Copermittee must implement a Residential Education Program using all media as appropriate to (1) measurably increase the knowledge regarding MS4s, impacts of 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 storm water and eliminate prohibited non-storm water pollutant releases to MS4s and the environment.

(b) Copermittee educational programs must emphasize underserved target audiences, residents and managers of CIA/HOA areas, high-risk behaviors, and "allowable" behaviors and discharges. At a minimum, the education program must meet the requirements of this section and address the following issues:

(i) Laws, regulations, permits, and requirements;
(ii) Best management practices;
(iii) General runoff concepts;
(iv) Existing water quality, including local water quality conditions, impaired waterbodies and environmentally sensitive areas; and
(v) Other topics, including public reporting mechanisms, water conservation, low-impact development techniques, and public health and disease vector issues associated with runoff.

d. Retrofitting Existing Development

Each Copermittee must develop and implement a retrofitting program which meets the requirements of this section. The goals of the existing development retrofitting program are to reduce impacts from hydromodification, promote LID, support riparian and aquatic habitat restoration, reduce the discharges of storm water pollutants from the MS4 to the MEP, and prevent discharges from the MS4 from causing or contributing to a violation of water quality standards. Where feasible, at the discretion of the Copermittee, the existing development retrofitting program may be coordinated with flood control projects and infrastructure

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improvement programs.

(1) Source Identification

The Copermittee must identify and inventory existing developments (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting. Potential retrofitting candidates must include but are not limited to:

(a) Development that contributes pollutants of concern to a TMDL or a ESA;
(b) Receiving waters channelized or otherwise hardened;
(c) Development tributary to receiving waters that are channelized or otherwise hardened;
(d) Developments tributary to receiving waters that are significantly eroded;
(e) Developments tributary to an ASBS or SWQPA; and
(f) Development that causes hydraulic constriction.

(2) Each Copermittee shall evaluate and rank the inventoried existing developments to prioritize retrofitting. Criteria for evaluation must include but is not limited to:

(a) Feasibility;
(b) Cost effectiveness;
(c) Pollutant removal effectiveness;
(d) Impervious area potentially treated;
(e) Maintenance requirements;
(f) Landowner cooperation;
(g) Neighborhood acceptance;
(h) Aesthetic qualities; and
(i) Efficacy at addressing concern.

(3) Each Copermittee must consider the results of the evaluation in prioritizing work plans for the following year. Highly feasible projects expected to benefit water quality should be given a high priority to implement source control and treatment control BMPs. Where feasible, the retrofit projects should be designed in accordance with the SSMP requirements within sections F.1.d.(3) through F.1.d.(8). In addition, the Copermittee shall encourage retrofit projects to implement where feasible the Hydromodification requirements in Section F.1.h.

(4) When requiring retrofitting on existing development, the Copermittees will cooperate with private landowners to encourage retrofitting projects. The Copermittee may consider the following practices in cooperating and encouraging private landowners to retrofit their existing development:

(a) Demonstration retrofit projects;
(b) Retrofits on public land and easements;

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(c) Education and outreach;
(d) Subsidies for retrofit projects;
(e) Requiring retrofit projects as mitigation or ordinance compliance;
(f) Public and private partnerships; and
(g) Fees for existing discharges to the MS4.

(5) The completed retrofit BMPs shall be tracked and inspected in accordance with section F.1.f.

(6) Where constraints on retrofitting preclude effective BMP deployment on existing developments at locations critical to protect receiving waters, a Copermittee may propose a regional mitigation project to improve water quality. Such regional projects may include but are not limited to:

(a) Regional water quality treatment BMPs;
(b) Urban creek or wetlands restoration and preservation;
(c) Daylighting and restoring underground creeks;
(d) Localized rainfall storage and reuse to the extent such projects are fully protective of downstream water rights;
(e) Hydromodification project; and
(f) Removal of invasive plant species.

(7) A retrofit project or regional mitigation project may qualify as a Watershed Water Quality Activity provided it meets the requirements in section G. Watershed Runoff Management Program.

4. ILLICIT DISCHARGE DETECTION AND ELIMINATION

Each Copermittee must implement a program which meets the requirements of this section to actively detect and eliminate illicit discharges and disposal into the MS4. The program must address all types of illicit discharges and connections excluding those non-storm water discharges not prohibited by the Copermittee in accordance with section B of this Order.

a. Prevent And Detect Illicit Discharges And Connections

Each Copermittee must implement measures to prevent and detect illicit discharges to the MS4.

(1) Legal Authority: Each Copermittee must retain legal authority to prevent and eliminate illicit discharges and connections to the MS4.

(2) Inspections: Each Copermittee must include use of appropriate municipal personnel and contractors to assist in identifying illicit discharges and connections during their daily activities.

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(a) Inspections for illegal discharges and connections must be conducted during routine maintenance of all MS4 facilities.

(b) Municipal staff and contractors conducting non-MS4 field operations must be trained to report suspected illegal discharges and connections to proper municipal staff.

b. MAINTAIN MS4 MAP

Each Copermittee must maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction. The use of GIS is required. The accuracy of the MS4 map must be confirmed during dry weather field screening and analytical monitoring and must be updated at least annually. The GIS layers of the MS4 map must be submitted with the updated Jurisdictional Runoff Management Plan within 365 days after adoption of this Order.

c. FACILITATE PUBLIC REPORTING OF ILLICIT DISCHARGES AND CONNECTIONS - PUBLIC HOTLINE

Each Copermittee must promote, publicize and facilitate public reporting of illicit discharges or water quality impacts associated with discharges into or from MS4s. Each Copermittee must facilitate public reporting through development and operation of a public hotline. Public hotlines can be Copermittee-specific or shared by Copermittees. All storm water hotlines must be capable of receiving reports in both English and Spanish 24 hours per day and seven days per week.

d. DRY WEATHER FIELD SCREENING AND ANALYTICAL MONITORING

Each Copermittee must conduct dry weather field screening and analytical monitoring of MS4 outfalls and other portions of its MS4 within its jurisdiction to detect illicit discharges and connections in accordance with Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2009-0002 in Attachment E of this Order.

e. INVESTIGATION INSPECTION AND FOLLOW-UP

Each Copermittee must implement procedures to investigate and inspect portions of the MS4 that, based on the results of field screening, analytical monitoring, or other appropriate information, indicate a reasonable potential of containing illicit discharges, illicit connections, or other sources of pollutants in non-storm water.

(1) Develop response criteria for data: Each Copermittee must develop, update, and use numeric criteria action levels (or other actions level criteria where appropriate) to determine when follow-up investigations will be performed in response to water quality monitoring. The criteria must include required

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non-storm water action levels (see Section C) and a consideration of 303(d)-listed waterbodies and environmentally sensitive areas (ESAs) as defined in Attachment C.

(2) Respond to data: Each Copermittee must investigate portions of the MS4 for which water quality data or conditions indicates a potential illegal discharge or connection.

(a) Obvious illicit discharges (i.e. color, odor, or significant exceedances of action levels) must be investigated immediately.

(b) Field screen data: Within two business days of receiving dry weather field screening results that exceed action levels, the Copermittees must either initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation shall be included in the Annual Report.

(c) Analytical data: Within five business days of receiving analytical laboratory results that exceed action levels, the Copermittees must either initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation shall be included in the Annual Report.

(3) Respond to notifications: Each Copermittee must respond to and resolve each reported incident (e.g., public hotline, staff notification, etc.) in a timely manner. Criteria may be developed to assess the validity of, and prioritize the response to, each report.

f. Elimination Of Illicit Discharges And Connections

Each Copermittee must take immediate action to initiate steps necessary to eliminate all detected illicit discharges, illicit discharge sources, and illicit connections after detection. Elimination measures may include an escalating series of enforcement actions for those illicit discharges that are not a serious threat to public health or the environment. Illicit discharges that pose a serious threat to the public's health or the environment must be eliminated immediately.

g. Enforce Ordinances

Each Copermittee must implement and enforce its ordinances, orders, or other legal authority to prevent illicit discharges and connections to its MS4 and to eliminate detected illicit discharges and connections to it's MS4.

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h. Prevent And Respond To Sewage Spills (Including From Private Laterals And Failing Septic Systems) And Other Spills

(1) Each Copermittee must implement management measures and procedures to prevent, respond to, contain and clean up all sewage (see below) and other spills that may discharge into its MS4 from any source (including private laterals and failing septic systems). Copermittees must coordinate with spill response teams to prevent entry of spills into the MS4 and contamination of surface water, ground water and soil. Each Copermittee must coordinate spill prevention, containment and response activities throughout all appropriate departments, programs and agencies so that maximum water quality protection is available at all times.

(2) Each Copermittee must develop and implement a mechanism whereby it is notified of all sewage spills from private laterals and failing septic systems into its MS4. Each Copermittee must implement management measures and procedures to prevent, respond to, and coordinate a response to contain and clean up sewage from any such notification.

i. Education And Training

Each Copermittee must implement educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials.

5. PUBLIC PARTICIPATION COMPONENT

Each Copermittee must incorporate a mechanism for public participation in the updating, development, and implementation of the Jurisdictional Runoff Management Program.

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G. WATERSHED RUNOFF MANAGEMENT PROGRAM

1. Lead Watershed Copermittee Identification

Watershed Copermittees shall identify the Lead Watershed Copermittee for their Watershed Management Area (WMA). The Lead Watershed Copermittees shall serve as liaisons between the Permittees and Regional Board, where appropriate.

2. Watershed Water Quality Workplan (Watershed Workplan)

The Watershed Workplan shall describe the Permittees' development and implementation of a collective watershed strategy to assess and prioritize the water quality problems within the watershed's receiving waters, identify and model sources of the highest priority water quality problem(s), develop a watershed-wide BMP implementation strategy to abate highest priority water quality problems, and a monitoring strategy to evaluate BMP effectiveness and changing water quality prioritization in the WMA.

The work plan shall, at a minimum:

a. Characterize the receiving water quality in the WMA. Characterization shall include use of regularly collected water quality data, reports, monitoring and analysis generated in accordance with the requirements of the Receiving Waters Monitoring and Reporting Program, as well as applicable information available from other public and private organizations.

b. Identify the highest priority water quality problem(s), in terms of constituents by location, in the WMA's receiving waters. Identified water quality problem(s) shall, at a minimum, give consideration to; TMDLs, receiving waters listed on the CWA section 303(d) list, waters with persistent violations of water quality standards, toxicity, or impacts to beneficial uses, and other pertinent conditions.

c. Identify the sources of the highest water quality problem(s) within the WMA. Efforts to determine such sources shall include, but not be limited to: use of information from the construction, industrial/commercial, municipal, and residential source identification programs required within the Jurisdictional Runoff Program (JRMP) of this Order; specific actions to model pollutant transport to receiving waters for the sake of identifying the source(s) point(s) of origin; water quality monitoring data collected as part of the Receiving Water Monitoring and Reporting Program required by this Order, and additional focused water quality monitoring to identify specific sources within the watershed.

d. Develop a watershed BMP implementation strategy to attain receiving water quality objectives in the identified highest priority water quality problem(s). The BMP implementation strategy shall include a schedule for implementation of the BMP projects to abate specific receiving water quality problems. BMPs not

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contributing to measured pollutant reductions or improvements to water quality must be removed and replaced with alternative BMPs. Identified watershed water quality problems may be the result of jurisdictional discharges that will need to be addressed with BMPs applied in a specific jurisdiction in order to generate a benefit to the watershed.

e. Develop a strategy to model and monitor improvements in receiving water quality directly resulting from implementation of the BMPs described in the Watershed Workplan. The modeling and monitoring strategy shall generate the necessary data to report on the measured pollutant reduction that results from proper BMP implementation. Monitoring shall, at a minimum, be conducted in the receiving water to demonstrate reduction in pollutant concentrations and progression towards attainment of receiving water quality objectives.

f. Establish a schedule for development and implementation of the Watershed strategy outlined in the Workplan. The schedule shall, at a minimum, include forecasted dates of planned actions to address Provisions E.2(a) through E.2(e) and dates for watershed review meetings through the remaining portion of this Permit cycle. Annual watershed workplan review meetings must be open to the public and appropriately publically noticed such that interested parties may come and provide comments on the watershed program.

3. **Watershed Workplan Implementation** □Watershed Copermittee's shall begin implementing the Watershed Workplan within 60-days of acceptance by the Regional Board Executive Officer. If within 30 days of submittal, the Regional Board has not taken an action, the Workplan shall be deemed acceptable.

4. **Copermittee Collaboration** – Watershed Copermittees shall collaborate to develop and implement the Watershed Workplan. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

5. **Public Participation** □Watershed Copermittees shall implement a watershed-specific public participation mechanism within each watershed. A required component of the watershed-specific public participation shall be a minimum 30-day public review of the Watershed Workplan prior to submittal for acceptance by the Regional Board Execuive Officer. Opportunity for the public to review and comment on the Watershed Workplan must occur before the workplan is implemented.

6. **Watershed Workplan Review and Updates** □Watershed Copermittees shall review and update the Watershed Workplan annually to identify needed changes to the prioritized water quality problem(s) listed in the workplan. All updates to the Watershed Workplan shall be presented during an Annual Watershed Review Meeting. Annual Watershed Review Meetings shall occur once every calendar year and be conducted by the Watershed Copermittees. Annual Watershed Review Meetings shall be open to the public and adequately noticed. Individual Watershed Copermittees shall also review and modify their jurisdictional programs and JRMP

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Annual Reports, as necessary, so that they are consistent with the updated Watershed Workplan.

7. Aliso Creek Watershed Runoff Management Plan (WRMP) Provisions

The following provisions apply to the Aliso Creek WRMP. Requirements in this subsection must supersede requirements prescribed by the Regional Board on October 18, 2005.[20]

a. Each Copermittee within the Aliso Creek Watershed must implement the monitoring and reporting program described in *Aliso Creek 13325 Directive, Revised Monitoring Program Design – Integration with NPDES Program*, December 2004 (Revised Aliso Creek Program).

b. Each Copermittee must provide annual reports by March 1 of each year beginning in 2011 for the preceding annual period of January through December. The annual reports must contain the following information:

(1) Water quality data and assessment from the Revised Aliso Creek Program. Each municipality must implement the monitoring and reporting program described in the Revised Aliso Creek Program. All information submitted in the report must conform to a SWAMP-Compatible Quality Assurance Project Plan[21]. The report must contain an assessment of compliance with applicable water quality standards for each monitoring station. The report must include data in tabular and graphical form, and electronic data must be submitted to the Regional Board.

(2) Program Assessment. A description and assessment of each municipality's program implemented within the high-priority storm drain locations (as identified Revised Aliso Creek Program) to reduce discharges of indicator fecal bacteria/pathogens. Monitoring alone is not sufficient to assess progress of the municipal programs. Municipalities must demonstrate each year that their programs are effective and resulting in a reduction of bacteria sources.

(i) For structural and nonstructural management practices implemented, the assessment must contain a description of the

[20] On October 12, 2005, the Regional Board accepted proposed changes to the bacteria monitoring program that had been conducted since spring 2001 pursuant to an Investigative Order from the Regional Board's executive officer. The October 18, 2005, letter from the Regional Board's executive officer revised the Investigative Order and instituted the new monitoring and reporting requirements.

[21] The State Water Resource Control Board (State Board) has prepared an electronic template for Quality Assurance Project Plans (QAPP) to assist in QAPP development, to provide a common format that will allow for review to be expedited, and to provide information on Surface Water Ambient Monitoring (SWAMP) consistency. Additional information and the template are available on-line at http://www.waterboards.ca.gov/swamp/qapp.html.

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practice, capital and maintenance costs, expectations for effectiveness, date implemented, and any observed results.

(ii) For structural and nonstructural management practices evaluated, the assessment must contain a description of the practice(s), conclusions from the evaluation, and whether and when the practice is planned for implementation by the municipality or group of municipalities.

(3) Status Reports. Updates on high-priority storm drain areas. Status reports must be provided by each municipality that discuss the causes of impairment and subsequent management activities implemented within the reporting period in the high priority areas and the planned activities for the next reporting period.

(4) Certification Statement. The technical reports submitted to the Regional Board must include the following certification statement signed by either the principal executive officer, ranking elected official, or duly authorized representative of that person:

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 gather and evaluate the information submitted. Based on my inquiry of the person(s) directly responsible for gathering the information, the information 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.

c. The annual reports must be submitted until the Regional Board determines they are no longer warranted. If requested by a municipality, the monitoring program may be modified or reduced by the Regional Board. The monitoring program and annual reporting may be modified in response to adopted TMDLs and additional Clean Water Act 303(d) listings for impairment.

d. Municipalities must continue meeting on a quarterly basis to discuss efforts to reduce bacteria in the Aliso Creek watershed.

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H. FISCAL ANALYSIS

1. Secure Resources: Each Copermittee must secure the resources necessary to meet all requirements of this Order.

2. Annual Analysis: Each Copermittee must conduct an annual fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs required by this Order. The analysis must include estimated expenditures for the reporting period, the preceding period, and the next reporting period.

   a. Each analysis must 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.
   b. Each analysis must include a narrative description of circumstances resulting in a 25 percent or greater annual change for any budget line items.

3. Annual Reporting: Each Copermittee must submit its annual fiscal analysis with the annual JRMP report.

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I. TOTAL MAXIMUM DAILY LOADS

The waste load allocations (WLAs) of fully approved and adopted TMDLs are incorporated as Water Quality Based Effluent Limitations on a pollutant by pollutant, watershed by watershed basis. Early TMDL requirements, including monitoring, may be required and inserted into this Order pursuant to Finding E.10

1. Baby Beach Bacterial Indicator TMDL Water Quality Based Effluent Limitations

a. The Copermittees in the Baby Beach watershed shall implement BMPs capable of achieving the interim and final Bacterial Indicator Waste Load Allocations (WLAs) in discharges to Baby Beach as described in Table 6.

Table 6: TMDL Waste Load Reduction Milestones

Action Date	
Meet 50% wasteload reductions	3 years after effective date for dry weather
	7 years after effective date for wet weather
Meet 100% wasteload reductions	5 years after effective date for dry weather
	10 years after effective date for wet weather

b. The Copermittees shall conduct necessary monitoring, as described in Attachment A to Resolution No. R9-2008-0027, and submit annual progress reports as part of their yearly reports.

c. The following WLAs (Table 7) are to be met in Baby Beach receiving water by the end of the year 2019 for wet weather and 2014 for dry weather:

Table 7: Final Bacterial Indicator Waste Load Allocations for Baby Beach

	Waste Load Allocation	
Bacterial Indicator	Dry Weather (Billion MPN / Day)	Wet Weather (Billion MPN / 30 Days)
Total Coliform	0.86	3,254
Fecal Coliform	0.17	112
Enterococcus	0.03 114	

MPN: Most Probable Number

d. The Copermittees must meet the following Numeric Targets (Table 8) in Baby Beach receiving waters in order to meet the underlying assumptions of the TMDL. The Numeric Targets are to be met once 100 percent of the WLA reductions have been achieved (see Table 7 above).

Table 8: Final Bacterial Indicator Numeric Targets for Baby Beach

Bacterial Indicator	30-day geo mean (MPN / 100mL)	Single Sample Max (MPN / 100mL)
	Dry Weather only	Dry and Wet Weather
Total Coliform	1,000	10,000
Fecal Coliform	200	400
Enterococcus	35 104	

MPN: Most Probable Number

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J. PROGRAM EFFECTIVENESS ASSESSMENT AND REPORTING

1. Jurisdictional Program Effectiveness Assessments

a. Objectives of Effectiveness Assessments

Beginning with the Annual Report due in 2011, each Copermittee must annually assess the effectiveness of its Jurisdictional Runoff Management Program (JRMP) implementation at meeting the following objectives:

(1) Objective for 303(d) Waterbodies: Reduce storm water pollutant loadings.

(a) Each Copermittee must establish annual assessment measures or methods specifically for reducing discharges of storm water pollutants from its MS4 into each downstream 303(d)-listed water body for which that waterbody is impaired. Assessment measures must be developed for each of the six outcome levels described by CASQA.[22]
(b) Each Copermittee must annually conduct each established assessment measure or method and evaluate the outcome. Each outcome must then be used to assess the effectiveness of implemented management measures toward reducing MS4 discharges of the specific pollutants causing or contributing to conditions of impairment.
(c) The assessment measures must target both water quality outcomes and the results of municipal enforcement activities.

(2) Objective for Environmentally-Sensitive Areas: Prevent storm water MS4 discharges from causing or contributing to conditions of pollution, nuisance, or contamination.

(a) Each Copermittee must establish annual measures or methods specifically for assessing the effectiveness of its management measures for protecting downstream ESAs from adverse effects caused by discharges from its MS4. Assessment measures must be developed for each of the six outcome levels described by CASQA.
(b) Each Copermittee must annually implement each established assessment measure or method and evaluate the outcome. Each outcome must be used to assess the effectiveness of implemented management measures toward reducing MS4 discharges of the specific pollutants causing or contributing to conditions of impairment.
(c) The assessment measures must target both water quality outcomes and the results of municipal enforcement activities.

(3) Objectives for major program component outcomes: Determined by Each

[22] Effectiveness assessment outcome levels as defined by CASQA are defined in Attachment C of this Order. See "*Municipal Stormwater Program Effectiveness Assessment Guidance*" (CASQA, May 2007) for guidance for assessing program activities at the various outcome levels.

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Copermittee.

(a) Each Copermittee must annually develop objectives for each program component in Section F and the overall JRMP. The objectives must be established as appropriate in response to program implementation and evaluation of water quality and management practices.
(b) Assessment approaches for program implementation must include a mix of specific activities, general program components, and water quality data.
(c) The assessment measures must target both water quality outcomes and the results of municipal enforcement activities.

(4) Objectives for actions taken to protect receiving water limitations in accordance with this Order.

(a) Each Copermittee must develop and implement an effectiveness assessment strategy for each measure conducted in response to a determination to implement the "iterative" approach to prevent or reduce any storm water pollutants that are causing or contributing to the exceedance of water quality standards as outlined in this Order

b. ASSESSMENT REVIEW

(1) Based on the results of the effectiveness assessments, each Copermittee must annually review its jurisdictional activities and BMPs to identify modifications and improvements needed to maximize JRMP effectiveness, as necessary to achieve compliance with this Order.

(2) Each Copermittee must develop and annually conduct an Integrated Assessment[23] of each effectiveness assessment objective above (Section J.1.a) and the overall JRMP using a combination of outcomes as appropriate to the objectives.[24]

2. Program Modifications

a. Each Copermittee must develop and implement a plan and schedule to address program modifications and improvements identified during annual effectiveness assessments.

b. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs must 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

[23] Integrated assessment is defined in Attachment C. It is the process of evaluating whether program implementation is resulting in the protection or improvement of water quality. Integrated assessment combines assessments of program implementation and water quality.
[24] Not all program components need be addressed at each of the six outcome levels.

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contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems must be modified and improved to correct the water quality problems.

3. Effectiveness Assessment and Program Response Reporting

a. Each Copermittee must include a description and summary of its annual and long-term effectiveness assessments within each Annual Report. Beginning with the Annual Report due in 2011, the Program Effectiveness reporting must include:

(1) 303(d) waterbodies: A description and results of the annual assessment measures or methods specifically for reducing discharges of storm water pollutants from its MS4 into each 303(d)-listed waterbody;
(2) ESAs: A description and results of the annual assessment measures or methods specifically for managing discharges of pollutants from its MS4 into each downstream ESA;
(3) Other Program Components: A description of the objectives and corresponding assessment measures and results used to evaluate the effectiveness of each general program component. The results must include findings from both program implementation and water quality assessment where applicable;
(4) Receiving water protection: A description and results of the annual assessment measures or methods employed specifically for actions taken to protect receiving water limitations in accordance with Section A.3 of this Order;
(5) A description of the steps taken to use dry-weather and wet-weather monitoring data to assess the effectiveness of the programs for 303(d) impairments, ESAs, and general program components;
(6) A description of activities conducted in response to investigations of illicit discharge and illicit connection activities, including how each investigation was resolved and the pollutant(s) involved;
(7) Responses to effectiveness assessments: A description of each program modification, made in response to the results of effectiveness assessments conducted pursuant to Section J.1.a, and the basis for determining (pursuant to Section J.2.b.) that each modified activity and/or BMP represents an improvement with respect to reducing the discharge of storm water pollutants from the MS4.
(8) A description of the steps that will be taken to improve the Copermittee's ability to assess program effectiveness using measurable targeted outcomes, assessment measures, assessment methods, and outcome levels 1-6. Include a time schedule for when improvement will occur; and

(9) A description of the steps that will be taken to identify aspects of the Copermittee's Jurisdictional Runoff Management Program that will be changed based on the results of the effectiveness assessment.

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4. Work Plan

Each Copermittee must develop a work plan to address their high priority water quality problems in an iterative manner over the life of the permit. The goal of the work plan is to demonstrate a responsive and adaptive approach for the judicious and effective use of available resources to attack the highest priority problems. The work plan shall include, at a minimum, the following:

a. The problems and priorities identified during the assessment;
b. A list of priority pollutants and known or suspected sources;
c. A brief description of the strategy employed to reduce, eliminate or mitigate the negative impacts;
d. A description and schedule for new and/or modified BMPs. The schedule is to include dates for significant milestones;
e. A description of how the selected activities will address an identified high priority problem. This will include a description of the expected effectiveness and benefits of the new and/or modified BMPs;
f. A description of implementation effectiveness metrics;
g. A description of how efficacy results will be used to modify priorities and implementation; and
h. A review of past activities implemented, progress in meeting water quality standards, and planned program adjustments.

The Copermittee shall submit the work plan to the Regional Board within 365 days of adoption of the Order. Annual updates are also required and shall be included with the annual JRMP report. The Regional Board will assess the work plan for compliance with the specific and overall requirements of the Order. To increase effectiveness and efficiencies, Copermittees may combine their implementation efforts and work plans within a hydrologic area or sub area. Each Copermittee, however, maintains individual responsibility for developing and implementing an acceptable work plan.

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K. REPORTI NG

The Copermittees may propose alternate reporting criteria and schedules, as part of their updated JRMP, for the Executive Officer's acceptance. The Copermittees shall submit the updated JRMP within 365 days after adoption of this Order.

1. Runoff Management Plans

a. J URISDICTIONAL RUNOFF MANAGEMENT PLANS

(1) Copermittees: The written account of the overall program to be conducted by each Copermittee to meet the jurisdictional requirements of section F of this Order is referred to as the Jurisdictional Runoff Management Plan (JRMP). Each Copermittee must revise and update its existing JRMP so that it describes all activities the Copermittee will undertake to implement the requirements of this Order. Each Copermittee must submit its updated and revised JRMP to the Regional Board 365 days after adoption of this Order.

(2) At a minimum, each Copermittee's JRMP must be updated and revised to demonstrate compliance with each applicable section of this Order.

b. W ATERSHED WORKPLANS

(1) Copermittees: The written account of the program conducted by each watershed group of Copermittees is referred to as the Watershed Workplan. Copermittees within each watershed shall be responsible for updating and revising each Watershed Workplan. Each Watershed Workplan shall be updated and revised to describe any changes in water quality problems or priorities in the WMAs, and any necessary change to actions Copermittees will take to implement jurisdictional or watershed BMPs to address those identified.

(2) Lead Watershed Copermittee: Each Lead Watershed Permittee shall be responsible for coordinating the production of the Watershed Workplan, as well as coordinating Annual Watershed Review Meetings and public participation/public noticing in accordance with the requirements of this Order. The Lead Watershed Permittee shall submit the Watershed Workplan to the Principal.

(3) Principal Copermittee: The Principal Permittee shall assemble and submit the Watershed Workplan to the Regional Board no later than 365 days after adoption of this Order, and shall be prepared to implement the workplan within 60 days of the Regional Board Executive Officer deeming the workplan acceptable.

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(4) Each Watershed Workplan shall, at a minimum, include:

(a) Identification of the Lead Watershed Permittee for the watershed.
(b) An updated watershed map.
(c) Identification and description of all applicable water quality data, reports, analyses, and other information to be used to assess receiving water quality.
(d) Assessment and analysis of the watershed's water quality data, reports, analyses, and other information, used during identification and prioritization of the watershed's water quality problems.
(e) A prioritized list of water quality problems within the WMA including rationale explaining the method/logic used to determine prioritization.
(f) Identification of the likely sources, pollutant discharges, and/or other factors causing the high priority water quality problems within the WMA.
(g) A description of the strategy to be used to guide Copermittee implementation of BMPs either jurisdictionally or on a watershed-wide basis to abate the highest water quality problems
(h) A list of criteria used to evaluate BMP effectiveness and how it was applied.
(i) A GIS map of BMPs implemented and BMPs scheduled for implementation.
(j) A description of the public participation mechanisms to be used and the parties anticipated to be involved during the development and implementation of the Watershed Workplan.
(k) A description of Copermittee collaboration to accomplish development of the Watershed Workplan, including a schedule for Watershed meetings.
(l) A description of how TMDLs and 303(d)-listed water bodies were considered during prioritization of watershed water quality problems
(m) A description of the strategy to model and monitor improvement in receiving water quality directly resulting from implementation of the BMPs described in the Watershed Workplan.
(n) A scheduled annual Watershed Workplan Review Meeting once every calendar year. This meeting shall be open to the public.

2. Other Required Reports and Plans

a. SSMP UPDATES

(1) Copermittees must submit their updated model SSMP in accordance with the applicable requirements of section F.1 with the JRMP two years after adoption of this Order.
(2) Within 180 days of determination that the Model SSMP is in compliance with this Permit's provisions, each Copermittee must update their own local SSMP, and amended ordinances consistent with the model SSMP, and shall submit both (local SSMP and amended ordinances) to the Regional Board.
(3) For SSMP-related requirements of Section F.1 with subsequent

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implementation due dates, updated SSMPs must be submitted with the JRMP annual report covering the applicable reporting period.

b. Report of Waste Discharge

The Principal Copermittee must submit to the Regional Board, no later than 210 days in advance of the expiration date of this Order, a Report of Waste Discharge (ROWD) as an application for issuance of new waste discharge requirements. The fourth annual report for this Order may serve as the ROWD, provided it contains the minimum information below.

At a minimum, the ROWD must include the following: (1) Proposed changes to the Copermittees' runoff management programs; (2) Proposed changes to monitoring programs; (3) Justification for proposed changes; (4) Name and mailing addresses of the Copermittees; (5) Names and titles of primary contacts of the Copermittees; and (6) Any other information necessary for the reissuance of this Order.

3. Annual Reports

a. Jurisdictional Runoff Management Program (JRMP) Annual Reports

(1) Copermittees: Each Copermittee must generate individual JRMP Annual Reports which cover implementation of its jurisdictional activities during the past annual reporting period. Each Annual Report must verify and document compliance with this Order as directed in this section. Each Copermittee must retain records through 2015, available for review, that document compliance with each requirement of this Order. Each Copermittee must submit to the Principal Copermittee its individual JRMP Annual Report by the date specified by the Principal Copermittee. The reporting period for these annual reports must be the previous fiscal year. For example, the report submitted September 30, 2010 must cover the reporting period July 1, 2009 to June 30, 2010.

(2) Principal Copermittee: The Principal Copermittee is responsible for collecting and assembling each Copermittee's individual JRMP Annual Report. The Principal Copermittee must submit Unified JRMP Annual Reports to the Regional Board by September 30 of each year, beginning on September 30, 2011. The Unified JRMP Annual Report must contain the 13 individual JRMP Annual Reports.

(3) Each JRMP Annual Report must contain, at a minimum, the following information:

(a) Information required to be reported annually in Section H (Fiscal Analysis) of this Order;

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(b) Information required to be reported annually in Section J (Program Effectiveness) of this Order;
(c) The completed Reporting Checklist found in Attachment D, and
(d) Information for each program component by watershed as described in the following Table 9:

Table 9. Annual Reporting Requirements

Program Component	Reporting Requirement
New Development	1. Updated relevant sections of the General Plan and environmental review process and a description of planned updates within the next annual reporting period, if applicable
	2. Revisions to the local SSMP, including where applicable: (a) Identification and summary of where the SSMP fails to meet the requirements of this Order; (b) Updated procedures for identifying pollutants of concern for each Priority Development Project; (c) Updated treatment BMP ranking matrix; and (d) Updated site design and treatment control BMP design standards;
	3. Verification that site design, source control, and treatment BMPs were required on all applicable Priority Development Projects;
	4. Description of the application of LID and site design BMPs in the planning and approval process;
	5. Description of projects subject to the local waiver provision for numeric sizing of treatment control BMP requirements;
	6. Description and summary of the LID site design BMP substitution program, if applicable;
	7. Description and summary of the process to verify compliance with SSMP requirements;
	8. Updates to the BMPs that are listed in the local SSMP as options for treatment control;
	9. Description of the treatment control maintenance tracking process and verification that the requirements of this Order were met during the reporting period; (a) Updated watershed-based database of approved treatment control BMPs and treatment control BMP maintenance within its jurisdiction, including updates to the list of high-priority treatment BMPs;
	10. Description of the process for identifying and evaluating hydrologic conditions of concern and requiring a suite of management measures within all Priority Development Projects to protect downstream beneficial uses and prevent adverse physical changes to downstream stream channels;
	11. Description of enforcement activities applicable to the new development and redevelopment component and a summary of the effectiveness of those activities;

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Program Component	Reporting Requirement
Construction	1. Updated relevant ordinances and description of planned ordinance updates within the next annual reporting period, if applicable;
	2. A description of procedures used 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;
	3. Designated minimum and enhanced BMPs;
	4. Summary of the inspection program, including the following information: (a) Number and date of inspections conducted at each facility, including the facility address; (b) Number of facilities lacking adequate BMPs; (c) The BMP violations identified during the inspection by facility; (d) Number, date, and types of enforcement actions by facility; (e) Narrative description of inspection findings and follow-up activities for each facility;
Municipal	1. Updated source inventory;
	2. Changes to the designated municipal BMPs;
	3. Descriptions of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies;
	4. Summary and assessment of BMPs implemented at retrofitted flood control structures, including: (a) List of projects with BMP retrofits; and (b) List and description of structures retrofitted without BMPs;
	5. Description and assessment of the municipal structural treatment control operations and maintenance activities, including: (a) Number of inspections and types of facilities; and (b) Summary of findings;
	6. Description of the municipal areas/facilities operations and maintenance activities, including: (a) Number and types of facilities maintained; (b) Amount of material removed and how that material was disposed; and (c) List of facilities planned for bi-annual inspections and the justification;
	7. Description of the municipal areas/programs inspection activities, including: (a) Number and date of inspections conducted at each facility; (b) Number of facilities lacking adequate BMPs; (c) The BMP violations identified during the inspection by facility; (d) Number, date and types of enforcement actions by facility; (e) Narrative description of inspection findings and follow-up activities for each facility;

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Program Component	Reporting Requirement
	8. Description of activities implemented to address sewage infiltration into the MS4;
Commercial / Industrial	1. Annual inventory of commercial / industrial sources;
	2. Summary of the inspection program, including the following information: (a) Number and date of inspections conducted at each facility including the facility address; (b) Number of facilities lacking adequate BMPs; (c) The BMP violations identified during the inspection by facility; (d) Number, date, and types of enforcement actions by facility; (e) Narrative description of inspection findings and follow-up activities for each facility;
	3. Changes to designated minimum and enhanced BMPs;
	4. A list of industrial sites, including each name, address, and SIC code, that the Copermittee suspects may require coverage under the General Industrial Permit, but has not submitted an NOI;
Residential	1. Updated minimum BMPs required for residential areas and activities;
	2. Quantification and summary of applicable runoff and storm water enforcement actions within residential areas and activities;
	3. Description of efforts to manage runoff and storm water pollution in common interest areas;
Illicit Discharge Detection and Elimination	1. Changes to the legal authority to implement Illicit Discharge Detection and Elimination activities;
	2. Changes to the established investigation procedures;
	3. Public reporting mechanisms, including phone numbers and web pages;
	4. All data and assessments from the Dry Weather Effluent Analytical Monitoring activities;
	5. Response criteria developed for water quality data and notifications;
	6. Summaries of illicit discharges (including spills and water quality data events) and how each significant case was resolved;
	7. A description of instances when field screening and analytical data exceeded action levels, but for which no investigation was conducted;
	8. A description of enforcement actions taken in response to investigations of illicit discharges and a description of the effectiveness of those enforcement measures;
	9. A description of controls to prevent infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems;
Work Plan	Priorities, strategy, implementation schedule and effectiveness evaluation;

(4) Each JRMP Annual Report must also include the following information

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regarding non-storm water discharges (see Section B.2. of this Order):

(a) Identification of non-storm water discharge categories identified as a source of pollutants to waters of the U.S;
(b) A description of ordinances, orders, or similar means to prohibit non-storm water discharge categories identified under section B.2 above ;
(c) Identification of any control measures to be required and implemented for non-storm water discharge categories identified as needing said controls by the Regional Board; and
(d) A description of a program to address pollutants from non-emergency fire fighting flows identified by the Copermittee to be significant sources of pollutants.

4. Interim Reporting Requirements

For the July 2009-June 2010 reporting period, the Jurisdictional RMP must be submitted on January 31, 2011. Each Jurisdictional RMP Annual Report submitted for this reporting period must, at a minimum, include comprehensive descriptions of all activities conducted to fully implement the Copermittees' Jurisdictional RMP documents, as those documents were developed to comply with the requirements of Order No. 2002-01. The Principal Copermittee must submit these documents in a unified manner, consistent with the unified reporting requirements of Order No. 2002-01.

5. Universal Reporting Requirements

All submittals must include an executive summary, introduction, conclusion, recommendations, and signed certified statement. Each Copermittee must submit a signed certified statement covering its responsibilities for each applicable submittal. The Principal Copermittee must submit a signed certified statement covering its responsibilities for each applicable submittal and the sections of the submittals for which it is responsible.

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L. MODIFICATION OF PROGRAMS

Modifications of Jurisdictional Runoff Management Programs and/or Watershed Runoff Management Programs may be initiated by the Executive Officer of the Regional Board or by the Copermittees. Requests by Copermittees must be made to the Executive Officer, and must be submitted during the annual review process. Requests for modifications should be incorporated, as appropriate, into the Annual Reports or other deliverables required or allowed under this Order.

1. Minor Modifications: Minor modifications to Jurisdictional Runoff Management Programs, and/or Watershed Runoff Management Programs, may be accepted by the Executive Officer where the Executive Officer finds the proposed modification complies with all discharge prohibitions, receiving water limitations, and other requirements of this Order.

2. Modifications Requiring an Amendment to this Order: Proposed modifications that are not minor require amendment of this Order in accordance with this Order's rules, policies, and procedures.

M. PRINCIPAL COPERMITTEE RESPONSIBILITIES

Within 180 days of adoption of this Order, the Copermittees must designate the Principal Copermittee and notify the Regional Board of the name of the Principal Copermittee. The Principal Copermittee must, at a minimum:

1. Serve as liaison between the Copermittees and the Regional Board on general permit issues, and when necessary and appropriate, represent the Copermittees before the Regional Board.
2. Coordinate permit activities among the Copermittees and facilitate collaboration on the development and implementation of programs required under this Order.
3. Integrate individual Copermittee documents and reports into single unified documents and reports for submittal to the Regional Board as required under this Order.
4. Produce and submit documents and reports as required by section K of this Order and Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2009-0002 in Attachment E of this Order.

N. RECEIVING WATERS AND MS4 DISCHARGE MONITORING AND REPORTING PROGRAM

Pursuant to CWC section 13267, the Copermittees must comply with all the requirements contained in Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2009-0002 in Attachment E of this Order.

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O. STANDARD PROVISIONS, REPORTING REQUIREMENTS, AND NOTIFICATIONS

1. Each Copermittee must comply with Standard Provisions, Reporting Requirements, and Notifications contained in Attachment B of this Order. This includes 24 hour/5 day reporting requirements for any instance of non-compliance with this Order as described in section 5.e of Attachment B.

2. All plans, reports and subsequent amendments submitted in compliance with this Order must be implemented immediately (or as otherwise specified). All submittals by Copermittees must be adequate to implement the requirements of this Order.

I, David W. Gibson, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Diego Region, on December 16, 2009.

David W. Gibson
Executive Officer

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TAB "3"

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2001- 15

In the Matter of the Petitions of

BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY
AND
WESTERN STATES PETROLEUM ASSOCIATION

For Review Of Waste Discharge Requirements Order No. 2001-01
for Urban Runoff from San Diego County
[NPDES No. CAS0108758]
Issued by the
California Water Quality Control Board,
San Diego Region

SWRCB/OCC FILES A-1362, A-1362(a)

BY THE BOARD:

On February 21, 2001, the San Diego Regional Water Quality Control Board (Regional Water Board) issued a revised national pollutant discharge elimination system (NPDES) permit in Order No. 2001-01 (permit) to the County of San Diego (County), the 18 incorporated cities within the County, and the San Diego Unified Port District. The permit covers storm water discharges from municipal separate storm sewer systems (MS4) throughout the County. The permit is the second MS4 permit issued for the County, although the first permit was issued more than ten years earlier.[1]

[1] NPDES permits generally expire after five years, but can be extended administratively where the Regional Water Board is unable to issue a new permit prior to the expiration date. As the record in this matter amply demonstrates, the Regional Water Board engaged in an extensive process of issuing draft permits, accepting comments, and holding workshops and hearings since at least 1995.

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The permit includes various programmatic and planning requirements for the permittees, including construction and development controls, controls on municipal activities, controls on runoff from industrial, commercial, and residential sources, and public education. The types of controls and requirements included in the permit are similar to those in other MS4 permits, but also reflect the expansion of the storm water program since the first MS4 permit was adopted for San Diego County 11 years ago.[2]

On March 23, 2001, the State Water Resources Control Board (State Water Board or Board) received petitions for review of the permit from the Building Industry Association of San Diego County (BIA) and from the Western States Petroleum Association (WSPA).[3] The petitions are legally and factually related, and have therefore been consolidated for purposes of review.[4] None of the municipal dischargers subject to the permit filed a petition, nor did they file responses to the petitions.

I. BACKGROUND

MS4 permits are adopted pursuant to Clean Water Act section 402(p). This federal law sets forth specific requirements for permits for discharges from municipal storm sewers. One of the requirements is that permits "shall require controls to reduce the discharge of

[2] For a discussion of the evolution of the storm water program, consistent with guidance from the United States Environmental Protection Agency (U.S. EPA), see Board Order WQ 2000-11.

[3] On March 23, the State Water Board also received brief letters from the Ramona Chamber of Commerce, the North San Diego County Association of Realtors, the San Diego County Apartment Association, the National Association of Industrial and Office Properties, and the California Building Industry Association. All of these letters state that they are "joining in" the petition filed by BIA. None of the letters contain any of the required information for petitions, which is listed at Cal. Code of Regs., tit. 23, section 2050. These letters will be treated as comments on the BIA petition. To the extent the authors intended the letters be considered petitions, they are dismissed.

[4] Cal. Code of Regs., tit. 23, section 2054.

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pollutants to the maximum extent practicable [MEP]." States establish appropriate requirements for the control of pollutants in the permits.

This Board very recently reviewed the need for controls on urban runoff in MS4 permits, the emphasis on best management practices (BMPs) in lieu of numeric effluent limitations, and the expectation that the level of effort to control urban runoff will increase over time.[5] We pointed out that urban runoff is a significant contributor of impairment to waters throughout the state, and that additional controls are needed. Specifically, in Board Order WQ 2000-11 (hereinafter, LA SUSMP order), we concluded that the Los Angeles Regional Water Board acted appropriately in determining that numeric standards for the design of BMPs to control runoff from new construction and redevelopment constituted controls to the MEP.[6]

The San Diego permit incorporates numeric design standards for runoff from new construction and redevelopment similar to those considered in the LA SUSMP order.[7] In addition, the permit addresses programmatic requirements in other areas. The LA SUSMP order was a precedential decision,[8] and we will not reiterate our findings and conclusions from that decision.[9]

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[5] Board Order WQ 2000-11.

[6] As explained in that Order, numeric design standards are not the same as numeric effluent limitations. While BIA contends that the permit under review includes numeric effluent limitations, it does not. A numeric design standard only tells the dischargers how much runoff must be treated or infiltrated; it does not establish numeric effluent limitations proscribing the quality of effluent that can be discharged following infiltration or treatment.

[7] The San Diego permit also includes provisions that are different from those approved in the LA SUSMP Order, but which were not the subject of either petition. Such provisions include the inclusion of non-discretionary projects. We do not make any ruling in this Order on matters that were not addressed in either petition.

[8] Government Code section 11425.60; State Board Order WR 96-1 (Lagunitas Creek), at footnote 11.

[9] BIA restates some of the issues this Board considered in the LA SUSMP order. For instance, BIA contends that it is inappropriate for the permit to regulate erosion control. While this argument was not specifically addressed in our prior Order, it is obvious that the most serious concern with runoff from construction is the potential for increased erosion. It is absurd to contend that the permit should have ignored this impact from urban runoff.

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The petitioners make numerous contentions, mostly concerning requirements that they claim the dischargers will not be able to, or should not be required to, comply with. We note that none of the dischargers has joined in these contentions. We further note that BIA raises contentions that were already addressed in the LA SUSMP order. In this Order, we have attempted to glean from the petition issues that are not already fully addressed in Board Order Board Order WQ 2000-11, and which may have some impact on BIA and its members. WSPA restated the contentions it made in the petition it filed challenging the LA SUSMP order. We will not address those contentions again.[10] But we will address whether the Regional Water Board followed the precedent established there as it relates to retail gasoline outlets.[11]

[10] On November 8, 2001, following the October 31 workshop meeting that was held to discuss the draft order, BIA submitted a "supplemental brief" that includes many new contentions raised for the first time. (Interested persons who were not petitioners filed comments on the draft order asking the State Water Board to address some of these.) The State Water Board will not address these contentions, as they were not timely raised. (Wat. Code § 13320; Cal. Code of Regs., tit. 23, § 2050(a).) Specific contentions that are not properly subject to review under Water Code section 13320 are objections to findings 16, 17, and 38 of the permit, the contention that permit provisions constitute illegal unfunded mandates, challenges to the permit's inspection and enforcement provisions, objections to permit provisions regarding construction sites, the contention that post-construction requirements should be limited to "discretionary" approvals, the challenge to the provisions regarding local government compliance with the California Environmental Quality Act, and contentions regarding the term "discharge" in the permit. BIA did not meet the legal requirements for seeking review of these portions of the permit.

[11] On November 8, 2001, the State Water Board received eight boxes of documents from BIA, along with a "Request for Entry of Documents into the Administrative Record." BIA failed to comply with Cal. Code of Regs., tit. 23, section 2066(b), which requires such requests be made "prior to or during the workshop meeting." The workshop meeting was held on October 31, 2001. The request will therefore not be considered. BIA also objected in this submittal that the Regional Water Board did not include these documents in its record. The Regional Water Board's record was created at the time the permit was adopted, and was submitted to the State Water Board on June 11, 2001. BIA's objection is not timely.

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II. CONTENTIONS AND FINDINGS[12]

Contention: BIA contends that the discharge prohibitions contained in the permit are "absolute" and "inflexible," are not consistent with the standard of "maximum extent practicable" (MEP), and financially cannot be met.

Finding: The gist of BIA's contention concerns Discharge Prohibition A.2, concerning exceedance of water quality objectives for receiving waters: "Discharges from MS4s which cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited." BIA generally contends that this prohibition amounts to an inflexible "zero contribution" requirement.

BIA advances numerous arguments regarding the alleged inability of the dischargers to comply with this prohibition and the impropriety of requiring compliance with water quality standards in municipal storm water permits. These arguments mirror arguments made in earlier petitions that required compliance with water quality objectives by municipal storm water permittees. (See, e.g., Board Orders WQ 91-03, WQ 98-01, and WQ 99-05.) This Board has already considered and upheld the requirement that municipal storm water discharges must not cause or contribute to exceedances of water quality objectives in the receiving water. We adopted an iterative procedure for complying with this requirement, wherein municipalities must report instances where they cause or contribute to exceedances, and then must review and improve BMPs so as to protect the receiving waters. The language in the permit in Receiving

[12] This Order does not address all of the issues raised by the petitioners. The Board finds that the issues that are not addressed are insubstantial and not appropriate for State Water Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349]; Cal. Code Regs., tit. 23, § 2052.) We make no determination as to whether we will address the same or similar issues when raised in future petitions.

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Water Limitation C.1 and 2 is consistent with the language required in Board Order WQ 99-05, our most recent direction on this issue.[13]

While the issue of the propriety of requiring compliance with water quality objectives has been addressed before in several orders, BIA does raise one new issue that was not addressed previously. In 1999, the Ninth Circuit Court of Appeals issued an opinion addressing whether municipal storm water permits must require "strict compliance" with water quality standards.[14] (*Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.) The court in *Browner* held that the Clean Water Act provisions regarding storm water permits do not require that municipal storm-sewer discharge permits ensure strict compliance with water quality standards, unlike other permits.[15] The court determined that: "Instead, [the provision for municipal storm water permits] *replaces* the requirements of [section 301] 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'." (191 F.3d at 1165.) The court further held that the Clean Water Act does grant the permitting agency discretion to determine what pollution controls are appropriate for municipal storm water discharges. (*Id.* at 1166.) Specifically, the court stated

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[13] In addition to Discharge Prohibition A.2, quoted above, the permit includes Receiving Water Limitation C.1, with almost identical language: "Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited." Receiving Water Limitation C.2 sets forth the iterative process for compliance with C.1, as required by Board Order WQ 99-05.

[14] "Water quality objectives" generally refers to criteria adopted by the state, while "water quality standards" generally refers to criteria adopted or approved for the state by the U.S. EPA. Those terms are used interchangeably for purposes of this Order.

[15] Clean Water Act § 301(b)(1)(C) requires that most NPDES permits require strict compliance with quality standards.

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that U.S. EPA had the authority either to require "strict compliance" with water quality standards through the imposition of numeric effluent limitations, or to employ an iterative approach toward compliance with water quality standards, by requiring improved BMPs over time. (*Id.*) The court in *Browner* upheld the EPA permit language, which included an iterative, BMP-based approach comparable to the language endorsed by this Board in Order WQ 99-05.

In reviewing the language in this permit, and that in Board Order WQ 99-05, we point out that our language, similar to U.S. EPA's permit language discussed in the *Browner* case, does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs. As pointed out by the *Browner* court, there is nothing inconsistent between this approach and the determination that the Clean Water Act does not mandate strict compliance with water quality standards. Instead, the iterative approach is consistent with U.S. EPA's general approach to storm water regulation, which relies on BMPs instead of numeric effluent limitations.

It is true that the holding in *Browner* allows the issuance of municipal storm water permits that limit their provisions to BMPs that control pollutants to the maximum extent practicable (MEP), and which do not require compliance with water quality standards. For the reasons discussed below, we decline to adopt that approach. The evidence in the record before us is consistent with records in previous municipal permits we have considered, and with the data we have in our records, including data supporting our list prepared pursuant to Clean Water Act section 303(d). Urban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses. In order to protect beneficial uses and to achieve compliance with water quality objectives in our streams, rivers, lakes, and the ocean, we

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must look to controls on urban runoff. It is not enough simply to apply the technology-based standards of controlling discharges of pollutants to the MEP; where urban runoff is causing or contributing to exceedances of water quality standards, it is appropriate to require improvements to BMPs that address those exceedances.

While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvement of BMPs, is appropriate. We will generally not require "strict compliance" with water quality standards through numeric effluent limitations and we will continue to follow an iterative approach, which seeks compliance over time.[16] The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced throughout large and medium municipal storm sewer systems.[17]

We have reviewed the language in the permit, and compared it to the model language in Board Order WQ 99-05. The language in the Receiving Water Limitations is virtually identical to the language in Board Order WQ 99-05. It sets a limitation on discharges that cause or contribute to violation of water quality standards, and then it establishes an iterative approach to complying with the limitation. We are concerned, however, with the language in Discharge Prohibition A.2, which is challenged by BIA. This discharge prohibition is similar to the Receiving Water Limitation, prohibiting discharges that cause or contribute to exceedance of

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[16] Exceptions to this general rule are appropriate where site-specific conditions warrant. For example, the Basin Plan for the Lake Tahoe basin, which protects an outstanding national resource water, includes numeric effluent limitations for storm water discharges.

[17] While BIA argues that the permit requires "zero contribution" of pollutants in runoff, and "in effect" contains numeric effluent limitations, this is simply not true. The permit is clearly BMP-based, and there are no numeric effluent limitations. BIA also claims that the permit will require the construction of treatment plants for storm water similar to the publicly-owned treatment works for sanitary sewage. There is no basis for this contention; there is no requirement in the permit to treat all storm water. The emphasis is on BMPs.

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water quality objectives. The difficulty with this language, however, is that it is not modified by the iterative process. To clarify that this prohibition also must be complied with through the iterative process, Receiving Water Limitation C.2 must state that it is also applicable to Discharge Prohibition A.2. The permit, in Discharge Prohibition A.5, also incorporates a list of Basin Plan prohibitions, one of which also prohibits discharges that are not in compliance with water quality objectives. (See, Attachment A, prohibition 5.) Language clarifying that the iterative approach applies to that prohibition is also necessary.[18]

BIA also objects to Discharge Prohibition A.3, which appears to require that treatment and control of discharges must always occur prior to entry into the MS4: "Discharges into and from MS4s containing pollutants which have not been reduced to the [MEP] are prohibited."[19] An NPDES permit is properly issued for "discharge of a pollutant" to waters of the United States.[20] (Clean Water Act § 402(a).) The Clean Water Act defines "discharge of a pollutant" as an "addition" of a pollutant to waters of the United States from a point source. (Clean Water Act section 502(12).) Section 402(p)(3)(B) authorizes the issuance of permits for discharges "from municipal storm sewers."

We find that the permit language is overly broad because it applies the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s. It is certainly

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[18] The iterative approach is not necessary for all Discharge Prohibitions. For example, a prohibition against pollution, contamination or nuisance should generally be complied with at all times. (See, Discharge Prohibition A.1.) Also, there may be discharge prohibitions for particularly sensitive water bodies, such as the prohibition in the Ocean Plan applicable to Areas of Special Biological Significance.

[19] Discharge Prohibition A.1 also refers to discharges into the MS4, but it only prohibits pollution, contamination, or nuisance that occurs "in waters of the state." Therefore, it is interpreted to apply only to discharges to receiving waters.

[20] Since NPDES permits are adopted as waste discharge requirements in California, they can more broadly protect "waters of the state," rather than being limited to "waters of the United States." In general, the inclusion of "waters (footnote continued)

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true that in most instances it is more practical and effective to prevent and control pollution at its source. We also agree with the Regional Water Board's concern, stated in its response, that there may be instances where MS4s use "waters of the United States" as part of their sewer system, and that the Board is charged with protecting all such waters. Nonetheless, the specific language in this prohibition too broadly restricts all discharges "into" an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters.[21] It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control. In particular, dischargers subject to industrial and construction permits must comply with all conditions in those permits prior to discharging storm water into MS4s.

Contention: State law requires the adoption of wet weather water quality standards, and the permit improperly enforces water quality standards that were not specifically adopted for wet weather discharges.

Finding: This contention is clearly without merit. There is no provision in state or federal law that mandates adoption of separate water quality standards for wet weather conditions. In arguing that the permit violates state law, BIA states that because the permit applies the water quality objectives that were adopted in its Basin Plan, and those objectives were not specifically adopted for wet weather conditions only, the Regional Water Board violated

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of the state" allows the protection of groundwater, which is generally not considered to be "waters of the United States."

[21] There are other provisions in the permit that refer to restrictions "into" the MS4. (See, e.g., Legal Authority D.1.) Those provisions are appropriate because they do not apply the MEP standard to the permittees, but instead require the permittees to demand appropriate controls for discharges into their system. For example, the federal regulations require that MS4s have a program "to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system . . . ." (40 C.F.R. § 122.26(d)(2)(iv)(D).)

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Water Code section 13241. These allegations appear to challenge water quality objectives that were adopted years ago. Such a challenge is clearly inappropriate as both untimely, and because Basin Plan provisions cannot be challenged through the water quality petition process. (See Wat. Code § 13320.) Moreover, there is nothing in section 13241 that supports the claim that Regional Water Boards must adopt separate wet weather water quality objectives. Instead, the Regional Water Board's response indicates that the water quality objectives were based on all water conditions in the area. There is nothing in the record to support the claim that the Regional Water Board did not in fact consider wet weather conditions when it adopted its Basin Plan. Finally, Water Code section 13263 mandates the Regional Water Board to implement its Basin Plan when adopting waste discharge requirements. The Regional Water Board acted properly in doing so.

BIA points to certain federal policy documents that authorize states to promulgate water quality standards specific to wet-weather conditions.[22] Each Regional Water Board considers revisions to its Basin Plan in a triennial review. That would be the appropriate forum for BIA to make these comments.

Contention: BIA contends that the permit improperly classifies urban runoff as "waste" within the meaning of the Water Code.

Finding: BIA challenges Finding 2, which states that urban runoff is a waste, as defined in the Water Code, and that it is a "discharge of pollutants from a point source" under the federal Clean Water Act. BIA contends that the legislative history of section 13050(d) supports

[22] These documents do not support the claim that U.S. EPA and the Clinton Administration indicated that the absence of such regulations "is a major problem that needs to be addressed," as claimed in BIA's Points and Authorities, at page 18.

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its position that "waste" should be interpreted to exclude urban runoff. The Final Report of the Study Panel to the California State Water Resources Control Board (March, 1969) is the definitive document describing the legislative intent of the Porter-Cologne Water Quality Control Act. In discussing the definition of "waste," this document discusses its broad application to "current drainage, flow, or seepage into waters of the state of harmful concentrations" of materials, including eroded earth and garbage.

As we stated in Board Order WQ 95-2, the requirement to adopt permits for urban runoff is undisputed, and Regional Water Boards are not required to obtain any information on the impacts of runoff prior to issuing a permit. (At page 3.) It is also undisputed that urban runoff contains "waste" within the meaning of Water Code section 13050(d), and that the federal regulations define "discharge of a pollutant" to include "additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man." (40 C.F.R. § 122.2.) But it is the waste or pollutants in the runoff that meet these definitions of "waste" and "pollutant," and not the runoff itself.[23] The finding does create some confusion, since there are discharge prohibitions that have been incorporated into the permit that broadly prohibit the discharge of "waste" in certain circumstances. (See Attachment A to the permit.) The finding will therefore be amended to state that urban runoff contains waste and pollutants.

Contention: BIA contends that the Regional Water Board violated California Environmental Quality Act (CEQA).

[23] The Regional Water Board is appropriately concerned not only with pollutants in runoff but also the volume of runoff, since the volume of runoff can affect the discharge of pollutants in the runoff. (See Board Order WQ 2000-11, at page 5.)

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Finding: As we have stated in several prior orders, the provisions of CEQA requiring adoption of environmental documents do not apply to NPDES permits.[24] BIA contends that the exemption from CEQA contained in section 13389 applies only to the extent that the specific provisions of the permit are required by the federal Clean Water Act. This contention is easily rejected without addressing whether federal law mandated all of the permit provisions. The plain language of section 13389 broadly exempts the Regional Water Board from the requirements of CEQA to prepare environmental documents when adopting "any waste discharge requirement" pursuant to Chapter 5.5 (§§ 13370 et seq., which applies to NPDES permits).[25] BIA cites the decision in *Committee for a Progressive Gilroy v. State Water Resources Control Board* (1987) 192 Cal.App.3d 847. That case upheld the State Water Board's view that section 13389 applies only to NPDES permits, and not to waste discharge requirements that are adopted pursuant only to state law. The case did not concern an NPDES permit, and does not support BIA's argument.

Contention: WSPA contends that the Regional Water Board did not follow this Board's precedent for retail gasoline outlets (RGOs) established in the LA SUSMP order.

Finding: In the LA SUSMP order, this Board concluded that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. We also noted that, in light of the small size of many RGOs and the proximity to underground tanks, it might not always be feasible or safe to employ treatment methodologies. We directed the Los Angeles Regional Water Board to mandate that RGOs

[24] Water Code section 13389; see, e.g., Board Order WQ 2000-11.

[25] The exemption does have an exception for permits for "new sources" as defined in the Clean Water Act, which is not applicable here.

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employ the BMPs listed in a publication of the California Storm Water Quality Task Force. (*Best Management Practice Guide – Retail Gasoline Outlets* (March 1997).) We also concluded that RGOs should not be subject to the BMP design standards at this time. Instead, we recommended that the Regional Water Board undertake further consideration of a threshold relative to size of the RGO, number of fueling nozzles, or some other relevant factor. The LA SUSMP order did not preclude inclusion of RGOs in the SUSMP design standards, with proper justification, when the permit is reissued.

The permit adopted by the Regional Water Board did not comply with the directions we set forth in the LA SUSMP order for the regulation of RGOs. The permit contains no findings specific to the issues discussed in our prior order regarding RGOs, and includes no threshold for inclusion of RGOs in SUSMPs. Instead, the permit requires the dischargers to develop and implement SUSMPs within one year that include requirements for "Priority Development Project Categories," including "retail gasoline outlets." While other priority categories have thresholds for their inclusion in SUSMPs, the permit states: "Retail Gasoline Outlet is defined as any facility engaged in selling gasoline."[26]

The Regional Water Board responded that it did follow the directions in the LA SUSMP order. First, it points to findings that vehicles and pollutants they generate impact receiving water quality. But the only finding that even mentions RGOs is finding 4, which simply lists RGOs among the other priority development project categories as land uses that generate more pollutants. The Regional Water Board staff also did state some justifications for the inclusion of RGOs in two documents. The Draft Fact Sheet explains that RGOs contribute

[26] Permit at F.1.b(2)(a)(x).

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pollutants to runoff, and opines that there are appropriate BMPs for RGOs. The staff also prepared another document after the public hearing, which was distributed to Board Members prior to their vote on the permit, and which includes similar justifications and references to studies.[27] The LA SUSMP order called for some type of threshold for inclusion of RGOs in SUSMPs. The permit does not do so. Also, justifications for permit provisions should be stated in the permit findings or the final fact sheet, and should be subject to public review and debate.[28] The discussion in the document submitted after the hearing did not meet these criteria. There was some justification in the "Draft Fact Sheet," but the fact sheet has not been finalized.[29] In light of our concerns over whether SUSMP sizing criteria should apply to RGOs, it was incumbent on the Regional Water Board to justify the inclusion of RGOs in the permit findings or in a final fact sheet, and to consider an appropriate threshold, addressing the concerns we stated. The Regional Water Board also responded that when the dischargers develop the SUSMPs, the dischargers might add specific BMPs and a threshold as directed in the LA SUSMP order. But the order specifically directed that any threshold, and the justification therefore, should be included in the permit. The Regional Water Board did not comply with these directions.

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[27] See "Comparison Between Tentative Order No. 2001-01 SUSMP Requirements and LARWQCB SUSMP Requirements (as Supported by SWRCB Order WQ 2000-11)."

[28] See 40 C.F.R. sections 124.6(e) and 124.8.

[29] U.S. EPA regulations require that there be a fact sheet accompanying the permit. (40 C.F.R. § 124.8.) The record contains only a draft fact sheet, which was never published or distributed in final form. The Regional Water Board should finalize the fact sheet, accounting for any revisions made in the final permit, and publish it on its web site as a final document.

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III. CONCLUSIONS

Based on the discussion above, the Board concludes that:

1. The Regional Water Board appropriately required compliance with water quality standards and included requirements to achieve reduction of pollutants to the maximum extent practicable. The permit must be clarified so that the reference to the iterative process for achieving compliance applies not only to the receiving water limitation, but also to the discharge prohibitions that require compliance with water quality standards. The permit should also be revised so that it requires that MEP be achieved for discharges "from" the municipal sewer system, and for discharges "to" waters of the United States, but not for discharges "into" the sewer system.

2. The Regional Water Board was not required to adopt wet-weather specific water quality objectives.

3. The Regional Water Board inappropriately defined urban runoff as "waste."

4. The Regional Water Board did not violate the California Environmental Quality Act.

5. The permit will be revised to delete retail gasoline outlets from the Priority Development Project Categories for Standard Urban Storm Water Mitigation Plans. The Regional Water Board may consider adding retail gasoline outlets, upon inclusion of appropriate findings and a threshold describing which outlets are included in the requirements.

IV. ORDER

IT IS HEREBY ORDERED that the Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems in San Diego County (Order No. 2001-01) are revised as follows:

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1. Part A.3: The words "into and" are deleted.

2. Part C.2: Throughout the first paragraph, the words ", Part A.2, and Part A.5 as it applies to Prohibition 5 in Attachment A" shall be inserted following "Part C.1."

3. Finding 2: Revise the finding to read: **URBAN RUNOFF CONTAINS "WASTE" AND "POLLUTANTS"**: Urban runoff contains waste, as defined in the California Water Code, and pollutants, as defined in the federal Clean Water Act, and adversely affects the quality of the waters of the State.

4. Part F.1.b(2)(a): Delete section "x."

In all other respects the petitions are dismissed.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 15, 2001.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marché
Clerk to the Board

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INDEX TO DOCUMENTATION IN SUPPORT OF NARRATIVE STATEMENT

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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION
ORDER NO. R9-2002-0001
NPDES NO. CAS0108740

WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES OF URBAN RUNOFF FROM THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s) DRAINING THE WATERSHEDS OF THE COUNTY OF ORANGE, THE INCORPORATED CITIES OF ORANGE COUNTY, AND THE ORANGE COUNTY FLOOD CONTROL DISTRICT WITHIN THE SAN DIEGO REGION

The California Regional Water Quality Control Board, San Diego Region (hereinafter SDRWQCB), finds that:

1. **COPERMITTEES ARE DISCHARGERS OF URBAN RUNOFF:** Each of the persons in Table 1 below, hereinafter called Copermittees or dischargers, owns or operates a municipal separate storm sewer system (MS4), through which it discharges urban runoff into waters of the United States within the San Diego Region. The Copermittees serve a population of approximately 500,000 people within the San Diego Region. The MS4s operated by the Copermittees 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.

Table 1. Municipal Copermittees

1.	City of Aliso Viejo	8.	City of Mission Viejo
2.	City of Dana Point	9.	City of Rancho Santa Margarita
3.	City of Laguna Beach	10.	City of San Clemente
4.	City of Lake Forest	11.	City of San Juan Capistrano
5.	City of Laguna Hills	12.	County of Orange
6.	City of Laguna Niguel	13.	Orange County Flood Control District
7.	City of Laguna Woods		

2. **URBAN RUNOFF CONTAINS "WASTE" AND IS A "POINT SOURCE DISCHARGE OF POLLUTANTS":** Urban runoff contains waste, as defined in the California Water Code, and pollutants that adversely affect the quality of the waters of the State. The discharge of urban runoff from an MS4 is a "discharge of pollutants from a point source" into waters of the United States as defined in the Clean Water Act.

3. **URBAN DEVELOPMENT AND RUNOFF CAUSES RECEIVING WATER DEGRADATION:** Urban runoff discharges from MS4s are a leading cause of receiving water quality impairment in the San Diego Region and throughout the United States. As runoff flows over urban areas, it picks up harmful pollutants such as pathogens, sediment (resulting from human activities), fertilizers, pesticides, heavy metals, and petroleum products. These pollutants often become dissolved or suspended in urban runoff and are conveyed and discharged to receiving waters, such as streams, lakes, lagoons, bays, and the ocean without treatment. Once in receiving waters, these pollutants harm aquatic life primarily through toxicity and habitat degradation. Furthermore, the pollutants can enter the food chain and may eventually enter the tissues of fish and humans.

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There is a strong direct correlation between "urbanization" and "impacts to receiving water quality". In general, the more heavily developed the area, the greater the impacts to receiving waters from urban runoff.

These impacts especially threaten environmentally sensitive areas (such as Clean Water Act section 303(d) impaired water bodies, areas designated as Areas of Special Biological Significance, water bodies designated with the RARE beneficial use, riparian or estuarine areas designated by the Copermittees as Critical Aquatic Resources (CARS), and regional parks and preserves containing receiving waters within the Cities and County of Orange). Such environmentally sensitive areas have a much lower capacity to withstand pollutant shocks than might be acceptable in the general circumstance. In essence, urban development that is ordinarily insignificant in its impact on the environment may, in a particularly sensitive environment, be significant.

4. **URBAN DEVELOPMENT INCREASES POLLUTANT LOAD, VOLUME, AND VELOCITY OF RUNOFF:** During urban development two important changes occur. First, natural vegetated pervious ground cover is converted to impervious surfaces such as paved highways, streets, rooftops, and parking lots. Natural vegetated soil can both absorb rainwater and remove pollutants providing a very effective natural purification process. Because pavement and concrete can neither absorb water nor remove pollutants, the natural purification characteristics of the land are lost.

   Secondly, urban development creates new pollution sources as human population density increases and brings with it proportionately higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, household hazardous wastes, pet wastes, trash, etc. which can either be washed or directly dumped into the MS4.

   As a result of these two changes, the runoff leaving the developed urban area is significantly greater in volume, velocity and pollutant load than the pre-development runoff from the same area.

   The significance of the impacts of urban development on receiving waters is determined by the scope of the project, such as the size of the project, the project land-use type, etc. Large projects (such as commercial developments greater than 100,000 square feet, home subdivisions greater than 10 units, and streets, roads, highways, and freeways) generally have large amounts of impervious surface, and therefore have greater potential to significantly impact receiving waters by increasing erosion (through increased peak flow rates, flow velocities, flow volumes, and flow durations) than smaller projects. Projects of particular land use types also have greater potential to significantly impact receiving waters due to the presence of typically large amounts of pollutants on site or an increased potential for pollutants to move off site (such as automotive repair shops, restaurants, parking lots, streets, roads, highways, and freeways, hillside development, and retail gasoline outlets).

5. **WATER QUALITY DEGRADATION INCREASES WITH PERCENT IMPERVIOUSNESS:** The increased volume and velocity of runoff from developed urban areas greatly accelerates the erosion of downstream natural channels. Numerous studies have demonstrated a direct correlation between the degree of imperviousness of an area and the degradation of its receiving water quality. Significant declines in the biological integrity and physical habitat of streams and other receiving waters have been found to occur with as little as a 10% conversion from natural to impervious surfaces. (Developments of medium density single family homes range between 25 to 60% impervious). Today "% impervious coverage" is believed to be a reliable indicator and predictor of the water quality degradation expected from planned new development.

6. **URBAN RUNOFF IS A HUMAN HEALTH THREAT:** Urban runoff contains pollutants, which threaten human health. Human illnesses have been clearly linked to recreating (i.e., swimming, surfing, etc.) near storm drains flowing to coastal beach waters. Such flows from urban areas often result in the posting or closure of local beaches.

   Pollutants transported to receiving waters by urban runoff can also enter the food chain. Once in the food chain they can "bioaccumulate" in the tissues of invertebrates (e.g., mussels, oysters, and

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lobsters) and fish which may be eventually consumed by humans. Furthermore, some pollutants are also known to "biomagnify". This phenomenon can result in pollutant concentrations in the body fat of top predators that are millions of times greater than the concentrations in the tissues of their lower trophic (food chain) counterparts or in ambient waters.

7. **POLLUTANT TYPES:** The most common categories of pollutants in urban runoff include total suspended solids, sediment (due to anthropogenic activities); 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 (decaying vegetation, animal waste), and trash.

8. **URBAN STREAMS AS AN MS4 COMPONENT:** Historic and current development make use of natural drainage patterns and features as conveyances for urban runoff. Urban streams used in this manner are both MS4s and receiving waters.

9. **URBAN RUNOFF CAUSES BENEFICIAL USE IMPAIRMENT:** Individually and in combination, the discharge of pollutants and increased flows from MS4s can cause or threaten to cause a condition of pollution (i.e., unreasonable impairment of water quality for designated beneficial uses), contamination, or nuisance. The discharge of pollutants from MS4s can cause the concentration of pollutants to exceed applicable receiving water quality objectives and impair or threaten to impair designated beneficial uses. The discharge of urban runoff may also impact the physical habitat of receiving waters. Significant stream channel incision and bank erosion is a feature common in the Aliso Creek watershed and other drainages in Orange County and may be caused in part by changes in peak flow rates and volumes resulting from urban development. Preliminary results of the Ambient Bioassessment Monitoring Program in Aliso Creek and San Juan Creek in 1998 and 1999 indicate impacts to the benthic community that may be the result of water quality and habitat degradation.

10. **COPERMITTEES IMPLEMENT URBAN RUNOFF MANAGEMENT PROGRAMS (URMPs):** Copermittee implementation of Urban Runoff Management Programs (URMPs) designed to reduce discharges of pollutants and flow into and from MS4s to the maximum extent practicable (MEP) can protect receiving water quality by promoting attainment of water quality objectives necessary to support designated beneficial uses. To be most effective, URMPs must contain both structural and non-structural best management practices (BMPs).

11. **BEST MANAGEMENT PRACTICES (BMPs):** Pollutants can be effectively reduced in urban runoff by the application of a combination of pollution prevention, source control, and treatment control BMPs. Source control BMPs (both structural and non-structural) minimize the contact between pollutants and flows (e.g., rerouting run-on around pollutant sources or keeping pollutants on-site and out of receiving waters). Treatment control (or structural) BMPs remove pollutants from urban runoff. Where feasible, use of BMPs that utilize natural processes should be assessed. These types of BMPs, such as grassy swales and constructed wetlands, can frequently be as effective as less natural BMPs, while providing additional benefits such as aesthetics and habitat.

12. **POLLUTION PREVENTION:** Pollution prevention, the initial reduction/elimination of pollutant generation at its source, is the best "first line of defense" for Copermittees and should be used in conjunction with source control and treatment control BMPs. Pollutants that are never generated do not have to be controlled or treated. Encouragement during planning processes of the use of pollution prevention BMPs can be an effective means for pollution prevention BMPs to be implemented, through such methods as education, landscaping, etc.

13. **RECEIVING WATER LIMITATIONS:** Compliance with receiving water limits based on applicable water quality objectives is necessary to ensure that MS4 discharges will not cause or contribute to violations of water quality objectives and the creation of conditions of pollution.

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14. **RECEIVING WATER LIMITATION COMPLIANCE STRATEGY:** Implementation of BMPs cannot ensure attainment of receiving water quality objectives under all circumstances; some BMPs may not prove to be as effective as anticipated. An iterative process of BMP development, implementation, monitoring, and assessment is necessary to assure that an Urban Runoff Management Program is sufficiently comprehensive and effective to achieve compliance with receiving water quality objectives.

15. **COPERMITTEES' RESPONSIBILITY FOR ILLICIT DISCHARGES FROM THIRD PARTIES:** As operators of MS4s, the Copermittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to the waters of the United States, the operator of an MS4 that does not prohibit and/or control discharges into its system essentially accepts responsibility for those discharges. These discharges may cause or contribute to a condition of contamination or exceedances of receiving water quality objectives.

16. **COPERMITTEES' RESPONSIBILITY BASED ON LAND USE AUTHORITY:** Utilizing their land use authority, Copermittees authorize and realize benefits from the urban development which generates the pollutants and runoff that impair receiving waters. Since the Copermittees utilize their legal authority to authorize urbanization, they must also exercise their legal authority to ensure that the resulting increased pollutant loads and flows do not further degrade receiving waters.

17. **THREE PHASES OF URBAN DEVELOPMENT:** Urban development has three major phases: (1) land use planning for new development; (2) construction; and (3) the "use" or existing development phase. Because the Copermittees authorize, permit, and realize benefits from each of these phases, and because each phase has a profound impact on water quality, the Copermittees have commensurate responsibilities to protect water quality during each phase. In other words, Copermittees are held responsible for the short and long-term water quality consequences of their land use planning, construction, and existing development decisions.

18. **PLANNING PHASE FOR NEW DEVELOPMENT:** Because land use planning and zoning is where urban development is conceived, it is the phase in which the greatest and most cost-effective opportunities to protect water quality exists. When a Copermittee incorporates policies and principles designed to safeguard water resources into its General Plan and development project approval processes, it has taken a far-reaching step towards the preservation of local water resources for future generations.

19. **CONSTRUCTION PHASE:** Construction activities are a significant cause of receiving water impairment. Siltation is currently the largest cause of river impairment in the United States. Sediment runoff rates from construction sites greatly exceed natural erosion rates of undisturbed lands causing siltation and impairment of receiving waters. In addition to requiring implementation of the full range of BMPs, an effective construction runoff program must include local plan review, permit conditions, field inspections, and enforcement.

20. **EXISTING DEVELOPMENT:** The Copermittees' wet weather monitoring results collected during the past decade, as well as volumes of other references in the literature today, confirm substantial pollutant loads to receiving waters in runoff from existing urban development. Implementation of jurisdictional and watershed URMPs, which include extensive controls on existing development, can reduce pollutant loadings over the long term.

21. **CHANGES NEEDED:** Because the urbanization process is a direct and leading cause of water quality degradation in this Region, fundamental changes to existing policies and practices about urban development are needed if the beneficial uses of the San Diego Region's natural water resources are to be protected.

22. **DUAL REGULATION OF INDUSTRIAL AND CONSTRUCTION SITES:** Discharges of runoff from industrial and construction sites in this Region are subject to dual (state and local) regulation. (1) All industries and construction sites are subject to the local permits, plans, and ordinances of the municipal jurisdiction in which it is located. Pursuant to this Order, local (storm water, grading,

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construction, and use) permits, plans, and ordinances must (a) prohibit the discharge of pollutants and non-storm water into the MS4; and (b) require the routine use of BMPs to reduce pollutants in site runoff. (2) Many industries and construction sites are also subject to regulation under the statewide General Industrial Storm Water Permit or statewide General Construction Storm Water Permit[1]. These statewide general permits are adopted by the State Water Resources Control Board and enforced by the nine Regional Water Quality Control Boards throughout California. Like the Copermittees' local permits and ordinances, the statewide General Industrial and Construction Permits also (a) prohibit the discharge of pollutants and non-storm water; and (b) require the routine use of BMPs to reduce pollutants in site runoff.

Recognizing that both authorities share a common goal, the federal storm water regulations at 40 CFR 122.26 (and its preamble) call for the dual system to ensure the most effective oversight of industrial and construction site discharges. Under this dual system, each municipal Copermittee is responsible for enforcing its local permits, plans, and ordinances within its jurisdiction. Similarly, the SDRWQCB is responsible for enforcing both statewide general permits and this Order within the San Diego Region.

23. **EDUCATION:** Education is the foundation of every effective URMP and the basis for changes in behavior at a societal level. Education of municipal planning, inspection, and maintenance department staffs is especially critical to ensure that in-house staffs understand how their activities impact water quality, how to accomplish their jobs while protecting water quality, and their specific roles and responsibilities for compliance with this Order. Public education, designed to target various urban land users and other audiences, is also essential to inform the public of how individual actions impact receiving water quality and how these impacts can be minimized. The proposed Drainage Area Management Plan (DAMP) that was submitted to the SDRWQCB by the Orange County Copermittees in September 2000 has a strong emphasis on education measures.

24. **ENFORCING LOCAL LEGAL AUTHORITY**: Enforcement of local urban runoff related ordinances, permits, and plans is an essential component of every URMP and is specifically required in the federal storm water regulations and this Order. Routine inspections provide an effective means by which Copermittees can evaluate compliance with their permits and ordinances. Inspections are especially important at high-risk areas for pollutant discharges such as industrial and construction sites.

    When industrial or construction site discharges occur in violation of local permits and ordinances, the SDRWQCB looks to the municipality that has authorized the discharge for appropriate actions (typically education followed by enforcement where education has been unsuccessful). Each Copermittee must also provide enforcement against illegal discharges from other land uses it has authorized, such as commercial and residential developments.

25. **PUBLIC PARTICIPATION:** Public participation during the URMP development process is necessary to ensure that all stakeholder interests and a variety of creative solutions are considered.

26. **TOXICITY**: Urban runoff discharges from MS4s often contain pollutants that cause toxicity, (i.e., adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies). The water quality objectives for toxicity provided in the Water Quality Control Plan, San Diego Basin, Region 9, (Basin Plan), state in part *"All waters shall be free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life....The survival of aquatic life in surface waters subjected to a waste discharge or other controllable water quality factors, shall not be less than*

[1] The "statewide General Industrial Storm Water Permit" refers to State Water Resources Control Board Water Quality Order No. 97-03-DWQ National Pollutant Discharge Elimination System General Permit No. CAS000001, Waste Discharge Requirements for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities. The "statewide General Construction Storm Water Permit" refers to State Water Resources Control Board Order No. 99-08-DWQ National Pollutant Discharge Elimination System General Permit No. CAS000002, Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity.

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that for the same water body in areas unaffected by the waste discharge..." Urban runoff discharges from MS4s are considered toxic when (1) the toxic effect observed in an acute toxicity test exceeds zero Toxic Units Acute (TUa=0); or (2) the toxic effect observed in a chronic toxicity test exceeds one Toxic Unit Chronic (TUc=1).

27. **FOCUS ON MAN-MADE POLLUTANTS AND FLOWS:** The focus of this Order is on the control of urban runoff pollutants and flows, which are either generated or accelerated by human activities. This Order is not meant to control background or naturally occurring pollutants and flows.

28. **COMMON WATERSHEDS AND CWA SECTION 303(d) IMPAIRED WATERS:** The Copermittees discharge urban runoff into lakes, streams, creeks, bays, the Pacific Ocean, and tributaries thereto within six hydrologic areas within Orange County as shown in Table 2 below. During its downstream course, urban runoff is conveyed through lined and unlined (natural, manmade, and partially modified) channels, all of which are defined as components of the Copermittees' MS4.

    Some of the receiving water bodies listed below, which receive or convey urban runoff discharges, have been designated as impaired by the SDRWQCB and USEPA in 1998 pursuant to Clean Water Act section 303(d). Additional water bodies may be listed during the term of this Order pursuant to Clean Water Act section 303(d) as impaired as more information is collected and analyzed.

Table 2. Watershed Management Areas (WMAs)

SDRWQCB WATERSHED MANAGEMENT AREA (WMA)	HYDROLOGIC UNIT(S)	MAJOR SURFACE WATER BODIES	303(d) POLLUTANT(S) OF CONCERN OR WATER QUALITY EFFECT	COPERMITTEES
San Juan Creek WMA	San Juan Hydrologic Unit (901.00)	Moro Canyon Creek Laguna Canyon Creek Aliso Creek English Canyon Creek Sulphur Creek Wood Canyon Creek Salt Creek San Juan Creek Bell Canyon Creek Canada Gobernadora Arroyo Trabuco Oso Creek Prima Deshecha Canada Segunda Deshecha Canada Pacific Ocean	1. Coliform Bacteria	1. County of Orange 2. City of Aliso Viejo 3. City of Dana Point 4. City of Laguna Beach 5. City of Lake Forest 6. City of Laguna Hills 7. City of Laguna Niguel 8. City of Laguna Woods 9. City of Mission Viejo 10. City of Rancho Santa Margarita 11. City of San Juan Capistrano 12. City of San Clemente 13. Orange County Flood Control District

29. **CUMULATIVE POLLUTANT LOAD CONTRIBUTIONS:** Because they are interconnected, each MS4 within a watershed contributes to the cumulative pollutant loading, volume, and velocity of urban runoff and the ensuing degradation of downstream receiving water bodies. Accordingly, inland MS4s contribute to coastal impairments.

30. **LAND USE PLANNING ON A WATERSHED SCALE:** Because urban runoff does not recognize political boundaries, "watershed-based" land use planning (pursued collaboratively by neighboring local governments) can greatly enhance the protection of shared natural water resources. Such planning enables multiple jurisdictions to work together to plan for both development and resource conservation that can be environmentally as well as economically sustainable.

31. **INTERGOVERNMENTAL COORDINATION:** Within their common watersheds it is essential for the Copermittees to coordinate their water quality protection and land use planning activities to achieve the greatest protection of receiving water bodies. Copermittee coordination with other watershed stakeholders, especially CALTRANS and the Department of Defense is also critical.

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Continued implementation of the management structure developed under previous permits, within which the Copermittees subject to this Order, will fund and coordinate those aspects of their joint obligations will promote implementation of Urban Runoff Management Programs on a watershed and regional basis in the most cost effective manner.

32. **WASTE REMOVAL:** Waste and pollutants which are deposited and accumulate in MS4 drainage structures will be discharged from these structures to waters of the United States unless they are removed. These discharges may cause or contribute to, or threaten to cause or contribute to, a condition of pollution in receiving waters. Once removed, such accumulated wastes must be characterized and lawfully disposed.

33. **CHANGING THE STORM WATER MANAGEMENT APPROACH:** In contrast to the conventional "conveyance" approach, a more natural approach to storm water management seeks to filter and infiltrate runoff by allowing it to flow slowly over permeable vegetated surfaces. By "preserving and restoring the natural hydrologic cycle", filtration and infiltration can greatly reduce the volume/peak rate, velocity, and pollutant loads of urban runoff. The greatest opportunities for changing from a "conveyance" to a more natural management approach occur during the land use planning and zoning processes and when new development projects are under early design.

34. **INFILTRATION AND POTENTIAL GROUNDWATER CONTAMINATION:** Any drainage feature that infiltrates runoff poses some risk of potential groundwater contamination. Although dependent on several factors, the risks typically associated with properly managed infiltration of runoff (especially from residential land use areas) are not significant. The risks associated with infiltration can be managed by many techniques, including (1) designing landscape drainage features that promote infiltration of runoff, but do not "inject" runoff (injection bypasses the natural processes of filtering and transformation that occur in the soil); (2) taking reasonable steps to prevent the illegal disposal of wastes; and (3) ensuring that each drainage feature is adequately maintained in perpetuity. Minimum conditions needed to protect groundwater are specified in section F.1.b. of this Order.

35. **VECTOR CONTROL:** Certain BMPs implemented or required by municipalities for urban runoff management may create a habitat for vectors (e.g. mosquitoes and rodents) if not properly designed or maintained. Close collaboration and cooperative effort between municipalities and local vector control agencies and the State Department of Health Services during the development and implementation of the Urban Runoff Management Programs is necessary to minimize nuisances and public health impacts resulting from vector breeding.

36. **LEGAL AUTHORITY:** This Order is based on the federal Clean Water Act, the Porter-Cologne Water Quality Control Act (Division 7 of the Water Code, 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 Resources Control Board, the Regional Water Quality Control Plan (Basin Plan) adopted by the Regional Board, the California Toxics Rule, and the California Toxics Rule Implementation Plan.

37. **TOTAL MAXIMUM DAILY LOADS (TMDLs):** 40 CFR 122.44 (d)(vii)(B) requires that NPDES permits contain effluent limitations that are consistent with waste load allocations developed under a TMDL. Several TMDLs are being developed in the San Diego Region for impaired water bodies that receive Copermittees' discharge. Once these TMDLs are approved by the SDRWQCB and USEPA, Copermittees' discharge of urban runoff into an impaired water body will be subject to load allocations established by the TMDLs. This Order may be revised by the Regional Board to implement the TMDL waste load allocations for specific water bodies within the Orange County watersheds.

38. **ANTIDEGRADATION:** Conscientious implementation of URMPs that satisfy the requirements contained in this Order will reduce the likelihood that discharges from MS4s will cause or contribute to unreasonable degradation of the quality of receiving waters. Therefore, this Order is in

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conformance with SWRCB Resolution No. 68-16 and the federal antidegradation policy described in 40 CFR 131.12.

39. **CEQA:** The issuance of waste discharge requirements for the discharge of urban runoff from MS4s to waters of the United States is exempt from the requirement for preparation of environmental documents under the California Environmental Quality Act (CEQA) (Public Resources Code, Division 13, Chapter 3, § 21000 et seq.) in accordance with the CWC § 13389.

40. **COMMON INTEREST DEVELOPMENTS AND HOMEOWNERS ASSOCIATIONS:** Common interest developments occur within the jurisdiction of the Copermittees. Commonly owned areas can include those used to convey urban runoff. State Law (Civil code 1350-1376) requires that an association be established to manage the commonly owned areas. Urban runoff from storm water conveyance systems within common interest developments is discharged to receiving waters and/or MS4s. This runoff is expected to have water quality and quantity characteristics similar to runoff from areas of similar land use and drainage area.

41. **REPORT OF WASTE DISCHARGE:** In September 2000, the Orange County Copermittees submitted a Report of Waste Discharge and a proposed Drainage Area Management Plan (DAMP) for 2001-2006 to the SDRWQCB.

42. **PUBLIC NOTICE:** The SDRWQCB has notified the Copermittees, all known interested parties, and the public of its intent to consider adoption of an Order prescribing waste discharge requirements that would serve to renew an NPDES permit for the existing discharge of urban runoff.

43. **PUBLIC HEARING:** The SDRWQCB has, at a public meeting on January 9, 2002, held a public hearing and heard and considered all comments pertaining to the terms and conditions of this Order.

IT IS HEREBY ORDERED that the Copermittees, in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted thereunder, and the provisions of the Clean Water Act and regulations adopted thereunder, shall each comply with the following:

A. PROHIBITIONS -- DISCHARGES

1. Discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC § 13050), in waters of the state are prohibited.

2. Discharges from MS4s that cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited.

3. Discharges from MS4s containing pollutants which have not been reduced to the maximum extent practicable (MEP) are prohibited.

4. In addition to the above prohibitions, discharges from MS4s are subject to all Basin Plan prohibitions cited in **Attachment A** to this Order.

B. PROHIBITIONS -- NON-STORM WATER DISCHARGES

1. Each Copermittee shall effectively prohibit **all** types of non-storm water discharges into its Municipal Separate Storm Sewer System (MS4) unless such discharges are either authorized by a separate NPDES permit; or not prohibited in accordance with B.2. and B.3. below.

2. Pursuant to 40 CFR 122.26(d)(2)(iv)(B)(1), the following categories of non-storm water discharges need only be prohibited from entering an MS4 if such categories of discharges are identified by the Copermittee as a significant source of pollutants to waters of the United States:

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a. Diverted stream flows;
b. Rising ground waters;
c. Uncontaminated ground water infiltration [as defined at 40 CFR 35.2005(20)] to MS4s;
d. Uncontaminated pumped ground water;
e. Foundation drains;
f. Springs;
g. Water from crawl space pumps;
h. Footing drains;
i. Air conditioning condensation;
j. Flows from riparian habitats and wetlands;
k. Water line flushing;
l. Landscape irrigation;
m. Discharges from potable water sources other than water main breaks;
n. Irrigation water;
o. Lawn watering;
p. Individual residential car washing; and
q. Dechlorinated swimming pool discharges.

3. When a discharge category above is identified as a significant source of pollutants to waters of the United States, the Copermittee shall either:

   a. Prohibit the discharge category from entering its MS4; ***OR***

   b. Not prohibit the discharge category and implement, or require the responsible party(ies) to implement, BMPs which will reduce pollutants to the MEP; ***AND***

   c. For each discharge category not prohibited, the Copermittee shall submit the following information to the SDRWQCB within **365 days** of adoption of this Order:

      (1) The non-storm water discharge category listed above which the Copermittee elects not to prohibit; and

      (2) The BMP(s) for each discharge category listed above which the Copermittee will implement, or require the responsible party(ies) to implement, to prevent or reduce pollutants to the MEP.

4. **Fire Fighting Flows:** Emergency and non-emergency fire fighting flows need not be prohibited. However, where applicable, when not interfering with health and safety issues, BMPs for non-emergency fire fighting flows are encouraged.

5. **Dry Weather Monitoring and Non-Storm Water Discharges:** Each Copermittee shall examine all dry weather monitoring results collected in accordance with section F.5. and Attachment E of this Order to identify water quality problems which may be the result of any non-prohibited discharge category(ies) identified above in Non-Storm Water Discharges to MS4s Prohibition B.2. Follow-up investigations shall be conducted as necessary to identify and control any non-prohibited discharge category(ies) listed above.

C. RECEIVING WATER LIMITATIONS

1. Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited.

2. Each Copermittee shall comply with Part C.1., Part A.2, and Part A.4 as it applies to Prohibition 5 in Attachment A of this Order through timely implementation of control measures and other actions to

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reduce pollutants in urban runoff discharges in accordance with the Jurisdictional Urban Runoff Management Program (Jurisdictional URMP) and other requirements of this Order including any modifications. The Jurisdictional URMP shall be designed to achieve compliance with Part C.1., Part A.2, and Part A.4 as it applies to Prohibition 5 in Attachment A of this Order. If exceedance(s) of water quality standards persist notwithstanding implementation of the URMP and other requirements of this Order, the Copermittee shall assure compliance with Part C.1., Part A.2, and Part A.4 as it applies to Prohibition 5 in Attachment A of this Order by complying with the following procedure:

a. Upon a determination by either the Copermittee or the SDRWQCB that MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard, the Copermittee shall promptly notify and thereafter submit a report to the SDRWQCB 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 water quality standards. The report may be incorporated in the annual update to the Jurisdictional URMP unless the SDRWQCB directs an earlier submittal. The report shall include an implementation schedule. The SDRWQCB may require modifications to the report;

b. Submit any modifications to the report required by the SDRWQCB within 30 days of notification;

c. Within 30 days following approval of the report described above by the SDRWQCB, the Copermittee shall revise its Jurisdictional URMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required;

d. Implement the revised Jurisdictional URMP and monitoring program in accordance with the approved schedule.

So long as the Copermittee has complied with the procedures set forth above and are implementing the revised Jurisdictional URMP, the Copermittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the SDRWQCB to do so.

3. Nothing in this section shall prevent the SDRWQCB from enforcing any provision of this Order while the Copermittee prepares and implements the above report.

D. LEGAL AUTHORITY

1. Each Copermittee shall establish, maintain, and enforce adequate legal authority to control pollutant discharges **into** and **from** its MS4 through ordinance, statute, permit, contract or similar means. This legal authority must, at a minimum, authorize the Copermittee to:

   a. Control the contribution of pollutants in discharges of runoff associated with industrial and construction activity **to** its MS4 and control the quality of runoff **from** industrial and construction sites. This requirement applies both to industrial and construction sites that have coverage under the statewide general industrial or construction storm water permits, as well as to those sites that do not. Grading ordinances shall be upgraded and enforced as necessary to comply with this Order.

   b. Prohibit **all** identified illicit discharges not otherwise allowed pursuant to section B.2 including but not limited to:

      (1) Sewage;

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(2) Discharges of wash water resulting from the hosing or cleaning of gas stations, auto repair garages, or other types of automotive services facilities;

(3) Discharges resulting from the cleaning, repair, or maintenance of any type of equipment, machinery, or facility including motor vehicles, cement-related equipment, and port-a-potty servicing, etc.;

(4) Discharges of wash water from mobile operations such as mobile automobile washing, steam cleaning, power washing, and carpet cleaning, etc.;

(5) Discharges of wash water from the cleaning or hosing of impervious surfaces in municipal, industrial, commercial, and residential areas including parking lots, streets, sidewalks, driveways, patios, plazas, work yards and outdoor eating or drinking areas, etc.;

(6) Discharges of runoff from material storage areas containing chemicals, fuels, grease, oil, or other hazardous materials;

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

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

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

c. Prohibit and eliminate illicit connections to the MS4;

d. Control the discharge of spills, dumping, or disposal of materials other than storm water to its MS4;

e. Require compliance with conditions in Copermittee ordinances, permits, contracts or orders (i.e., hold dischargers to its MS4 accountable for their contributions of pollutants and flows);

f. Utilize enforcement mechanisms to require compliance with Copermittee storm water ordinances, permits, contracts, or orders;

g. Control the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements among Copermittees. Control of the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements with other owners of the MS4 such as CALTRANS, Native American Tribes, and the Department of Defense is encouraged;

h. Carry out all inspections, surveillance, and monitoring necessary to determine compliance and noncompliance with local ordinances and permits and with this Order, including the prohibition on illicit discharges to the MS4. This means the Copermittee must have authority to enter, sample, inspect, review and copy records, and require regular reports from industrial facilities discharging into its MS4, including construction sites; and

i. Require the use of best management practices (BMPs) to prevent or reduce the discharge of pollutants to MS4s.

2. Within **365 days** of adoption of this Order, each Copermittee shall provide to the SDRWQCB a statement certified by its chief legal counsel that the Copermittee has adequate legal authority to

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implement and enforce each of the requirements contained in 40 CFR 122.26(d)(2)(i)(A-F) and this Order. This statement shall include:

a. Identification of all departments within the jurisdiction that conduct urban runoff related activities, and their roles and responsibilities under this Order. Include an up to date organizational chart specifying these departments and key personnel;

b. Citation of urban runoff related ordinances and the reasons they are enforceable;

c. Identification of the local administrative and legal procedures available to mandate compliance with urban runoff related ordinances and therefore with the conditions of this Order;

d. Description of how these ordinances are implemented and appealed; and

e. Description of whether the municipality can issue administrative orders and injunctions or if it must go through the court system for enforcement actions.

E. TECHNOLOGY BASED STANDARDS

Each Copermittee shall implement, or require implementation of, best management practices to ensure that the following pollutant discharges **into** and/or **from** its MS4 are reduced to the applicable technology based standard as specified below:

Table 3. Technology Based Standards[2]

POLLUTANT DISCHARGE FROM	DESCRIPTION	APPLICABLE PERFORMANCE STANDARD
Industrial Activity owned by the Copermittee	Categorical Industry in 40 CFR 122.26	The Copermittees are required to implement BMPs to the BAT/BCT standard (pursuant to Statewide General Industrial Permit)
Industrial Activity	All other industry	The Copermittees are required to implement or require the implementation of BMPs to the MEP standard for discharges into their MS4s.[3]
Construction Activity owned by the Copermittee	Greater than or Equal to 5 Acres (or less than 5 acres and Part of a Larger Common Plan of Sale or Development)	The Copermittees are required to implement BMPs to the BAT/BCT standard (pursuant to Statewide General Construction Permit)
Construction Activity	All Other construction	The Copermittees are required to implement or require the implementation of BMPs to the MEP standard for discharges into their MS4s[4]
Other Sources	All Other Land Use Activities	The Copermittees are required to implement or require the implementation of BMPs to the MEP standard for discharges into their MS4s
MS4s	All discharges from MS4s	The Copermittees are required to implement or require the implementation of BMPs to the MEP standard for all discharges from their MS4s

[2] Pursuant to this Order, each Copermittee shall ensure that pollutants in runoff from industrial and construction sites within its jurisdiction have been reduced to the MEP standard before entering its MS4. The industrial and construction site dischargers themselves however must ensure that pollutants in runoff leaving their sites have been reduced to the BAT/BCT standard pursuant to either the statewide General Industrial or Construction Storm Water Permit. Runoff from industrial and construction sites owned by municipalities and subject to either the General Industrial or Construction Storm Water Permits, must meet the BAT/BCT standard.

[3] The facility operator is required to implement BMPs to the BAT/BCT standard pursuant to the Statewide General Industrial permit.

[4] The facility operator is required to implement BMPs to the BAT/BCT standard pursuant to the Statewide General Construction permit.

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F. JURISDICTIONAL URBAN RUNOFF MANAGEMENT PROGRAM

Each Copermittee shall take appropriate actions to reduce discharges of pollutants and runoff flow during each of the three major phases of urban development, i.e., the planning, construction, and existing development (or use) phases. Following the adoption of the Order and prior to the full implementation of the Jurisdictional URMP, each Copermittee shall at a minimum implement the provisions and commitments of the proposed DAMP submitted in September 2000.

Each Copermittee shall implement a Jurisdictional Urban Runoff Management Program (Jurisdictional URMP) that contains the components shown below as described in Sections F.1. through F.9:

F.1. Land-Use Planning for New Development and Redevelopment Component
F.2. Construction Component
F.3. Existing Development Component
- **a. Municipal**
- **b. Industrial**
- **c. Commercial**
- **d. Residential**

F.4. Education Component
F.5. Illicit Discharge Detection and Elimination Component
F.6. Common Interest Areas and Homeowners Associations
F.7. Public Participation Component
F.8. Assessment of Jurisdictional URMP Effectiveness Component
F.9. Fiscal Analysis Component

F.1. Land-Use Planning for New Development and Redevelopment Component

Each Copermittee shall minimize the short and long-term impacts on receiving water quality from new development and redevelopment. In order to reduce pollutants and runoff flows from new development and redevelopment to the maximum extent practicable, each Copermittee shall at a minimum:

F.1.a Assess General Plan
F.1.b Modify Development Project Approval Processes
F.1.c Revise Environmental Review Processes
F.1.d Conduct Education Efforts Focused on New Development and Redevelopment

F.1.a. Assess General Plan

Each Copermittee's General Plan or equivalent plan (e.g., Comprehensive, Master, or Community Plan) shall include water quality and watershed protection principles and policies to direct land-use decisions and require implementation of consistent water quality protection measures for development projects. As part of its Jurisdictional Urban Runoff Management Program document, each Copermittee shall provide a workplan with time schedule detailing any changes to its General Plan regarding water quality and watershed protection. Examples of water quality and watershed protection principles and policies to be considered include the following:

(1) Minimize the amount of impervious surfaces and directly connected impervious surfaces in areas of new development and redevelopment and where feasible slow runoff and maximize on-site infiltration of runoff.

(2) Implement pollution prevention methods supplemented by pollutant source controls and treatment. Use small collection strategies located at, or as close as possible to, the source (i.e., the point where water initially meets the ground) to minimize the transport of urban runoff and pollutants offsite and into an MS4.

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(3) Preserve, and where possible, create or restore areas that provide important water quality benefits, such as riparian corridors, wetlands, and buffer zones. Encourage land acquisition of such areas.

(4) Limit disturbances of natural water bodies and natural drainage systems caused by development including roads, highways, and bridges.

(5) Prior to making land use decisions, utilize methods available to estimate increases in pollutant loads and flows resulting from projected future development. Require incorporation of structural and non-structural BMPs to mitigate the projected increases in pollutant loads and flows.

(6) Avoid development of areas that are particularly susceptible to erosion and sediment loss; or establish development guidance that identifies these areas and protects them from erosion and sediment loss.

(7) Reduce pollutants associated with vehicles and increasing traffic resulting from development. Coordinate local traffic management reduction efforts with Orange County Transit Authority's Congestion Management Plan.

(8) Post-development runoff from a site shall not contain pollutant loads that cause or contribute to an exceedance of receiving water quality objectives and which have not been reduced to the maximum extent practicable.

F.1.b. Modify Development Project Approval Processes

Prior to project approval and issuance of local permits, Copermittees shall require each proposed project to implement measures to ensure that pollutants and runoff from the development will be reduced to the maximum extent practicable and will not cause or contribute to an exceedance of receiving water quality objectives. Each Copermittee shall further ensure that all development will be in compliance with Copermittee storm water ordinances, local permits, all other applicable ordinances and requirements, and this Order.

(1) Development Project Requirements

Each Copermittee shall include development project requirements in local permits to ensure that pollutant discharges from development are reduced to the maximum extent practicable, peak runoff velocities and runoff volumes from development are controlled, and that receiving water quality objectives are not violated throughout the life of the project. Such requirements shall, at a minimum:

(a) Require project proponent to implement source control BMPs for all applicable development projects.
(b) Require project proponent to implement site design/landscape characteristics where feasible which maximize infiltration, provide retention, slow runoff, and minimize impervious land coverage for all development projects.
(c) Require project proponent to implement buffer zones for natural water bodies, where feasible. Where buffer zone implementation is infeasible, require project proponent to implement other buffers such as trees, lighting restrictions, access restrictions, etc.
(d) Require industrial applicants subject to California's statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction), (hereinafter General Industrial Permit), to provide evidence of coverage under the General Industrial Permit.
(e) Require project proponent to ensure its grading or other construction activities meet the provisions specified in Section F.2. of this Order.

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(f) Require project proponent to provide proof of a mechanism which will ensure ongoing long-term maintenance of all structural post-construction BMPs.

(2) Standard Urban Storm Water Mitigation Plans (SUSMPs)

Within 365 days of adoption of this Order, the Copermittees shall collectively develop a model Standard Urban Storm Water Mitigation Plan (SUSMP) to reduce pollutants and to maintain or reduce downstream erosion and stream habitat from all new development and significant redevelopment projects falling under the priority project categories or locations listed in section F.1.b.(2)(a) below. The Copermittes shall submit the model SUSMP to the SDRWQCB. Within 180 days of development of the model SUSMP, each Copermittee shall adopt its own local SUSMP, and amended ordinances consistent with the model SUSMP, and shall submit both (local SUSMP and amended ordinances) to the SDRWQCB.

Immediately following adoption of its local SUSMP, each Copermittee shall ensure that all new development and significant redevelopment projects falling under the priority project categories or locations listed in F.1.b.(2)(a) below meet SUSMP requirements. The SUSMP requirements shall apply to all priority projects or phases of priority projects that have not yet begun grading or construction activities. If a Copermittee determines that lawful prior approval of a project exists, whereby application of SUSMP requirements to the project is infeasible, SUSMP requirements need not apply to the project. Where feasible, the Copermittees shall utilize the 18-month SUSMP implementation period to ensure that projects undergoing approval processes include application of SUSMP requirements in their plans.

(a) *Priority Development Project Categories - SUSMP requirements shall apply to all new development and significant redevelopment projects falling under the priority project categories or locations listed below.* Significant redevelopment is defined as the creation or addition of at least 5,000 square feet of impervious surfaces on an already developed site. Significant redevelopment includes, but is not limited to: the expansion of a building footprint or addition or replacement of a structure; structural development including an increase in gross floor area and/or exterior construction or remodeling; replacement of impervious surface that is not part of a routine maintenance activity; and land disturbing activities related with structural or impervious surfaces. Where significant redevelopment results in an increase of less than fifty percent of the impervious surfaces of a previously existing development, and the existing development was not subject to SUSMP requirements, the numeric sizing criteria discussed in section F.1.b.(2)(c) applies only to the addition, and not to the entire development.

i. *Home subdivisions of 10 or more housing units.* This category includes single-family homes, multi-family homes, condominiums, and apartments.

ii. *Commercial developments greater than 100,000 square feet.* 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 100,000 square feet. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; commercial airfields; and other light industrial facilities.

iii. *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.

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iv. *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 F.1.b.(2)(c) and peak flow rate requirement F.1.b(2)(b)(i).

v. *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.

vi. *Environmentally Sensitive Areas: All development and redevelopment located within or directly adjacent to or discharging directly to an environmentally sensitive area (where discharges from the development or redevelopment will enter receiving waters within the environmentally sensitive area), 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.* Environmentally sensitive areas include but are not limited to all Clean Water Act Section 303(d) impaired water bodies; areas designated as Areas of Special Biological Significance by the State Water Resources Control Board (Water Quality Control Plan for the San Diego Basin (1994) and amendments); water bodies designated with the RARE beneficial use by the State Water Resources Control Board (Water Quality Control Plan for the San Diego Basin (1994) and amendments); areas designated as preserves or equivalent under the Natural Community Conservation Planning Program; and any areas designated as Critical Aquatic Resources (CARS) or other equivalent environmentally sensitive areas which have been identified by the Copermittees. "Directly adjacent" means situated within 200 feet of the environmentally sensitive area. "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.

vii. *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.

viii. *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.

(b) BMP Requirements – The SUSMP shall include a list of recommended source control and structural treatment BMPs. The SUSMP shall require all new development and significant redevelopment projects falling under the above priority project categories or locations to implement a combination of BMPs selected from the recommended BMP list, including at a minimum (1) source control BMPs and (2) structural treatment BMPs. The BMPs shall, at a minimum:

i. Control the post-development peak storm water runoff discharge rates and velocities to maintain or reduce pre-development downstream erosion, and to protect stream habitat;

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ii. Conserve natural areas where feasible;
iii. Minimize storm water pollutants of concern in urban runoff from the new development or significant redevelopment (through implementation of source control BMPs). Identification of pollutants of concern should include at a minimum consideration of any pollutants for which water bodies receiving the development's runoff are listed as impaired under Clean Water Act section 303(d), any pollutant associated with the land use type of the development, and any pollutant commonly associated with urban runoff;
iv. Remove pollutants of concern from urban runoff (through implementation of structural treatment BMPs);
v. Minimize directly connected impervious areas where feasible;
vi. Protect slopes and channels from eroding;
vii. Include storm drain stenciling and signage;
viii. Include properly designed outdoor material storage areas;
ix. Include properly designed trash storage areas;
x. Include proof of a mechanism, to be provided by the project proponent or Copermittee, which will ensure ongoing long-term structural BMP maintenance;
xi. Include additional water quality provisions applicable to individual priority project categories;
xii. Be correctly designed so as to remove pollutants to the maximum extent practicable;
xiii. Be implemented close to pollutant sources, when feasible, and prior to discharging into receiving waters supporting beneficial uses; and
xiv. Ensure that post-development runoff does not contain pollutant loads which cause or contribute to an exceedance of water quality objectives and which have not been reduced to the maximum extent practicable.

(c) Numeric Sizing Criteria – The SUSMP shall require structural treatment BMPs to be implemented for all priority development projects. All structural treatment BMPs shall be located so as to infiltrate, filter, or treat the required runoff volume or flow prior to its discharge to any receiving water body supporting beneficial uses. Structural treatment BMPs may be shared by multiple new development projects as long as construction of any shared structural treatment BMPs is completed prior to the use of any new development project from which the structural treatment BMP will receive runoff.

In addition to meeting the BMP requirements listed in item F.1.b.(2)(b) above, all structural treatment BMPs for a single priority development project shall collectively be sized to comply with the following numeric sizing criteria:

Volume

Volume-based BMPs shall be designed to mitigate (infiltrate, filter, or treat) either:

i. The volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the local historical rainfall record (0.8 inch approximate average for the Orange County area);[5] or
ii. The volume of runoff produced by the 85th percentile 24-hour rainfall event, determined as the maximized capture storm water volume for the area, from the formula recommended in Urban Runoff Quality

[5]This volume is not a single volume to be applied to all of Orange County. The size of the 85th percentile storm event is different for various parts of the County. The Copermittees are encouraged to calculate the 85th percentile storm event for each of their jurisdictions using local rain data pertinent to their particular jurisdiction (the 0.8 inch standard is a rough average for the County and should only be used where appropriate rain data is not available). In addition, isopluvial maps may be used to extrapolate rainfall data to areas where insufficient data exists in order to determine the volume of the local 85th percentile storm event in such areas. Where the Copermittees will use isopluvial maps to determine the 85th percentile storm event in areas lacking rain data, the Copermittees shall describe their method for using isopluvial maps in the model and local SUSMPs.

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Management, WEF Manual of Practice No. 23/ASCE Manual of Practice No. 87, (1998); or

iii. The volume of annual runoff based on unit basin storage volume, to achieve 90% or more volume treatment by the method recommended in California Stormwater Best Management Practices Handbook – Industrial/Commercial, (1993); or

iv. The volume of runoff, as determined from the local historical rainfall record, that achieves approximately the same reduction in pollutant loads and flows as achieved by mitigation of the 85th percentile 24-hour runoff event;[6]

OR

Flow

Flow-based BMPs shall be designed to mitigate (infiltrate, filter, or treat) either:

i. The maximum flow rate of runoff produced from a rainfall intensity of 0.2 inch of rainfall per hour, for each hour; or

ii. The maximum flow rate of runoff produced by the 85th percentile hourly rainfall intensity, as determined from the local historical rainfall record, multiplied by a factor of two; or

iii. The maximum flow rate of runoff, as determined from the local historical rainfall record, that achieves approximately the same reduction in pollutant loads and flows as achieved by mitigation of the 85th percentile hourly rainfall intensity multiplied by a factor of two.

(d) Equivalent Numeric Sizing Criteria - The Copermittees may develop, as part of the model SUSMP, any equivalent method for calculating the volume or flow which must be mitigated (i.e., any equivalent method for calculating numeric sizing criteria) by post-construction structural treatment BMPs. Such equivalent sizing criteria may be authorized by the SDRWQCB for use in place of the above criteria. In the absence of development and subsequent authorization of such equivalent numeric sizing criteria, the above numeric sizing criteria requirement shall be implemented.

(e) Pollutants or Conditions of Concern – As part of the model SUSMP, the Copermittees shall develop a procedure for pollutants or conditions of concern to be identified for each new development or significant redevelopment project. The procedure shall include, at a minimum, consideration of (1) receiving water quality (including pollutants for which receiving waters are listed as impaired under Clean Water Act section 303(d)); (2) land use type of the development project and pollutants associated with that land use type; (3) pollutants expected to be present on site; (4) changes in storm water discharge flow rates, velocities, durations, and volumes resulting from the development project; and (5) sensitivity of receiving waters to changes in storm water discharge flow rates, velocities, durations, and volumes.

(f) Implementation Process – As part of the model SUSMP, the Copermittees shall develop a process by which SUSMP requirements will be implemented. The process shall identify at what point in the planning process development projects will be required to meet SUSMP requirements. The process shall also include identification of the roles and responsibilities of various municipal departments in implementing the SUSMP requirements, as well as any other measures necessary for the implementation of SUSMP requirements.

[6] Under this volume criteria, hourly rainfall data may be used to calculate the 85th percentile storm event, where each storm event is identified by its separation from other storm events by at least six hours of no rain. Where the Copermittees may use hourly rainfall data to calculate the 85th percentile storm event, the Copermittees shall describe their method for using hourly rainfall data to calculate the 85th percentile storm event in the model and local SUSMPs.

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(g) Waiver Provision – A Copermittee may provide for a project to be waived from the requirement of implementing all structural treatment BMPs (F.1.b.(2)(b) & F.1.b.(2)(c)) if infeasibility can be established. A waiver of infeasibility shall only be granted by a Copermittee when all available structural treatment BMPs have been considered and rejected as infeasible. Copermittees shall notify the SDRWQCB within 5 days of each waiver issued and shall include the name of the person granting each waiver.

As part of the model SUSMP, the Copermittees may develop a program to require project proponents who have received waivers to transfer the savings in cost, as determined by the Copermittee(s), to a storm water mitigation fund. This program may be implemented by all Copermittees that choose to provide waivers. Funds may be used on projects to improve urban runoff quality within the watershed of the waived project. The waiver program may identify:

i. The entity or entities that will manage the storm water mitigation fund (i.e., assume full responsibility for)
ii. The range and types of acceptable projects for which mitigation funds may be expended;
iii. The entity or entities that will assume full responsibility for each mitigation project including its successful completion
iv. How the dollar amount of fund contributions will be determined.

(h) Infiltration and Groundwater Protection – To protect groundwater quality, each Copermittee shall apply restrictions to the use of structural treatment BMPs which are designed to primarily function as infiltration devices (such as infiltration trenches and infiltration basins). Such restrictions shall ensure that the use of such infiltration structural treatment BMPs shall not cause or contribute to an exceedance of groundwater quality objectives. At a minimum, use of structural treatment BMPs which are designed to primarily function as infiltration devices shall meet the following conditions:[7]

i. Urban runoff shall undergo pretreatment such as sedimentation or filtration prior to infiltration.
ii. All dry weather flows shall be diverted from infiltration devices.
iii. Pollution prevention and source control BMPs shall be implemented at a level appropriate to protect groundwater quality at sites where infiltration structural treatment BMPs are to be used.
iv. Infiltration structural treatment BMPs shall be adequately maintained so that they remove pollutants to the maximum extent practicable.
v. The vertical distance from the base of any infiltration structural treatment BMP to the seasonal high groundwater mark shall be at least 10 feet. Where groundwater basins do not support beneficial uses, this vertical distance criteria may be reduced, provided groundwater quality is maintained.
vi. The soil through which infiltration is to occur shall have physical and chemical characteristics (such as appropriate cation exchange capacity, organic content, clay content, and infiltration rate) which are adequate for proper infiltration durations and treatment of urban runoff for the protection of groundwater beneficial uses.
vii. Infiltration structural treatment BMPs shall not be used for areas of industrial or light industrial activity; areas subject to high vehicular traffic (25,000 or greater average daily traffic on main roadway or 15,000 or more average daily traffic on any intersecting roadway); automotive repair shops; car washes; fleet storage

[7] These conditions do not apply to structural treatment BMPs which allow incidental infiltration and are not designed to primarily function as infiltration devices (such as grassy swales, detention basins, vegetated buffer strips, constructed wetlands, etc.)

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areas (bus, truck, etc.); nurseries; and other high threat to water quality land uses and activities as designated by each Copermittee.

viii. Infiltration structural BMPs shall be located a minimum of 100 feet horizontally from any water supply wells.

As part of the model and local SUSMPs, the Copermittees may develop alternative restrictions on the use of structural treatment BMPs which are designed to primarily function as infiltration devices.

(i) Downstream Erosion – As part of the model SUSMP 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.

F.1.c. Revise Environmental Review Processes

(1) To the extent feasible, the Copermittees shall revise their current environmental review processes to include requirements for evaluation of water quality effects and identification of appropriate mitigation measures. The following questions are examples to be considered in addressing increased pollutants and flows from proposed projects:

(a) Could the proposed project result in an increase in pollutant discharges to receiving waters? Consider water quality parameters such as temperature, dissolved oxygen, turbidity and other typical storm water pollutants (e.g., heavy metals, pathogens, petroleum derivatives, synthetic organics, sediment, nutrients, oxygen-demanding substances, and trash).
(b) Could the proposed project result in significant alteration of receiving water quality during or following construction?
(c) Could the proposed project result in increased impervious surfaces and associated increased runoff?
(d) Could the proposed project create a significant adverse environmental impact to drainage patterns due to changes in runoff flow rates or volumes?
(e) Could the proposed project result in increased erosion downstream?
(f) Is the project tributary to an already impaired water body, as listed on the Clean Water Act Section 303(d) list? If so, can it result in an increase in any pollutant for which the water body is already impaired?
(g) Is project tributary to other environmentally sensitive areas? If so, can it exacerbate already existing sensitive conditions?
(h) Could the proposed project have a potentially significant environmental impact on surface water quality, to either marine, fresh, or wetland waters?
(i) Could the proposed project have a potentially significant adverse impact on ground water quality?
(j) Could the proposed project cause or contribute to an exceedance of applicable surface or groundwater receiving water quality objectives or degradation of beneficial uses?
(k) Can the project impact aquatic, wetland, or riparian habitat?

F.1.d. Conduct Education Efforts Focused on New Development and Redevelopment

(1) Internal: Municipal Staff and Others

Each Copermittee shall implement an education program to ensure that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

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(a) Federal, state, and local water quality laws and regulations applicable to development projects;
(b) The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization); and
(c) How impacts to receiving water quality resulting from development can be minimized (i.e., through implementation of various source control and structural BMPs).

(2) External: Project Applicants, Developers, Contractors, Property Owners, Community Planning Groups

As early in the planning and development process as possible, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, and community planning groups on the following topics:

(a) Federal, state, and local water quality laws and regulations applicable to development projects;
(b) Required federal, state, and local permits pertaining to water quality;
(c) Water quality impacts of urbanization; and
(d) Methods for minimizing the impacts of development on receiving water quality.

F.2. Construction Component

Each Copermittee shall implement a Construction Component of its Jurisdictional URMP to reduce pollutants in runoff from construction sites during all construction phases. At a minimum the construction component shall address:

F.2.a. Pollution Prevention
F.2.b. Grading Ordinance Update
F.2.c. Modify Construction and Grading Approval Process
F.2.d. Source Identification
F.2.e. Threat to Water Quality Prioritization
F.2.f. BMP Implementation
F.2.g. Inspection of Construction Sites
F.2.h. Enforcement of Construction Sites
F.2.i. Reporting of Non-compliant Sites
F.2.j. Education Focused on Construction Activities

F.2.a. Pollution Prevention (Construction)

Each Copermittee shall implement pollution prevention methods in its Construction Component and shall require its use by construction site owners, developers, contractors, and other responsible parties, where appropriate.

F.2.b. Grading Ordinance Update (Construction)

Each Copermittee shall review and update its grading ordinances as necessary for compliance with its storm water ordinances and this Order. The updated grading ordinance shall require implementation of BMPs and other measures during all construction activities, including the following BMPs and other measures or their equivalent:

(1) Erosion prevention;
(2) Seasonal restrictions on grading;
(3) Slope stabilization requirements;
(4) Phased grading;
(5) Revegetation as early as feasible;

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(6) Preservation of natural hydrologic features;
(7) Preservation of riparian buffers and corridors;
(8) Maintenance of all source control and structural treatment BMPs; and
(9) Retention and proper management of sediment and other construction pollutants on site.

F.2.c Modify Construction and Grading Approval Process (Construction)

Prior to approval and issuance of local construction and grading permits, each Copermittee shall require all individual proposed construction and grading projects to implement measures to ensure that pollutants from the site will be reduced to the maximum extent practicable and will not cause or contribute to an exceedance of water quality objectives. Each Copermittee shall further ensure that all grading and construction activities will be in compliance with applicable Copermittee ordinances (e.g., storm water, grading, construction, etc.) and other applicable requirements, including this Order.

(1) Construction and Grading Project Requirements

Include construction and grading project requirements in local grading and construction permits to ensure that pollutant discharges are reduced to the maximum extent practicable and water quality objectives are not violated during the construction phase. Such requirements shall include the following requirements or their equivalent:

(a) Require project proponent to develop and implement a plan to manage storm water and non-storm water discharges from the site at all times;
(b) Require project proponent to minimize grading during the wet season and coincide grading with seasonal dry weather periods to the extent feasible. If grading does occur during the wet season, require project proponent to implement additional BMPs for any rain events which may occur, as necessary for compliance with this Order;
(c) Require project proponent to emphasize erosion prevention as the most important measure for keeping sediment on site during construction;
(d) Require project proponent to utilize sediment controls as a supplement to erosion prevention for keeping sediment on-site during construction, and never as the single or primary method;
(e) Require project proponent to minimize areas that are cleared and graded to only the portion of the site that is necessary for construction;
(f) Require project proponent to minimize exposure time of disturbed soil areas;
(g) Require project proponent to temporarily stabilize and reseed disturbed soil areas as rapidly as possible;
(h) Require project proponent to permanently revegetate or landscape as early as feasible;
(i) Require project proponent to stabilize all slopes; and
(j) Require project proponents subject to California's statewide General NPDES Permit for Storm Water Discharges Associated With Construction Activities, (hereinafter General Construction Permit), to provide evidence of existing coverage under the General Construction Permit.

F.2.d. Source Identification (Construction)

Each Copermittee shall annually develop and update, prior to the rainy season, a watershed-based inventory of all construction sites within its jurisdiction regardless of site size or ownership. This requirement is applicable to all construction sites regardless of whether the construction site is subject to the California statewide General NPDES Permit for Storm Water Discharges Associated With Construction Activities (hereinafter General Construction Permit), or other individual NPDES permit. The use of an automated database system, such as Geographical Information System (GIS) is highly recommended, but not required.

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F.2.e. Threat to Water Quality Prioritization (Construction)

(1) To establish priorities for construction oversight activities under this Order, the Copermittee shall prioritize its watershed-based inventory (developed pursuant to F.2.d. above) by threat to water quality. Each construction site shall be classified as high, medium, or low threat to water quality. In evaluating threat to water quality each Copermittee shall consider (1) soil erosion potential; (2) site slope; (3) project size and type; (4) sensitivity of receiving water bodies; (5) proximity to receiving water bodies; (6) non-storm water discharges; and (7) any other relevant factors.

(2) A high priority construction site shall at a minimum be defined as a site meeting either of the following criteria or equivalent criteria:

(a) The site is 50 acres or more and grading will occur during the wet season; OR
(b) The site is (1) 5 acres or more and (2) tributary to a Clean Water Act section 303(d) water body impaired for sediment or is within or directly adjacent to or discharging directly to a receiving water within an environmentally sensitive area (as defined in section F.1.b.(2)(a)vi. of this Order).

F.2.f. BMP Implementation (Construction)

(1) Each Copermittee shall designate a set of minimum BMPs for high, medium, and low threat to water quality construction sites (as determined under section F.2.e). BMPs are to be implemented year round.

(2) Each Copermittee shall implement, or require the implementation of, the designated minimum BMPs (based upon the site's threat to water quality rating) at each construction site within its jurisdiction year round. If particular minimum BMPs are infeasible at any specific site, each Copermittee shall implement, or require the implementation of, other equivalent BMPs. Each Copermittee shall also implement or require any additional site specific BMPs as necessary to comply with this Order, including BMPs which are more stringent than those required under the statewide General Construction Permit.

(3) Each Copermittee shall implement, or require the implementation of, BMPs year round; however, BMP implementation requirements can vary based on wet and dry seasons.

(4) Each Copermittee shall implement, or require implementation of, additional controls for construction sites tributary to Clean Water Act section 303(d) water bodies impaired for sediment as necessary to comply with this Order. Each Copermittee shall implement, or require implementation of, additional controls for construction sites within or adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in section F.1.b.(2)(a)vi. of this Order) as necessary to comply with this Order.

F.2.g. Inspection of Construction Sites (Construction)

(1) Each Copermittee shall conduct construction site inspections for compliance with its ordinances (grading, storm water, etc.), permits (construction, grading, etc.), and this Order. Inspections shall include review of site erosion control and BMP implementation plans.

(2) Each Copermittee shall establish inspection frequencies and priorities as determined by the threat to water quality prioritization described in F.2.e above. During the wet season (i.e., October 1 through April 30 of each year), each Copermittee shall inspect, at a minimum, each High Priority construction site, either:

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(a) Weekly

OR

(b) Monthly for any site that the responsible Copermittee certifies in a written statement to the SDRWQCB all of the following (certified statements may be submitted to the SDRWQCB at any time for one or more sites):

i. Copermittee has record of construction site's Waste Discharge Identification Number (WDID#) documenting construction site's coverage under the statewide General Construction Permit; and
ii. Copermittee has reviewed the constructions site's Storm Water Pollution Prevention Plan (SWPPP); and
iii. Copermittee finds SWPPP to be in compliance with all local ordinances, permits, and plans; and
iv. Copermittee finds that the SWPPP is being properly implemented on site.

At a minimum, Medium and Low Priority construction sites shall be inspected by Copermittees twice during the wet season. All construction sites shall be inspected by the Copermittees as needed during the dry season (i.e., May 1 through September 30 of each year).

(3) Based upon site inspection findings, each Copermittee shall implement all follow-up actions necessary to comply with this Order.

F.2.h. Enforcement of Construction Sites (Construction)

Each Copermittee shall enforce its ordinances (grading, storm water, etc.) and permits (construction, grading, etc.) at all construction sites as necessary to maintain compliance with this Order. Copermittee ordinances or other regulatory mechanisms shall include sanctions to ensure compliance. Sanctions shall include the following or their equivalent: Non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance.

F.2.i. Reporting of Non-compliant Sites (Construction)

Each Copermittee shall provide oral notification to the SDRWQCB of non-compliant sites that are determined to pose a threat to human or environmental health within its jurisdiction within 24 hours of the discovery of noncompliance, as required under section R.1 (and B.6 of Attachment C) of this Order.

Each Copermittee shall develop and submit criteria by which to evaluate events of non-compliance to determine whether they pose a threat to human or environmental health. These criteria shall be submitted in the Jurisdictional Urban Runoff Management Program Document and Annual Reports for SDRWQCB review.

Such oral notification shall be followed up by a written report to be submitted to the SDRWQCB within 5 days of the incidence of non-compliance as required under section R.1 (and B.6 of Attachment C) of this Order. Sites are considered non-compliant when one or more violations of local ordinances, permits, plans, or this Order exist on the site.

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F.2.j. Education Focused on Construction Activities (Construction)

(1) Internal: Municipal Staff

Each Copermittee shall implement an education program to ensure that its construction, building, and grading review staffs and inspectors have an understanding of:

(a) Federal, state, and local water quality laws and regulations applicable to construction and grading activities.
(b) The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization).
(c) How erosion can be prevented.
(d) How impacts to receiving water quality resulting from construction activities can be minimized (i.e., through implementation of various source control and structural BMPs).
(e) Applicable topics listed in section F.4. of this Order.

(2) External: Project Applicants, Contractors, Developers, Property Owners, and other Responsible Parties

Each Copermittee shall implement an education program to ensure that project applicants, contractors, developers, property owners, and other responsible parties have an understanding of the topics outlined in section F.2.j.(1) above of this Order.

F.3. Existing Development Component

Each Copermittee shall minimize the short and long-term impacts on receiving water quality from all types of existing development.

F.3.a. Municipal (Existing Development)

Each Copermittee shall implement a Municipal (Existing Development) Component to prevent or reduce pollutants in runoff from all municipal land use areas and activities. At a minimum the municipal component shall address:

F.3.a.(1)	Pollution Prevention
F.3.a.(2)	Source Identification
F.3.a.(3)	Threat to Water Quality Prioritization
F.3.a.(4)	BMP Implementation
F.3.a.(5)	Maintenance of Municipal Separate Storm Sewer System
F.3.a.(6)	Management of Pesticides, Herbicides, and Fertilizers
F.3.a.(7)	Inspection of Municipal Areas and Activities
F.3.a.(8)	Enforcement of Municipal Areas and Activities

F.3.a.(1) Pollution Prevention (Municipal)

Each Copermittee shall include and describe pollution prevention methods within its Municipal (Existing Development) Component. Each Copermittee shall require the use of pollution prevention methods by municipal departments, contractors, and personnel, where appropriate.

F.3.a.(2) Source Identification (Municipal)

Each Copermittee shall develop, and update annually, a watershed-based inventory of the name, address (if applicable), and description of all municipal land use areas and activities which generate pollutants.

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F.3.a.(3) Threat to Water Quality Prioritization (Municipal)

(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.
ii. Flood Management Projects and Flood Control Devices.
iii. Areas and activities tributary to a Clean Water Act section 303(d) impaired water body, where an area or activity generates pollutants for which the water body is impaired. Areas and activities within or adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in section F.1.b.(2)(a)vi of this Order).
iv. Municipal Waste Facilities.
- Active or closed municipal landfills;
- Publicly owned treatment works (including water and wastewater treatment plants) and sanitary sewage collection systems;
- Municipal separate storm sewer systems;
- Incinerators;
- Solid waste transfer facilities;
- Land application sites;
- Uncontrolled sanitary landfills;
- Corporate yards including maintenance and storage yards for materials, waste, equipment and vehicles;
- Sites for disposing and treating sewage sludge; and
- Hazardous waste treatment, disposal, and recovery facilities.

v. Other municipal areas and activities that the Copermittee determines may contribute a significant pollutant load to the MS4.
vi. Municipal airfields.

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.

(b) Each Copermittee shall implement, or require the implementation of, the designated minimum BMPs (based upon the threat to water quality rating) at each municipal area or activity within its jurisdiction. If particular minimum BMPs are infeasible for any specific area or activity, each Copermittee shall implement, or require implementation of other equivalent BMPs. Each Copermittee shall also implement any additional BMPs as are necessary to comply with this Order.

i. Each Copermittee shall evaluate feasibility of retrofitting existing structural flood control devices and retrofit where needed.

(c) Each Copermittee shall implement, or require implementation of, any additional controls for municipal areas and activities tributary to Clean Water Act section 303(d) impaired

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water bodies (where an area or activity generates pollutants for which the water body is impaired) as necessary to comply with this Order. Each Copermittee shall implement, or require implementation of, additional controls for municipal areas and activities within or directly adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in section F.1.b.(2)(a)vi. of this Order) as necessary to comply with this Order.

F.3.a.(5) Maintenance of Municipal Separate Storm Sewer System (Municipal)

(a) Each Copermittee shall implement a schedule of maintenance activities at all structural 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 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.

F.3.a.(6) Management of Pesticides, Herbicides, and Fertilizers (Municipal)

The Copermittees shall implement BMPs to reduce the contribution of pollutants associated with the application, storage, and disposal of pesticides, herbicides and fertilizers from municipal areas and activities to MS4s. Important municipal areas and activities include municipal facilities, public rights-of-way, parks, recreational facilities, golf courses, cemeteries, botanical or zoological gardens and exhibits, landscaped areas, etc.

Such BMPs shall include, at a minimum: (1) educational activities, permits, certifications and other measures for municipal applicators and distributors; (2) integrated pest management measures that rely on non-chemical solutions; (3) the use of native vegetation; (4) schedules for irrigation and chemical application; and (5) the collection and proper disposal of unused pesticides, herbicides, and fertilizers.

F.3.a.(7) Inspection of Municipal Areas and Activities (Municipal)

At a minimum, each Copermittee shall inspect high priority municipal areas and activities annually. Based upon site inspection findings, each Copermittee shall implement all follow-up actions necessary to comply with this Order.

F.3.a.(8) Enforcement of Municipal Areas and Activities (Municipal)

Each Copermittee shall enforce its storm water ordinance for all municipal areas and activities as necessary to maintain compliance with this Order.

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F.3.b. Industrial (Existing Development)

Each Copermittee shall implement an Industrial (Existing Development) Component to reduce pollutants in runoff from all industrial sites. At a minimum the industrial component shall address:

F.3.b.(1)	Pollution Prevention
F.3.b.(2)	Source Identification
F.3.b.(3)	Threat to Water Quality Prioritization
F.3.b.(4)	BMP Implementation
F.3.b.(5)	Monitoring of Industrial Sites
F.3.b.(6)	Inspection of Industrial Sites
F.3.b.(7)	Enforcement Measures for Industrial Sites
F.3.b.(8)	Reporting of Non-compliant Sites

F.3.b.(1) Pollution Prevention (Industrial)

Each Copermittee shall include and describe pollution prevention methods within its Industrial (Existing Development) Component. Each Copermittee shall require the use of pollution prevention methods by industry, where appropriate.

F.3.b.(2) Source Identification (Industrial)

Each Copermittee shall develop and update annually a watershed-based inventory of all industrial sites within its jurisdiction regardless of site ownership. This requirement is applicable to all industrial sites regardless of whether the industrial site is subject to the California statewide General NPDES Permit for Storm Water Discharges Associated With Industrial Activities, Except Construction (hereinafter General Industrial Permit) or other individual NPDES permit.

The inventory shall include the following minimum information for each industrial site: name; address; and a narrative description including SIC codes which best reflects the principal products or services provided by each facility.

F.3.b.(3) Threat to Water Quality Prioritization (Industrial)

(a) To establish priorities for industrial oversight activities under this Order, the Copermittee shall prioritize each watershed-based inventory in F.3.b.(2) above by threat to water quality and update annually. Each industrial site 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 industrial activity (SIC Code); (2) materials used in industrial processes; (3) wastes generated; (4) pollutant discharge potential; (5) non-storm water discharges; (6) size of facility; (7) proximity to receiving water bodies; (8) sensitivity of receiving water bodies; (9) whether the industrial site is subject to the statewide General Industrial Permit; and (10) any other relevant factors.

(b) At a minimum the high priority industrial sites shall include industrial facilities that are subject to section 313 of Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA); industrial facilities tributary to a Clean Water Act section 303(d) impaired water body, where a facility generates pollutants for which the water body is impaired; industrial facilities within or directly adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in section F.1.b.(2)(a)vi. of this Order); facilities subject to the statewide General Industrial Permit (excluding those facilities that have been approved for No Exposure Certification); and all other industrial facilities that the Copermittee determines are contributing significant pollutant loading to its MS4, regardless of whether such facilities are covered under the statewide General Industrial Permit or other NPDES permit.

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F.3.b.(4) BMP Implementation (Industrial)

(a) Each Copermittee shall designate a set of minimum BMPs for high, medium, and low threat to water quality industrial sites (as determined under section F.3.b.(3)). The designated minimum BMPs for high threat to water quality industrial sites shall be industry and site specific as appropriate.

(b) Each Copermittee shall implement, or require the implementation of, the designated minimum BMPs (based upon the site's threat to water quality rating) at each industrial site within its jurisdiction. If particular minimum BMPs are infeasible at any specific site, each Copermittee shall implement, or require implementation of, other equivalent BMPs. Each Copermittee shall also implement or require any additional site specific BMPs as necessary to comply with this Order including BMPs which are more stringent than those required under the statewide General Industrial Permit.

(c) Each Copermittee shall implement, or require implementation of, additional controls for industrial sites tributary to Clean Water Act section 303(d) impaired water bodies (where a site generates pollutants for which the water body is impaired) as necessary to comply with this Order. Each Copermittee shall implement, or require implementation of, additional controls for industrial sites within or directly adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in section F.1.b.(2)(a)vi. of this Order) as necessary to comply with this Order.

F.3.b.(5) Monitoring of Industrial Sites (Industrial)

(a) Each Copermittee shall conduct, or require industry to conduct, a monitoring program for runoff from each high threat to water quality industrial site (identified in F.3.b.(3) above). Group monitoring by multiple industrial sites conducted under group monitoring programs approved by the State Water Resources Control Board is acceptable.

(b) At a minimum, the monitoring program shall provide quantitative data from two storm events per year on the following constituents:

i. Any pollutant listed in effluent guidelines subcategories where applicable;
ii. Any pollutant for which an effluent limit has been established in an existing NPDES permit for the facility;
iii. Oil and grease or Total Organic Carbon (TOC);
iv. pH;
v. Total suspended solids (TSS);
vi. Specific conductance; and
vii. Toxic chemicals and other pollutants that are likely to be present in storm water discharges.
viii. Any pollutant that may be used, stored, or generated at the facility, which may be discharged to a water body or a tributary of that water body that is listed as impaired under Clean Water Act Section 303(d) for that pollutant(s), unless the facility can demonstrate approval of No Exposure Certification.

F.3.b.(6) Inspection of Industrial Sites (Industrial)

(a) Each Copermittee shall conduct industrial site inspections for compliance with its ordinances, permits, and this Order. Inspections shall include review of BMP implementation plans.

(b) Each Copermittee shall establish inspection frequencies and priorities as determined by the threat to water quality prioritization described in F.3.b.(3) above. Each Copermittee shall inspect high priority industrial sites, at a minimum:

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i. Annually

OR

ii. Bi-annually for any site that the responsible Copermittee certifies in a written statement to the SDRWQCB all of the following (certified statements may be submitted to the SDRWQCB at any time for one or more sites):

- Copermittee has record of industrial site's Waste Discharge Identification Number (WDID#) documenting industrial site's coverage under the statewide General Industrial Permit; and
- Copermittee has reviewed the industrial site's Storm Water Pollution Prevention Plan (SWPPP); and
- Copermittee finds SWPPP to be in compliance with all local ordinances, permits, and plans; and
- Copermittee finds that the SWPPP is being properly implemented on site.

Each Copermittee shall inspect medium and low threat to water quality industrial sites as needed.

(c) Based upon site inspection findings, each Copermittee shall implement all follow-up actions necessary to comply with this Order.

(d) To the extent that the SDRWQCB has conducted an inspection of a high priority industrial site during a particular year, the requirement for the responsible Copermittee to inspect this site during the same year will be satisfied.

F.3.b.(7) Enforcement of Industrial Sites (Industrial)

Each Copermittee shall enforce its storm water ordinance at all industrial sites as necessary to maintain compliance with this Order. Copermittee ordinances or other regulatory mechanisms shall include sanctions to ensure compliance. Sanctions shall include the following or their equivalent: Non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance.

F.3.b.(8) Reporting of Non-compliant Sites (Industrial)

Each Copermittee shall provide oral notification to the SDRWQCB of non-compliant sites that are determined to pose a threat to human or environmental health within its jurisdiction within 24 hours of the discovery of noncompliance, as required under section R.1 (and B.6 of Attachment C) of this Order.

Each Copermittee shall develop and submit criteria by which to evaluate events of non-compliance to determine whether they pose a threat to human or environmental health. These criteria shall be submitted in the Jurisdictional Urban Runoff Management Program Document and Annual Reports for SDRWQCB review.

Such oral notification shall be followed up by a written report to be submitted to the SDRWQCB within 5 days of the incidence of non-compliance as required under section R.1(and B.6 of Attachment C) of this Order. Sites are considered non-compliant when one or more violations of local ordinances, permits, plans, or this Order exist on the site.

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F.3.c. Commercial (Existing Development)

Each Copermittee shall implement a Commercial (Existing Development) Component to reduce pollutants in runoff from commercial sites. At a minimum the commercial component shall address:

F.3.c.(1) Pollution Prevention
F.3.c.(2) Source Identification
F.3.c.(3) BMP Implementation
F.3.c.(4) Inspection of Commercial Sites and Sources
F.3.c.(5) Enforcement of Commercial Sites and Sources

F.3.c.(1) Pollution Prevention (Commercial)

Each Copermittee shall include and describe pollution prevention methods within its Commercial (Existing Development) Component. Each Copermittee shall require the use of pollution prevention methods by commercial facilities, where appropriate.

F.3.c.(2) Source Identification (Commercial)

Each Copermittee shall develop and update annually an inventory of the following high priority threat to water quality commercial sites/sources listed below. (If any commercial site/source listed below is inventoried as an industrial site, as required under section F.3.b.(2) of this Order, it is not necessary to also inventory it as a commercial site/source).

(a) Automobile mechanical repair, maintenance, fueling, or cleaning;
(b) Airplane mechanical repair, maintenance, fueling, or cleaning;
(c) Boat mechanical repair, maintenance, fueling, or cleaning;
(d) Equipment repair, maintenance, fueling, or cleaning;
(e) Automobile and other vehicle body repair or painting;
(f) Mobile automobile or other vehicle washing;
(g) Automobile (or other vehicle) parking lots and storage facilities;
(h) Retail or wholesale fueling;
(i) Pest control services;
(j) Eating or drinking establishments;
(k) Mobile carpet, drape or furniture cleaning;
(l) Cement mixing or cutting;
(m) Masonry;
(n) Painting and coating;
(o) Botanical or zoological gardens and exhibits;
(p) Landscaping;
(q) Nurseries and greenhouses;
(r) Golf courses, parks and other recreational areas/facilities;
(s) Cemeteries;
(t) Pool and fountain cleaning;
(u) Marinas;
(v) Port-a-Potty servicing;
(w) Other commercial sites/sources that the Copermittee determines may contribute a significant pollutant load to the MS4;
(x) Any commercial site or source tributary to a Clean Water Act section 303(d) impaired water body, where the site or source generates pollutants for which the water body is impaired; and
(y) Any commercial site or source within or directly adjacent to or discharging directly to a coastal lagoon or other receiving water within an environmentally sensitive area (as defined in F.1.b(2)(a)vi. of this Order).

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F.3.c.(3) BMP Implementation (Commercial)

(a) Each Copermittee shall designate a set of minimum BMPs for the high priority threat to water quality commercial sites/sources (listed above in section F.3.c.(2)). The designated minimum BMPs for the high threat to water quality commercial sites/sources shall be site and source specific as appropriate.

(b) Each Copermittee shall implement, or require the implementation of, the designated minimum BMPs at each high priority threat to water quality commercial site/source within its jurisdiction. If particular minimum BMPs are infeasible for any specific site/source, each Copermittee shall implement, or require the implementation of, other equivalent BMPs. Each Copermittee shall also implement or require any additional site specific BMPs as necessary to comply with this Order.

(c) Each Copermittee shall implement, or require implementation of, additional controls for commercial sites or sources tributary to Clean Water Act section 303(d) impaired water bodies (where a site or source generates pollutants for which the water body is impaired) as necessary to comply with this Order. Each Copermittee shall implement, or require implementation of, additional controls for commercial sites or sources within or directly adjacent to or discharging directly to coastal lagoons or other receiving waters within environmentally sensitive areas (as defined in section F.1.b.(2)(a)vi. of this Order) as necessary to comply with this Order.

F.3.c.(4) Inspection of Commercial Sites and Sources (Commercial)

Each Copermittee shall inspect high priority commercial sites and sources as needed. Based upon site inspection findings, each Copermittee shall implement all follow-up actions necessary to comply with this Order.

F.3.c.(5) Enforcement of Commercial Sites and Sources (Commercial)

Each Copermittee shall enforce its storm water ordinance for all commercial sites and sources as necessary to maintain compliance with this Order.

F.3.d. Residential (Existing Development)

Each Copermittee shall implement a Residential (Existing Development) Component to prevent or reduce pollutants in runoff from all residential land use areas and activities. At a minimum the residential component shall address:

F.3.d.(1) Pollution Prevention
F.3.d.(2) Threat to Water Quality Prioritization
F.3.d.(3) BMP Implementation
F.3.d.(4) Enforcement of Residential Areas and Activities

F.3.d.(1) Pollution Prevention (Residential)

Each Copermittee shall include pollution prevention methods in its Residential (Existing Development) Component and shall encourage their use by residents, where appropriate.

F.3.d.(2) Threat to Water Quality Prioritization (Residential)

Each Copermittee shall identify high priority residential areas and activities. At a minimum, these shall include:

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- Automobile repair and maintenance;
- Automobile washing;
- Automobile parking;
- Home and garden care activities and product use (pesticides, herbicides, and fertilizers);
- Disposal of household hazardous waste (e.g., paints, cleaning products, and other wastes generated during home improvement or maintenance activities);
- Disposal of pet waste;
- Disposal of green waste;
- Any other residential source that the Copermittee determines may contribute a significant pollutant load to the MS4;
- Any residence tributary to a Clean Water Act section 303(d) impaired water body, where the residence generates pollutants for which the water body is impaired; and
- Any residence within or directly adjacent to or discharging directly to coastal waters or other receiving waters within an environmentally sensitive area (as defined in F.1.b.(2)(a)vi. of this Order).

F.3.d.(3) BMP Implementation (Residential)

(a) Each Copermittee shall designate a set of minimum BMPs for high threat to water quality residential areas and activities (as required under section F.3.d.(2)). The designated minimum BMPs for high threat to water quality residential areas and activities shall be area or activity specific.

(b) Each Copermittee shall implement or require implementation of the designated minimum BMPs for high threat to water quality residential areas and activities. If particular minimum BMPs are infeasible for any specific site/source, each Copermittee shall require implementation of other equivalent BMPs. Each Copermittee shall also implement, or require implementation of, any additional BMPs as are necessary to comply with this Order.

(c) Each Copermittee shall implement, or require implementation of, any additional controls for residential areas and activities tributary to Clean Water Act Section 303(d) impaired water bodies (where a residential area or activity generates pollutants for which the water body is impaired) as necessary to comply with this Order. Each Copermittee shall implement, or require implementation of, additional controls for residential areas within or directly adjacent to or discharging directly to coastal waters or other receiving waters within environmentally sensitive areas (as defined in section F.1.b.(2)(a)vi. of this Order) as necessary to comply with this Order.

F.3.d.(4) Enforcement of Residential Areas and Activities (Residential)

Each Copermittee shall enforce its storm water ordinance for all residential areas and activities as necessary to maintain compliance with this Order.

F.4. Education Component

Each Copermittee shall implement an Education Component 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 component shall address the following target communities:

- Municipal Departments and Personnel

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- Construction Site Owners and Developers
- Industrial Owners and Operators
- Commercial Owners and Operators
- Residential Community, General Public, and School Children
- Quasi-Governmental Agencies/Districts (i.e., educational institutions, water districts, sanitation districts, etc.)

F.4.a. All Target Communities

The Education Program for each target audience may contain information on the following topics where applicable:

- State and Federal water quality laws
- Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits)
- Water conservation
- Impacts of urban runoff on receiving waters
- Watershed concepts (i.e., stewardship, connection between inland activities and coastal problems, etc.)
- Distinction between MS4s and sanitary sewers
- Importance of good housekeeping (e.g., sweeping impervious surfaces instead of hosing)
- Pollution prevention and safe alternatives
- Household hazardous waste collection
- Recycling
- BMPs: Site specific, structural and source control
- BMP maintenance
- Non-storm water disposal alternatives (e.g., all wash waters)
- Pet and animal waste disposal
- Proper solid waste disposal (e.g., garbage, tires, appliances, furniture, vehicles)
- Equipment and vehicle maintenance and repair
- Public reporting mechanisms
- Green waste disposal
- Integrated pest management
- Native vegetation
- Proper disposal of boat and recreational vehicle waste
- Traffic reduction, alternative fuel use

F.4.b. Municipal, Construction, Industrial, Commercial, and Quasi-Governmental (educational institutions, water districts, sanitation districts, etc.) Communities

In addition to the topics listed in F.4.a. above, the Municipal, Construction, Industrial, Commercial, and Quasi-Governmental (Educational Institutions, Water Districts, Sanitation Districts) Communities may also be educated on the following topics where applicable:

- Basic urban runoff training for all personnel
- Additional urban runoff training for appropriate personnel
- Illicit Discharge Detection and Elimination observations and follow-up during daily work activities
- Lawful disposal of catchbasin and other MS4 cleanout wastes
- Water quality awareness for Emergency/First Responders
- California's Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction).

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- California's Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities
- SDRWQCB's General NPDES Permit for Groundwater Dewatering
- 401 Water Quality Certification by the SDRWQCB
- Statewide General NPDES Utility Vault Permit (NPDES No. CAG990002)
- SDRWQCB Waste Discharge Requirements for Dredging Activities
- Local requirements beyond statewide general permits
- Federal, state and local water quality regulations that affect development projects
- Water quality impacts associated with land development
- Alternative materials & designs to maintain peak runoff values
- How to conduct a storm water inspection
- Potable water discharges to the MS4
- Dechlorination techniques
- Hydrostatic testing
- Spill response, containment, & recovery
- Preventive maintenance
- How to do your job and protect water quality

F.4.c. Residential, General Public, School Children Communities

In addition to the topics listed in F.4.a. above, the Residential, General Public, and School Children Communities may 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.)

F.5. Illicit Discharge Detection and Elimination Component

Each Copermittee shall implement an Illicit Discharge Detection and Elimination Component containing measures to actively seek and eliminate illicit discharges and connections. At a minimum the Illicit Discharge Detection and Elimination Component shall address:

F.5.a Illicit Discharges and Connections
F.5.b Dry Weather Monitoring Program
F.5.c Investigation / Inspection and Follow-up
F.5.d Elimination of Illicit Discharges and Connections
F.5.e Enforce Ordinances
F.5.f Prevent and Respond To Sewage Spills (Including from Private Laterals and Failing Septic Systems) and Other Spills
F.5.g Facilitate Public Reporting of Illicit Discharges and Connections – Public Hotline
F.5.h Facilitate Disposal of Used Oil and Toxic Materials
F.5.i Limit Infiltration From Sanitary Sewer to MS4

F.5.a. Illicit Discharges and Connections

Each Copermittee shall implement a program to actively seek and eliminate illicit discharges and connections into its MS4. The program shall address all types of illicit discharges and connections excluding those non-storm water discharges not prohibited by the Copermittee in accordance with Section B. of this Order.

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F.5.b. Dry Weather Monitoring Program

Each Copermittee shall conduct dry weather inspections, field screening, and analytical monitoring of MS4 outfalls within its jurisdiction to detect illicit discharges and connections in accordance with Attachment E of this Order.

F.5.c. Investigation / Inspection and Follow-Up

Each Copermittee shall investigate and inspect any portion of the MS4 that, based on dry weather monitoring results or other appropriate information, indicates a reasonable potential for illicit discharges, illicit connections, or other sources of non-storm water (including non-prohibited discharge(s) identified in Section B. of this Order). Each Copermittee shall establish criteria to identify portions of the system where such follow-up investigations are appropriate.

F.5.d. Elimination of Illicit Discharges and Connections

Each Copermittee shall eliminate all detected illicit discharges, discharge sources, and connections immediately.

F.5.e. Enforce Ordinances

Each Copermittee shall implement and enforce its ordinances, orders, or other legal authority to prevent illicit discharges and connections to its MS4. Each Copermittee shall also implement and enforce its ordinance, orders, or other legal authority to eliminate detected illicit discharges and connections to it MS4.

F.5.f. Prevent and Respond to Sewage Spills (Including from Private Laterals and Failing Septic Systems) and Other Spills

Each Copermittee shall prevent, respond to, contain and clean up all sewage and other spills that may discharge into its MS4 from any source (including private laterals and failing septic systems). Spill response teams shall prevent entry of spills into the MS4 and contamination of surface water, ground water and soil to the maximum extent practicable. Each Copermittee shall coordinate spill prevention, containment and response activities throughout all appropriate departments, programs and agencies to ensure maximum water quality protection at all times.

Each Copermittee shall develop and implement a mechanism whereby it is notified of all sewage spills from private laterals and failing septic systems into its MS4. Each Copermittee shall prevent, respond to, contain and clean up sewage from any such notification.

F.5.g. Facilitate Public Reporting of Illicit Discharges and Connections - Public Hotline

Each Copermittee shall promote, publicize and facilitate public reporting of illicit discharges or water quality impacts associated with discharges into or from MS4s. Each Copermittee shall facilitate public reporting through development and operation of a public hotline. Public hotlines can be Copermittee-specific or shared by Copermittees. All storm water hotlines shall be capable of receiving reports in both English and Spanish 24 hours per day / seven days per week. Copermittees shall respond to and resolve each reported incident. All reported incidents, and how each was resolved, shall be summarized in each Copermittee's individual Jurisdictional URMP Annual Report.

F.5.h. Facilitate Disposal of Used Oil and Toxic Materials

Each Copermittee shall facilitate the proper management and disposal of used oil, toxic materials, and other household hazardous wastes. Such facilitation shall include educational

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activities, public information activities, and establishment of collection sites operated by the Copermittee or a private entity. Neighborhood collection of household hazardous wastes is encouraged.

F.5.i. Limit Infiltration From Sanitary Sewer to MS4/ Provide Preventive Maintenance of Both

Each Copermittee shall implement controls and measures to limit infiltration of seepage from municipal sanitary sewers to MS4s through thorough, routine preventive maintenance of the MS4. Each Copermittee that operates both a municipal sanitary sewer system and a MS4 shall implement controls and measures to limit infiltration of seepage from the municipal sanitary sewers to the MS4s that shall include overall sanitary sewer and MS4 surveys and thorough, routine preventive maintenance of both.

F.6. Common Interest Areas and Homeowners Associations

a. Each Copermittee shall develop and implement a plan for ensuring that urban runoff within common interest areas from private roads, drainage facilities, and other components of the storm water conveyance system, including those managed by associations, meets the objectives of this Order.
b. As part of its individual Jurisdictional URMP Annual Report, each Copermittee shall describe the measures taken to ensure that urban runoff from common interest areas to the MS4 meets the objectives of this Order.

F.7. Public Participation Component

Each Copermittee shall incorporate a mechanism for public participation in the implementation of the Jurisdictional URMP.

F.8. 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.

F.9. Fiscal Analysis Component

Each Copermittee shall secure the resources necessary to meet the requirements of this Order. As part of its individual Jurisdictional URMP, each Copermittee shall develop a strategy to conduct a fiscal analysis of its urban runoff management program in its entirety. In order to demonstrate sufficient financial resources to implement the conditions of this Order, each Copermittee shall conduct an annual fiscal analysis as part of its individual Jurisdictional URMP Annual Report. This analysis shall, for each fiscal year covered by this Order, evaluate the expenditures (such as capital, operation and maintenance, education, and administrative expenditures) necessary to accomplish the activities of the Copermittee's urban runoff management program. Such analysis shall include a description of the source(s) of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

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G. IMPLEMENTATION OF JURISDICTIONAL URMP

Each Copermittee shall have completed full implementation of all requirements of the Jurisdictional URMP section of this Order no later than **365 days after adoption** of this Order, except as stated as follows: Within 180 days of development of the model SUSMP, each Copermittee shall adopt its own local SUSMP, and amended ordinances consistent with the model SUSMP, and shall submit both (local SUSMP and amended ordinances) to the SDRWQCB.

Following the adoption of the Order and prior to the full implementation of the Jurisdictional URMP, the Copermittees shall at a minimum implement the provisions and commitments of the proposed DAMP submitted in September 2000.

H. SUBMITTAL OF JURISDICTIONAL URMP DOCUMENT

The written account of the overall program to be conducted by each Copermittee within its jurisdiction during the five-year life of this Order is referred to as the "Jurisdictional URMP Document".

1. Individual – Each Copermittee shall submit to the Principal Permittee(s) an individual Jurisdictional URMP document which describes all activities it has undertaken or is undertaking to implement the requirements of each component of the Jurisdictional URMP section F. of this Order.

   a. At a minimum, the individual Jurisdictional URMP document shall contain the following information for the following components:

      (1) Construction Component

         (a) Which pollution prevention methods will be required for implementation, and how and where they will be required
         (b) Updated grading ordinances
         (c) A description of the modified construction and grading approval process
         (d) Updated construction and grading project requirements in local grading and construction permits
         (e) A completed watershed-based inventory of all construction sites
         (f) A completed prioritization of all construction sites based on threat to water quality
         (g) Which BMPs will be implemented, or required to be implemented, for each priority category
         (h) How BMPs will be implemented, or required to be implemented, for each priority category
         (i) Planned inspection frequencies for each priority category
         (j) Methods for inspection
         (k) A description of enforcement mechanisms and how they will be used
         (l) A description of how non-compliant sites will be identified and the process for notifying the SDRWQCB, including a list of current non-compliant sites
         (m) A description of the construction education program and how it will be implemented

      (2) Municipal (Existing Development) Component

         (a) Which pollution prevention methods will be required for implementation, and how and where they will be required
         (b) A completed watershed-based inventory of all municipal land use areas and activities
         (c) A completed prioritization of all municipal areas and activities based on threat to water quality
         (d) Which BMPs will be implemented, or required to be implemented, for each priority category
         (e) How BMPs will be implemented, or required to be implemented, for each priority category

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(f) Municipal maintenance activities and schedules
(g) Management strategy for pesticides, herbicides, and fertilizer use.
(h) Planned inspection frequencies for the high priority category
(i) Methods for inspection
(j) A description of enforcement mechanisms and how they will be used

(3) Industrial (Existing Development) Component

(a) Which pollution prevention methods will be required for implementation, and how and where they will be required
(b) A completed watershed-based inventory of all industrial sites
(c) A completed prioritization of all industrial sites based on threat to water quality
(d) Which BMPs will be implemented, or required to be implemented, for each priority category
(e) How BMPs will be implemented, or required to be implemented, for each priority category
(f) A description of the monitoring program to be conducted, or required to be conducted
(g) Planned inspection frequencies for each priority category
(h) Methods for inspection
(i) A description of enforcement mechanisms and how they will be used
(j) A description of how non-compliant sites will be identified and the process for notifying the SDRWQCB, including a list of current non-compliant sites

(4) Commercial (Existing Development) Component

(a) Which pollution prevention methods will be required for implementation, and how and where they will be required
(b) A completed watershed-based inventory of high priority commercial sites
(c) Which BMPs will be implemented, or required to be implemented, for high priority sites
(d) How BMPs will be implemented, or required to be implemented, for high priority sites
(e) Planned inspection frequencies for high priority sites
(f) Methods for inspection
(g) A description of enforcement mechanisms and how they will be used

(5) Residential (Existing Development) Component

(a) Which pollution prevention methods will be encouraged for implementation, and how and where they will be encouraged
(b) A completed inventory of high priority residential areas and activities
(c) Which BMPs will be implemented, or required to be implemented, for high priority areas and activities
(d) How BMPs will be implemented, or required to be implemented, for high priority areas and activities
(e) A description of enforcement mechanisms and how they will be used

(6) Education Component

(a) A description of the content, form, and frequency of education efforts for each target community

(7) Illicit Discharges Detection and Elimination Component

(a) A description of the program to actively seek and eliminate illicit discharges and connections

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(b) A description of dry weather monitoring to be conducted to detect illicit discharges and connections (see Attachment E)
(c) A description of investigation and inspection procedures to follow-up on dry weather monitoring results or other information which indicate potential for illicit discharges and connections
(d) A description of procedures to eliminate detected illicit discharges and connections
(e) A description of enforcement mechanisms and how they will be used
(f) A description of methods to prevent, respond to, contain, and clean up all sewage (including spills from private laterals and failing septic systems) and other spills in order to prevent entrance into the MS4
(g) A description of the mechanism to receive notification of spills from private laterals
(h) A description of efforts to facilitate public reporting of illicit discharges and connections, including a public hotline
(i) A description of efforts to facilitate proper disposal of used oil and other toxic materials
(j) A description of controls and measures to be implemented to limit infiltration of seepage from sanitary sewers to MS4s
(k) A description of routine preventive maintenance activities on the sanitary system (where applicable) and the MS4

(8) Public Participation Component

(a) A description of how public participation will be included in the implementation of the Jurisdictional URMP

(9) Assessment of Jurisdictional URMP Effectiveness Component

(a) A description of strategies to be used for assessing the long-term effectiveness of the individual Jurisdictional URMP.

(10) Fiscal Analysis Component

(a) A description of the strategy to be used to conduct a fiscal analysis of the urban runoff management program.

(11) Land-Use Planning for New Development and Redevelopment Component

(a) Workplan for inclusion in General Plan (or equivalent plan) of water quality and watershed protection principles and policies
(b) Development project requirements in local development permits
(c) Participation efforts conducted in the development of the Model SUSMP
(d) Environmental review processes revisions
(e) A description of the planning education program and how it will be implemented

(12) Fire Fighting

(a) A description of a program to reduce pollutants from non-emergency fire fighting flows identified by the Copermittee to be significant sources of pollutants.

(13) Common Interest Areas and Homeowners Associations

(a) A description of the program that will be implemented to ensure that urban runoff within common interest areas from private roads, drainage facilities, and other components of the storm water conveyance system including those managed by associations meets the objectives of this Order.

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b. Each Copermittee shall submit to the Principal Permittee(s) each part of its individual Jurisdictional URMP document by the dates specified by the Principal Permittee(s).

c. In addition to submittal of the Jurisdictional URMP document, each Copermittee shall submit to the SDRWQCB its own adopted local SUSMP consistent with the submitted Model SUSMP, as described in section F.1.b.(2). of this Order. Each Copermittee's own local SUSMP, along with its amended ordinances, shall be submitted to the SDRWQCB within 180 days of the submittal of the Model SUSMP to the SDRWQCB.

2. Unified – The Principal Permittee(s) shall submit the unified Jurisdictional URMP document to the SDRWQCB. The unified Jurisdictional URMP document shall be submitted in two parts (the collected Jurisdictional URMPs and the model SUSMP).

a. The unified Jurisdictional URMP document submittal shall address the requirements of the entire Jurisdictional URMP sections F.1 - F.9. of this Order, with the exception of the local SUSMP requirements (which are to be implemented 180 days after submittal of the model SUSMP by the SDRWQCB).

b. The unified Jurisdictional URMP document submittal shall contain a section covering common activities conducted collectively by the Copermittees including jointly developed reporting formats (section O.4), to be produced by the Principal Permittee(s), and the thirteen individual Jurisdictional URMP documents.

c. The Principal Permittee(s) shall be responsible for the development and production of a stand alone Model SUSMP document meeting the requirements of section F.1.b.(2) of this Order.

d. The Principal Permittee(s) shall submit the unified Jurisdictional URMP document, including the Model SUSMP, to the SDRWQCB within **365 days of adoption** of this Order.

3. Universal Reporting Requirements

All individual and unified Jurisdictional URMP document submittals shall include an executive summary, introduction, conclusion, recommendations, and signed certified statement. Each Copermittee shall submit its individual Jurisdictional Urban Runoff Management Program Document with a signed certified statement. The Principal Permittee(s) shall submit a signed certified statement referring to its individual Jurisdictional Urban Runoff Management Program Document, the section covering common activities conducted collectively by the Copermittees, and the Model SUSMP document meeting the requirements of section F.1.b.(2) of this Order as produced by the Principal Permittee(s).

I. SUBMITTAL OF JURISDICTIONAL URMP ANNUAL REPORT

1. Individual - Each individual Jurisdictional URMP Annual Report shall be a documentation of the activities conducted by each Copermittee during the past annual reporting period. Each Jurisdictional URMP Annual Report shall, at a minimum, contain the following:

a. Comprehensive description of all activities conducted by the Copermittee to meet all requirements of each component of the Jurisdictional URMP section of this Order;

F.1. Land-Use Planning for New Development and Redevelopment Component
F.2. Construction Component
F.3. Existing Development Component (Including Municipal, Industrial, Commercial, Residential, and Education)
F.4. Education Component
F.5. Illicit Discharge Detection and Elimination Component
F.6 Common Interest Areas and Homeowners Associations

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F.7. Public Participation Component
F.8. Assessment of Jurisdictional URMP Effectiveness Component
F.9. Fiscal Analysis Component

b. Each Copermittee's accounting of all:
   (1) Reports of illicit discharges (i.e., complaints) and how each was resolved (indicating referral source);
   (2) Inspections conducted;
   (3) Enforcement actions taken; and
   (4) Education efforts conducted.

c. Public participation mechanisms utilized during the Jurisdictional URMP implementation process;

d. Proposed revisions to the Jurisdictional URMP;

e. A summary of all urban runoff related data not included in the annual monitoring report (e.g., special investigations);

f. Budget for upcoming year;

g. Identification of management measures proven to be ineffective in reducing urban runoff pollutants and flow; and

h. Identification of water quality improvements or degradation.

2. Unified - The unified Jurisdictional URMP Annual Report shall contain a section covering common activities conducted collectively by the Copermittees, to be produced by the Principal Permittee(s), and the thirteen individual Jurisdictional URMP Annual Reports. Each Copermittee shall submit to the Principal Permittee(s) an individual Jurisdictional URMP Annual Report by the date specified by the Principal Permittee(s). The Principal Permittee(s) shall submit a unified Jurisdictional URMP Annual Report to the SDRWQCB prior to **November 9, 2003 and prior to every November 9th thereafter.** The reporting period for these annual reports shall be the previous fiscal year. For example, the report submitted prior to November 9, 2003 shall cover the reporting period July 1, 2002 to June 30, 2003.

3. Universal Reporting Requirements

   All individual and unified Jurisdictional URMP submittals shall include an executive summary, introduction, conclusion, recommendations, and signed certified statement. Each Copermittee shall submit its individual Jurisdictional Urban Runoff Management Program Annual Report with a signed certified statement. The Principal Permittee(s) shall submit a signed certified statement referring to its individual Jurisdictional Urban Runoff Management Program Annual Report and the section covering common activities conducted collectively by the Copermittees as produced by the Principal Permittee(s).

J. WATERSHED URBAN RUNOFF MANAGEMENT PROGRAM

1. Each Copermittee shall collaborate with other Copermittees to identify, address, and mitigate the highest priority water quality issues/pollutants in the six (Table 4) watersheds in the San Juan Creek Watershed Management Area.

2. Each Copermittee shall collaborate with all other Copermittees discharging urban runoff into the same watershed to develop and implement a Watershed Urban Runoff Management Program (Watershed URMP) for the six watersheds in the San Juan Creek Watershed Management Area.

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The Watershed URMP shall, at a minimum contain the following:

a. An accurate map of the watersheds of the San Juan Creek Watershed Management Area in Orange County (preferably in Geographical Information System [GIS] format) that identifies all receiving waters (including the Pacific Ocean); all Clean Water Act section 303(d) impaired receiving waters (including the Pacific Ocean); existing and planned land uses; MS4s, major highways; jurisdictional boundaries; and inventoried commercial, construction, industrial, municipal sites, and residential areas.

b. An assessment of the water quality of all receiving waters in the watershed based upon (1) existing water quality data; and (2) annual dry weather monitoring that satisfies requirements of section F.5 and Attachment E of this Order; and (3) watershed receiving water quality monitoring that satisfies the watershed monitoring requirements of Attachment B;

c. An identification and prioritization of major water quality problems in the watershed caused or contributed to by MS4 discharges and the likely source(s) of the problem(s);

d. An implementation time schedule of short and long-term recommended activities (individual and collective) needed to address the highest priority water quality problem(s) identified in section J.2.c of this Order. For this section, "short-term activities" shall mean those activities that are to be completed during the life of this Order and "long-term activities" shall mean those activities that are to be completed beyond the life of this Order;

e. A mechanism for public participation throughout the entire watershed URMP process;

f. A watershed-based education program that builds on and expands upon the education activities conducted by each Copermittee in a given watershed and that can focus on water quality issues specific to that watershed;

g. A mechanism to facilitate collaborative "watershed-based" (i.e., natural resource-based) land use planning with neighboring local governments in the watershed.

h. Short-term strategy for assessing the effectiveness of the activities and programs implemented under the Watershed URMP. The short term assessment strategy shall identify methods to assess the Watershed URMP effectiveness and include specific direct and indirect performance measurements that will track the immediate progress and accomplishments of the Watershed URMP towards improving receiving water quality impacted by urban runoff discharges. The short-term strategy shall also discuss the role of monitoring data collected by the Copermittees in substantiating or refining the assessment.

i. Long-term strategy for assessing the effectiveness of the Watershed URMP. The long-term assessment strategy shall identify specific direct and indirect performance measurements that will track the long-term progress of Watershed URMP towards achieving improvements in receiving water quality impacted by urban runoff discharges. 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.

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Table 4. Orange County Copermittees by Watershed
for the San Juan Creek Watershed Management Area

Watershed	Major Receiving Water Bodies[8]	Copermittees
Orange County Coastal Streams - Laguna	Moro Canyon Creek Emerald Canyon Creek Laguna Canyon Creek Blue Bird Canyon Creek Rim Rock Canyon Creek Hobo Canyon Creek	County of Orange Laguna Beach Laguna Woods Orange County Flood Control District Aliso Viejo
Aliso Creek	Aliso Creek English Canyon Creek Sulphur Canyon Creek Wood Canyon Creek	Aliso Viejo Laguna Beach Laguna Hills Laguna Niguel Laguna Woods Lake Forest Mission Viejo County of Orange Orange County Flood Control District
Dana Point Coastal Streams	Salt Creek Arroyo Salada Creek San Juan Canyon	Dana Point Laguna Niguel Orange County Flood Control District
San Juan Creek	San Juan Creek Trampas Canyon Creek Canada Gobernadora Canada Chiquita Horno Creek Arroyo Trabuco Creek Tijeras Canyon Creek Live Oak Canyon Creek Oso Creek La Paz Creek Lucas Canyon Creek Verdugo Canyon Creek Bell Canyon Creek Dove Canyon Creek Crow Canyon Creek	San Juan Capistrano Mission Viejo Laguna Hills Laguna Niguel Dana Point Rancho Santa Margarita County of Orange Orange County Flood Control District San Clemente
Orange County Coastal Streams - San Clemente	Prima Deshecha Canada Segunda Deshecha Canada	San Clemente San Juan Capistrano County of Orange Orange County Flood Control District Dana Point
San Mateo Creek	Christianitos Creek Gambino Canyon Creek La Paz Canyon Creek Talega Canyon Creek	San Clemente County of Orange Orange County Flood Control District

[8] Indented water bodies are tributary to the above water body.

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K. IMPLEMENTATION OF WATERSHED URMP

Each Copermittee shall implement all requirements of the Watershed URMP section of this Order by August 13, 2003 unless otherwise specified. Following the adoption of the Order and prior to the full implementation of the Watershed URMP, the Copermittees shall at a minimum collectively implement the provisions and commitments of the proposed DAMP submitted in September 2000.

L. SUBMITTAL OF WATERSHED URMP DOCUMENT

The written account of the overall watershed program to be conducted by each Copermittee during the remaining life of this Order is referred to as the "Watershed URMP Document". The Watershed URMP is conducted concurrently with the Jurisdictional URMP.[9]

1. The Watershed URMP document shall state how the member Copermittees within each watershed will develop and implement the requirements of the Watershed URMP section J. of this Order. The Watershed URMP document shall include:

   (1) A completed watershed map
   (2) A water quality assessment of the San Juan Creek Watershed Management Area within Orange County and watershed monitoring needed
   (3) Prioritization of water quality problems within Orange County in the San Diego Region
   (4) Recommended activities (short and long term) to be conducted jointly by the Copermittees and a timeline for implementation
   (5) Individual Copermittee implementation responsibilities and time schedules for implementation
   (6) A description of watershed public participation mechanisms
   (7) A description of watershed education mechanisms
   (8) A description of the mechanism and implementation schedule for watershed-based land use planning
   (9) A strategy for assessing the short-term effectiveness of the Watershed URMP
   (10) A strategy for assessing the long-term effectiveness of the Watershed URMP
   (11) A program to address common interest areas and homeowners associations

2. The Principal Permittee(s) shall submit the Watershed URMP document to the SDRWQCB by August 13, 2003.

3. Universal Reporting Requirements.

   All Watershed URMP submittals shall include an executive summary, introduction, conclusion, recommendations, and signed certified statement. Each Copermittee shall submit a signed certified statement covering its responsibilities in the Watershed URMP Document. The Principal Permittee(s) shall submit a signed certified statement referring to its responsibilities in the Watershed URMP Document and the section covering common activities conducted collectively by the Copermittees as produced by the Principal Permittee(s).

[9] As the Copermittees jointly revise and implement the submitted proposed DAMP and each Copermittee revises and implements its jurisdictional level program to satisfy the requirements of this Order, it is expected that many activities will be conducted on both a jurisdictional level (e.g., enforcement of local ordinances and permits) and a watershed level. Implementation of the Watershed URMP is not meant to replace, but to expand and complement implementation of the Jurisdictional URMP. For this reason, it is necessary to report management activities on both levels. This can be accomplished either by submitting both a Jurisdictional URMP Annual Report and a Watershed URMP Annual Report or by submitting a single Watershed URMP Annual Report that contains two separate sections (i.e., watershed activities and jurisdictional activities). Information need only be reported once (to the extent something is covered in the Watershed URMP Annual Report, it need not be covered again the Jurisdictional URMP Annual Report).

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M. SUBMITTAL OF WATERSHED URMP ANNUAL REPORT

1. Each Watershed URMP Annual Report shall be a documentation of the activities conducted by watershed member Copermittees during the previous annual reporting period to meet the requirements of all components of the Watershed URMP section of this Order. Each Watershed URMP Annual Report shall, at a minimum, contain the following:

   a. Comprehensive description of all activities conducted by the watershed member Copermittees to meet all requirements of each component of Watershed URMP section J. of this Order
   b. A section covering common activities conducted collectively by the Copermittees, to be produced by the Principal Permittee(s)
   c. Public participation mechanisms utilized during the Watershed URMP implementation process;
   d. Mechanism for watershed-based land use planning;
   e. Assessment of effectiveness of Watershed URMP;
   f. Proposed revisions to the Watershed URMP;
   g. A summary of watershed effort related data not included in the annual monitoring report (e.g., special investigations); and
   h. Identification of water quality improvements or degradation.

2. The Principal Permittee(s) shall submit the Watershed URMP Annual Report to the SDRWQCB prior to November 9, 2004 and prior to every November 9th thereafter. The reporting period for these annual reports shall be the previous fiscal year. For example, the report submitted prior to November 9, 2004 shall cover the reporting period July 1, 2003 to June 30, 2004.

3. Universal Reporting Requirements

   All Watershed URMP submittals shall include an executive summary, introduction, conclusion, recommendations, and signed certified statement. Each Copermittee shall submit a signed certified statement covering its responsibilities in the Watershed URMP Annual Report. The Principal Permittee(s) shall submit a signed certified statement referring to its responsibilities in the Watershed URMP Annual Report and the section covering common activities conducted collectively by the Copermittees as produced by the Principal Permittee(s).

N. PROGRAM MANAGEMENT

1. The Copermittees shall implement the Program Management activities and commitments as described in section 2 (Program Management) of the proposed DAMP.

O. PRINCIPAL PERMITTEE RESPONSIBILITIES

Within 90 days of adoption of this Order, the Copermittees shall designate the Principal Permittee(s) and notify the SDRWQCB of the name(s) of the Principal Permittee(s). The Principal Permittee(s) may require the Copermittees to reimburse the Principal Permittee(s) for reasonable costs incurred while performing coordination responsibilities and other related tasks. The Principal Permittee(s) shall, at a minimum:

1. Be responsible for implementing or coordinating the implementation of the Program Management activities and commitments described in section 2 (Program Management) of the proposed DAMP.

2. Serve as liaison(s) between the Copermittees and the SDRWQCB on general permit issues.

3. Coordinate permit activities among the Copermittees and facilitate collaboration on the development and implementation of programs required under this Order;

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4. Coordinate the joint development by all of the Copermittees of standardized format(s) for all reports required under this Order (e.g., annual reports, monitoring reports, fiscal analysis reports, and program effectiveness reports, etc.). The standardized reporting format(s) shall be used by all Copermittees and shall include protocols for electronic reporting. The Principal Permittee(s) shall submit the standardized format(s) to the SDRWQCB as part of the unified Jurisdictional URMP document no later than **365 days after adoption** of this Order.

5. Integrate individual Copermittee documents and reports required under this Order into single unified documents and reports for submittal to the SDRWQCB as described below. If a reporting date falls on a non-working day or State holiday, then the report is to be submitted on the following working day.

   a. Unified Jurisdictional URMP Document – The Principal Permittee(s) shall submit the unified Jurisdictional URMP document in its entirety (including the model SUSMP) to the SDRWQCB within 365 days of the adoption of this Order.

      The Principal Permittee(s) shall be responsible for producing the sections of the unified Jurisdictional URMP document submittals covering common activities conducted by the Copermittees. The Principal Permittee(s) shall be responsible for the development and production of a stand alone Model SUSMP document meeting the requirements of section F.1.b.(2). of this Order. The Principal Permittee(s) shall also be responsible for collecting and assembling the individual Jurisdictional URMP document submittals covering the activities conducted by each individual Copermittee.

   b. Unified Jurisdictional URMP Annual Reports – The Principal Permittee(s) shall submit unified Jurisdictional URMP Annual Reports to the SDRWQCB prior to November 9th of each year, beginning on **November 9, 2003**. The reporting period for these annual reports shall be the previous fiscal year. For example, the report submitted prior to November 9, 2003 shall cover the reporting period July 1, 2002 to June 30, 2003.

      The Principal Permittee(s) shall be responsible for producing the section of the unified Jurisdictional URMP Annual Reports covering common activities conducted by the Copermittees. The Principal Permittee(s) shall also be responsible for collecting and assembling the individual Jurisdictional URMP Annual Reports covering the activities conducted by each individual Copermittee.

   c. Watershed URMP Document – The Principal Permittee(s) shall prepare and submit the Watershed URMP document to the SDRWQCB by **August 13, 2003** .

   d. Watershed URMP Annual Report - The Principal Permittee(s) shall prepare and submit the Watershed URMP Annual Reports to the SDRWQCB prior to November 9th of each year, beginning on **November 9, 2004**. The reporting period for these annual reports shall be the previous fiscal year. For example, the report submitted prior to November 9, 2004 shall cover the reporting period July 1, 2003 to June 30, 2004.

   e. Receiving Waters Monitoring and Reporting Program - The Principal Permittee(s) shall be responsible for the production and submittal of the Previous Monitoring and Future Recommendations Report. The report shall be submitted to the SDRWQCB within 180 days of adoption of this Order.

   f. Receiving Waters Monitoring and Reporting Program - The Principal Permittee(s) shall be responsible for the development and production of the Receiving Waters Monitoring Program as it is outlined in Attachment B. The Principal Permittee(s) shall submit the Receiving Waters Monitoring Program to the SDRWQCB within 180 days of adoption of this Order.

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g. Receiving Waters Monitoring and Reporting Program – The Principal Permittee(s) shall be responsible for coordinating the joint development by all of the Copermittees of monitoring reporting formats (Section O.4) and for implementing the Receiving Waters Monitoring Program as outlined in Attachment B by August 13, 2002.

h. Receiving Waters Monitoring and Reporting Program - The Principal Permittee(s) shall submit the Receiving Waters Monitoring Annual Report to the SDRWQCB prior to November 9th of each year, beginning on November 9, 2003.

i. Formal Agreements/Standardized Formats - The Principal Permittee(s) shall submit to the SDRWQCB, within 365 days of adoption of this Order, a formal agreement between the Copermittees which provides a management structure for meeting the requirements of this Order (as described in section N.1.). The Principal Permittee(s) shall submit to the SDRWQCB, within 365 days of adoption of this Order, standardized formats for all reports and documents required under this Order.

j. Dry Weather Monitoring - The Principal Permittee(s) shall collectively submit the Copermittees' dry weather monitoring maps and procedures to the SDRWQCB within 365 days of adoption of this Order.

P. RECEIVING WATERS MONITORING AND REPORTING PROGRAM

1. Pursuant to California Water Code section 13267, each Copermittee shall comply with the Receiving Waters Monitoring and Reporting Program for Order No. R9-2002-0001 contained in **Attachment B** of this Order.

2. Each Copermittee shall also comply with standard provisions, reporting requirements, and notifications contained in **Attachment C** of this Order.

Q. TASKS AND SUBMITTAL SUMMARY

The tasks and submittals required under this Order are summarized in Tables 5 and 6 below:

Table 5. Task Summary

Task No.	Task	Permit Section	Completion Date	Frequency
1	Identify discharges not to be prohibited and BMPs required for treatment of discharges not prohibited	B.3.	365 days after adoption of Order	One Time
2	Examine field screening results to identify water quality problems resulting from non-prohibited non-storm water discharges, including follow-up of problems	B.5.	Prior to November 9, 2003	Annually
3	Notify SDRWQCB of discharges causing or contributing to an exceedance of water quality standards	C.2.a.	Immediate	As Needed
4	Establish adequate legal authority to control pollutant discharges into and from MS4	D.1.	365 days after adoption of Order	One Time
5	Assess General Plan to incorporate water quality and watershed protection principles	F.1.a.	365 days after adoption of Order	One Time
6	Include Development Project Requirements in local permits	F.1.b.(1).	365 days after adoption of Order	One Time
7	Develop Model SUSMP	F.1.b.(2).	365 days after adoption of Order	One Time
8	Develop and adopt individual local SUSMP and amended ordinances	F.1.b.(2).	180 days after development of Model SUSMP	One Time
9	Implement individual jurisdictional SUSMP	F.1.b.(2).	180 days after submittal of Model SUSMP to SDRWQCB	Continuous

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Task No.	Task	Permit Section	Completion Date	Frequency
10	Revise environmental review processes	F.1.c.(1).	365 days after adoption of Order	One Time
11	Conduct education program for municipal planning and development review staff, project applicants, developers, contractors, community planning groups, and property owners	F.1.d.(1). And F.1.d.(2).	365 days after adoption of Order	Ongoing
12	Implement all requirements of Construction Component of Jurisdictional URMP	F.2.a. – F.2.j.	365 days after adoption of Order	Ongoing
13	Notify SDRWQCB of non-compliant construction sites that pose a threat to human or environmental health	F.2.i.	Within 24 hours of discovery of noncompliance	As Needed
14	Implement all requirements of Municipal Existing Development Component of Jurisdictional URMP	F.3.a.(1). – F.3.a.(8).	365 days after adoption of Order	Ongoing
15	Implement all requirements of Industrial Existing Development Component of Jurisdictional URMP	F.3.b.(1) – F.3.b.(8)	365 days after adoption of Order	Ongoing
16	Notify SDRWQCB of non-compliant industrial sites that pose a threat to human or environmental health	F.3.b.8.	Within 24 hours of discovery of noncompliance	As Needed
17	Implement all requirements of Commercial Existing Development Component of Jurisdictional URMP	F.3.c.(1) – F.3.c.(5)	365 days after adoption of Order	Ongoing
18	Implement all requirements of Residential Existing Development Component of Jurisdictional URMP	F.3.d.(1) – F.3.d.(4)	365 days after adoption of Order	Ongoing
19	Implement all requirements of Education Component of Jurisdictional URMP	F.4.a. – F.4.c.	365 days after adoption of Order	Ongoing
20	Implement all requirements of Illicit Discharge Detection and Elimination Component of Jurisdictional URMP	F.5.a. – F.5.i.	365 days after adoption of Order	Ongoing
21	Develop a plan to manage urban runoff from common interest areas, private roads, drainage facilities, and other components of the storm water conveyance system, including those managed by homeowners associations.	F.6.	365 days after adoption of Order	One Time
22	Implement all requirements of Public Participation Component of Jurisdictional URMP	F.7.	365 days after adoption of Order	Ongoing
23	Develop strategy for assessment of Jurisdictional URMP effectiveness	F.8.a.	365 days after adoption of Order	One Time
24	Assess Jurisdictional URMP effectiveness	F.8.b.	Prior to November 9, 2003	Annually
25	Develop strategy for fiscal analysis of urban runoff management program	F.9.	365 days after adoption of Order	One Time
26	Conduct fiscal analysis of urban runoff management program in entirety	F.9.	Prior to November 9, 2003	Annually
27	Develop and implement Watershed URMP	J.2.	August 13, 2003	Ongoing
28	Implement Program Management activities and commitments in proposed DAMP	N.1.	Immediately	Ongoing
29	Develop standardized formats for all required reports of this Order	O.4.	365 days after adoption of Order	One Time
30	Develop Receiving Waters Monitoring Document	Attachment B	180 days after adoption of Order	One Time
31	Implement Receiving Waters Monitoring Program	Attachment B	180 days after adoption of Order	Continuous
32	Develop Dry Weather Monitoring Program Document	Attachment E	365 days after adoption of Order	One Time
33	Conduct Dry Weather Monitoring Program	Attachment E	Begins May 1, 2003 Thereafter conducted May 1st to September 30th	Annually
34	Complete NPDES applications for issuance of renewal watershed-based permits	Attachment C	At least 180 days prior to expiration of Order	One Time

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Task No.	Task	Permit Section	Completion Date	Frequency
35	Notify SDRWQCB of any incidence of non-compliance with this Order that poses a threat to human or environmental health.	R.1, B.6 of Attachment C	Within 24 hours of discovery of non-compliance	As Needed
36	Designate Principal Permittee(s) and notify SDRWQCB	O.	90 days after adoption of the Order	One Time

Table 6. Submittal Summary

Submittal No.	Submittal	Permit Section	Completion Date	Frequency
1	Submit identification of discharges not to be prohibited and BMPs required for treatment of discharges not prohibited	B.3.	365 days after adoption of Order	One Time
2	Report on discharges causing or contributing to an exceedance of water quality standards, including description of BMP implementation	C.2.a.	With individual Jurisdictional URMP Annual Reports	As Needed
3	Submit Certified Statement of Adequate Legal Authority	D.2.	365 days after adoption of Order	One Time
4	Submit certified statement if particular high priority construction sites are to be inspected monthly rather than weekly in the rainy season	F.2.g.(2).	365 days after adoption of Order and as needed thereafter	As Needed
5	Submit report on non-compliant construction sites that pose a threat to human or environmental health.	F.2.i.	Within 5 Days of discovery of non-compliance	As Needed
6	Submit report on non-compliant industrial sites that pose a threat to human or environmental health.	F.3.b.8.	Within 5 days of discovery of non compliance	As Needed
7	Submit to Principal Permittee(s) individual Jurisdictional URMP document covering requirements for all Components	H.1.a.	Prior to 365 days after adoption of Order (Principal Permittee(s) specifies date of submittal)	One Time
8	(This space reserved).			
9	Principal Permittee(s) shall submit to SDRWQCB unified Jurisdictional URMP document covering requirements for all Components, including Model SUSMP	H.2.a.	365 days after adoption of Order	One Time
10	(This space reserved).			
11	Submit to SDRWQCB local SUSMP and amended ordinances	F.1.b.(2). and H.1.d.	180 days after development of Model SUSMP	One Time
12	Submit to Principal Permittee(s) individual Jurisdictional URMP Annual Report	I.1.	Prior to November 9, 2003 (Principal Permittee(s) specifies date of submittal)	Annually
13	Principal Permittee(s) shall submit 1st unified Jurisdictional URMP Annual Report to SDRWQCB	I.2.	Prior to November 9, 2003	One Time and Annually Thereafter
14	Submit to Principal Permittee(s) Watershed Specific URMP document	L.1.	Prior to August 13, 2003 (Principal Permittee(s) specifies date of submittal)	One Time
15	Principal Permittee(s) shall submit Watershed URMP document to SDRWQCB	L.2.	August 13, 2003	One Time
16	Principal Permittee(s) shall submit 2nd unified Jurisdictional URMP Annual Report to SDRWQCB	I.2.	Prior to November 9, 2004	One Time
17	(This space reserved).			
18	Principal Permittee(s) shall submit 1st Watershed URMP Annual Report to SDRWQCB	M.2.	Prior to November 9, 2004	One Time and Annually Thereafter
19	Principal Permittee(s) shall submit 3rd unified Jurisdictional URMP Annual Report to SDRWQCB	I.2.	Prior to November 9, 2005	One Time

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Submittal No.	Submittal	Permit Section	Completion Date	Frequency
20	Principal Permittee(s) shall submit 2nd Watershed URMP Annual Report to SDRWQCB	M.2.	Prior to November 9, 2005	One Time
21	Principal Permittee(s) shall submit 4th unified Jurisdictional URMP Annual Report to SDRWQCB	I.2.	Prior to November 9, 2006	One Time
22	Principal Permittee(s) shall submit 3rd Watershed URMP Annual Report to SDRWQCB	M.2.	Prior to November 9, 2006	One Time
23	Principal Permittee(s) shall submit 5th unified Jurisdictional URMP Annual Report to SDRWQCB	I.2.	Prior to November 9, 2007	One Time
24	Principal Permittee(s) shall submit standardized formats for all reports required under this Order	O.4.	365 days after adoption of Order	One Time
25	Principal Permittee(s) submits Receiving Waters Monitoring Program Document	Attachment B	180 days after adoption of Order	One Time
26	Principal Permittee(s) submits Receiving Waters Monitoring Annual Report to SDRWQCB	Attachment B	Prior to November 9, 2003	Annually
27	Submit to Principal Permittee(s) Dry Weather Monitoring Program Document	Attachment E	Prior to 365 days after adoption of Order	One Time
28	Principal Permittee(s) submits collective Dry Weather Monitoring Program Documents	Attachment E	365 days after adoption of Order	One Time
29	Submit to Principal Permittee(s) Dry Weather Monitoring Program results as part of individual Jurisdictional URMP Annual Report	Attachment E	Prior to November 9, 2003, as part of individual Jurisdictional URMP Annual Report	Annually
30	Principal Permittee(s) shall submit NPDES applications for issuance of renewal watershed-based permits	Attachment C	At least 180 days prior to expiration of this Order	One Time
31	Submit reports of any incidence of non-compliance with this Order that poses a threat to human or environmental health.	R.1, B.6 of Attachment C	Within 5 days of discovery of non compliance	As Needed

R. STANDARD PROVISIONS, REPORTING REQUIREMENTS AND NOTIFICATIONS

1. Each Copermittee shall comply with Standard Provisions, Reporting Requirements, and Notifications contained in **Attachment C** of this Order. This includes 24 hour/5day reporting requirements for any instance of non-compliance with this Order as described in section B.6 of Attachment C.

2. All plans, reports and subsequent amendments submitted in compliance with this Order shall be implemented immediately (or as otherwise specified) and shall be an enforceable part of this Order upon submission to the SDRWQCB. All submittals by Copermittees must be adequate to implement the requirements of this Order.

I, John H. Robertus, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Diego Region, on ***February 13, 2002.***

John H. Robertus
Executive Officer

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ATTACHMENT A

BASIN PLAN PROHIBITIONS

California Water Code Section 13243 provides that a Regional Board, in a water quality control plan, may specify certain conditions or areas where the discharge of waste, or certain types of waste is not permitted. The following discharge prohibitions are applicable to any person, as defined by Section 13050(c) of the California Water Code, who is a citizen, domiciliary, or political agency or entity of California whose activities in California could affect the quality of waters of the state within the boundaries of the San Diego Region.

1. 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.

2. The discharge of waste to land, except as authorized by waste discharge requirements or the terms described in California Water Code Section 13264 is prohibited.

3. The discharge of pollutants or dredged or fill material to waters of the United States except as authorized by an NPDES permit or a dredged or fill material permit (subject to the exemption described in California Water Code §13376) is prohibited.

4. Discharges of recycled water to lakes or reservoirs used for municipal water supply or to inland surface water tributaries thereto are prohibited, unless this Regional Board issues a NPDES permit authorizing such a discharge; the proposed discharge has been approved by the State Department of Health Services and the operating agency of the impacted reservoir; and the discharger has an approved fail-safe long-term disposal alternative.

5. The discharge of waste to inland surface waters, except in cases where the quality of the discharge complies with applicable receiving water quality objectives, is prohibited. Allowances for dilution may be made at the discretion of the Regional Board. Consideration would include streamflow data, the degree of treatment provided and safety measures to ensure reliability of facility performance. As an example, discharge of secondary effluent would probably be permitted if streamflow provided 100:1 dilution capability.

6. The discharge of waste in a manner causing flow, ponding, or surfacing on lands not owned or under the control of the discharger is prohibited, unless the discharge is authorized by the Regional Board.

7. The dumping, deposition, or discharge of waste directly into waters of the state, or adjacent to such waters in any manner which may permit its being transported into the waters, is prohibited unless authorized by the Regional Board.

8. Any discharge to a storm water conveyance system that is not composed entirely of "*storm water*" is prohibited unless authorized by the Regional Board. [The federal regulations, 40 CFR 122.26 (b) (13), define storm water as storm water runoff, snow melt runoff, and surface runoff and drainage. 40 CFR 122.26 (b) (2) defines an illicit discharge as any discharge to a storm water conveyance system that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from fire fighting activities. [§122.26 amended at 56 FR 56553, November 5, 1991; 57 FR 11412, April 2, 1992].

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9. The unauthorized discharge of treated or untreated sewage to waters of the state or to a storm water conveyance system is prohibited.

10. The discharge of industrial wastes to conventional septic tank/subsurface disposal systems, except as authorized by the terms described in California Water Code Section 13264, is prohibited.

11. The discharge of radioactive wastes amenable to alternative methods of disposal into the waters of the state is prohibited.

12. The discharge of any radiological, chemical, or biological warfare agent into waters of the state is prohibited.

13. The discharge of waste into a natural or excavated site below historic water levels is prohibited unless the discharge is authorized by the Regional Board.

14. The discharge of sand, silt, clay, or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity or discoloration in waters of the state or which unreasonably affect, or threaten to affect, beneficial uses of such waters is prohibited.

15. The discharge of treated or untreated sewage from vessels to Mission Bay, Oceanside Harbor, Dana Point Harbor, or other small boat harbors is prohibited.

16. The discharge of untreated sewage from vessels to San Diego Bay is prohibited.

17. The discharge of treated sewage from vessels to portions of San Diego Bay that are less than 30 feet deep at mean lower low water (MLLW) is prohibited.

18. The discharge of treated sewage from vessels, which do not have a properly functioning US Coast Guard certified Type I or Type II marine sanitation device, to portions of San Diego Bay that are greater than 30 feet deep at mean lower low water (MLLW) is prohibited.

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ATTACHMENT B

RECEIVING WATERS MONITORING AND REPORTING PROGRAM FOR ORDER NO. R9-2002-0001

B.1 Receiving Waters Monitoring Program

The Copermittees shall collaborate to develop, implement, and report annually on a Receiving Waters Monitoring Program for Orange County within the San Diego Region. The primary objectives of the Receiving Waters Monitoring and Reporting Program include:

- Assessing compliance with Order No. R9-2002-0001;
- Measuring the effectiveness of Urban Runoff Management Plans;
- Assessing the chemical, physical, and biological impacts to receiving waters resulting from urban runoff; and
- Assessing the overall health and evaluating long-term trends in receiving water quality.

Order No. R9-2002-0001 may be modified by the SDRWQCB Executive Officer without further public notice to direct the Copermittees to participate in comprehensive regional monitoring activities in the Southern California Bight in lieu of specific Order R9-2002-0001 receiving waters monitoring requirements during the term of this Order.

B.2 Receiving Waters Monitoring Program Document

Within **180** days of the adoption of this Order the Copermittees shall submit to the SDRWQCB a Receiving Waters Monitoring Program document, subject to SDRWQCB review, that incorporates the following components:

a. Previous Monitoring and Future Recommendations Technical Report; and
b. Receiving Waters Monitoring Program

B.2.a. Previous Monitoring and Future Recommendations Technical Report

The Copermittees shall collaborate to prepare a technical report that provides analysis, interpretation, and summary of all previous wet weather monitoring results from programs conducted in the watersheds within the San Diego Region under the First Term Permit, the Second Term Permit, and the Orange County Water Quality Monitoring Program (99-04 Plan) currently being implemented by the Copermittees. The report shall also provide recommendations for the Receiving Waters Monitoring Program to comply with the objectives listed in Attachment B.1 above and incorporates the specific receiving waters monitoring requirements of Attachment B.2.b. At a minimum, the report shall:

(1) Summarize the cumulative findings of all previous wet weather monitoring;
(2) Identify detectable trends in water quality data and receiving water quality, based on the cumulative previous wet weather monitoring findings;
(3) Interpret the cumulative previous wet weather monitoring findings;
(4) Describe the monitoring design, sampling and analytical methods employed in the 99-04 Plan within the San Diego Region;
(5) Describe the identification of Critical Aquatic Resources and Warm Spots in the 99-04 Plan within the San Diego Region and how these will be addressed in the Receiving Waters Monitoring Program;
(6) Draw conclusions regarding the cumulative previous wet weather monitoring findings;

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(7) Describe how the monitoring data collected under the previous monitoring programs, including the 99-04 Plan, have been utilized by the Copermittees in the implementation of the 1993 DAMP under Order No. 96-03;
(8) Describe how the monitoring data collected under this Order will be utilized in the implementation of the Jurisdictional and Watershed Urban Runoff Management Plans;
(9) Provide recommendations for future monitoring activities in the San Diego Region (i.e. number and location of sampling stations, frequency of sampling, parameters to be analyzed, methods and materials to be used, and a rationale for each) that achieves the objectives listed in section B.1 and incorporates the specific program requirements of section B.2.b of this Attachment; and
(10) Include an executive summary, introduction, conclusion, and summary of recommendations.

B.2.b. Receiving Waters Monitoring Program

The Copermittees shall collaborate to review and revise the existing 99-04 Plan utilizing the findings of the Previous Monitoring and Future Recommendations Technical Report. The revised 99-04 Plan shall incorporate the specific requirements of this section for Orange County within the San Diego Region and henceforth referred to under this Order as the Receiving Waters Monitoring Program. The Receiving Waters Monitoring Program shall at a minimum include, satisfy, or exceed the following requirements:

(1) The Receiving Waters Monitoring shall be conducted during each reporting period under the Order. A reporting period is defined as October 1st to September 30th of any year. The first reporting period under this Order is October 1, 2002 to September 30, 2003.
(2) Both the annual and long-term objectives of the Receiving Waters Monitoring Program shall be clearly stated and reported annually and shall focus on the primary objectives of the program listed in Attachment B.1.
(3) The monitoring program design, implementation, analysis, assessment, and reporting shall be conducted annually on a watershed basis for each of the six hydrologic units in the San Juan Creek Watershed Management Area within Orange County (Orange County Coastal Streams – Laguna, Aliso Creek Watershed, Dana Point Watershed, San Juan Creek Watershed, Orange County Coastal Streams – San Clemente, and San Mateo Creek) as defined in the Water Quality Control Plan for the San Diego Region (9) and Watershed Management Chapter for the San Diego Region.
(4) Monitoring results shall be assessed and reported annually on a watershed basis as a single report by the Copermittees consisting of one common section and six watershed sections. Monitoring, analysis, assessment, and reporting shall satisfy the requirements of specified below for each watershed as applicable.
(5) Describe how the Copermittees may collaborate with other agencies or organizations conducting similar monitoring, such as the Southern California Coastal Water Research Project (SCCWRP), including the possibility of participating in coordinated comprehensive regional monitoring in the Southern California Bight under this Order.
(6) The Receiving Waters Monitoring Program document shall be submitted to the SDRWQCB for review and comment no later than 180 days following the adoption of this Order.
(7) Implementation of the Receiving Waters Monitoring Program shall begin no later than August 13, 2002.
(8) The Receiving Waters Monitoring Program shall incorporate the components listed below and shall address the primary objectives of the Receiving Waters Monitoring Program:
    (a) Urban Stream Bioassessment
    (b) Long Term Mass Loading

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(c) Coastal Storm Drain Outfall Monitoring
(d) Ambient Coastal Receiving Waters Monitoring

B.2.b.8.a Urban Stream Bioassessment Monitoring

1. The Copermittees shall collaborate to develop and implement an urban stream bioassessment monitoring program. At a minimum, the program shall consist of station identification, sampling, monitoring, and analysis of data for 12 bioassessment stations in order to determine the biological and physical integrity of urban streams within the County of Orange. In addition to the urban stream bioassessment stations, three reference bioassessment stations shall be identified, sampled, monitored, and analyzed. The selection, sampling, monitoring, and analysis of bioassessment stations shall meet the following requirements:

   a. Each urban stream bioassessment station shall be selected using the following criteria. Each urban stream bioassessment station shall:

      (1) be located within the jurisdiction of a Copermittee; or
      (2) be located within one of the six watersheds described above; and
      (3) be representative of urban stream conditions within one of the six watersheds specified in Section J, Table 4 of this Order; and
      (4) meet the physical criteria of the California Stream Bioassessment Procedure[1]; and
      (5) to the extent feasible, coincide with the location of an already existing monitoring station used by the California Department of Fish and Game in the conduct of the SDRWQCB's Ambient Bioassessment Program.

   b. Each bioassessment station shall be monitored twice annually, in May and October of each year, beginning in October 2002[2]. A minimum of three replicate samples shall be collected at each station during each sampling event.

   c. Sampling, laboratory, quality assurance, and analysis procedures shall follow the standardized procedures set forth in the California Department of Fish and Game's California Stream Bioassessment Procedure (CSBP). Analysis procedures shall include comparison between station mean values for various biological metrics. Sampling, laboratory, quality assurance, and analytical procedures shall follow the standardized "Non-Point Source Bioassessment Sampling Procedures" for professional bioassessment set forth in the CSBP. In the event that the CSBP "Point-Source Professional Bioassessment Procedure" is performed in place of the "Non Point Source Bioassessment Sampling Procedure," justification and documentation of the procedure shall be submitted with the report. Results of the Urban Stream Bioassessment Monitoring shall be reported annually as part of the overall Receiving Waters Monitoring and Reporting Program for Order No. R9-2002-0001. Reporting of the bioassessment data shall follow the format of the San Diego Regional Water Quality Control Board 1999 Biological Assessment Annual Report[3]. The report shall include:

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[1] California Stream Bioassessment Procedure (Protocol Brief for Biological and Physical/Habitat Assessment in Wadeable Streams), California Department of Fish and Game – Aquatic Bioassessment Laboratory, May 1999.

[2] Bioassessment sampling shall be performed in May and October each year.

[3] San Diego Regional Water Quality Control Board ,1999 Biological Assessment Annual Report. A Water Quality Inventory Series: Biological and Physical/Habitat Assessment of California Water Bodies. California Department of Fish and Game Office of Spill Prevention and Response, Water Pollution Control Laboratory. December 1999.

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(1) All physical, chemical and biological data collected in the assessment;
(2) Photographic documentation of assessment and reference stations;
(3) Documentation of quality assurance and control procedures;
(4) Analysis that includes calculation of the metrics used in both the CSBP and the 1999 Annual Report.
(5) The assessment shall utilize a regional index of biological integrity when it becomes available.
(6) The report shall provide interpretation for comparisons of mean biological and habitat assessment metric values between assessment and reference stations.
(7) Electronic data formatted to California Department of Fish and Game Aquatic Bioassessment Laboratory specifications for inclusion in the Statewide Access Bioassessment database.

d. A professional environmental laboratory or Copermittee staff shall perform all sampling, laboratory, quality assurance, and analytical procedures. While valuable, data collected by volunteer monitoring organizations shall not be submitted in place of professional assessments.

e. Reference stations shall be selected following the recommendations in the 1999 Annual Report, Hughes (1995)[4] and Barbour et. al. (1999)[5]. Reference stations shall be evaluated annually by the Copermittees for suitability and the results included in the annual report. New reference stations will be selected as needed by the Copermittees.

2. The Copermittees shall design and implement a program to conduct standardized toxicity testing at urban stream bioassessment stations where the bioassessment data indicates significant impairment. When findings indicate the presence of toxicity, a Toxicity Identification Evaluation (TIE) shall be conducted to determine the cause(s) of the toxicity.

B.2.b.8.b Long Term Mass Loading

For purposes of evaluating long-term trends and assessing the effectiveness of urban runoff management programs, the Copermittees shall continue to implement the mass loading monitoring conducted under the 99-04 Plan in Orange County within the San Diego Region. The mass loading monitoring component shall, however, be revised as necessary to ensure adequate coverage of the San Diego Region and to specify that when findings or observations indicate the possible presence of toxicity, a Toxicity Identification Evaluation (TIE) shall be conducted to determine the cause(s) of the toxicity.

B.2.b.8.c. Coastal Storm Drain Outfall Monitoring

The Copermittees shall collaborate to develop and implement a monitoring program for discharges of urban runoff from coastal storm drain outfalls. The program shall meet the following requirements:

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4 Hughes, R. M. (1995) Defining Acceptable Biological Status by Comparing with Reference Conditions in Biological Assessment and Criteria: Tools for Water Resource Planning and Decision Making, Wayne S. Davis and Thomas P. Simon eds. Lewis Publishers, Boca Raton, LA.

5 Barbour, M.T. , J Gerritsen, B.D. Synder, and J.B. Stribling (1999) Rapid Bioassessment Protocols For Use in Streams and Wadeable Rivers: Periphyton, Benthic Macroinvertebrates, and Fish. Second Edition. EPA 841-B-99-002.

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1. The program shall include rationale and criteria for selection of storm drain outfalls to be monitored.

2. The program shall include collection of samples for analysis of total coliform, fecal coliform, and enterococci, in addition to any other indicators or pathogens identified by the Copermittees.

3. Samples shall be collected at both the storm drain outfall and in the surf zone (at ankle to knee water depths) directly in front of the outfall.

4. Samples shall be collected during both dry and wet weather periods.

5. Exceedances of public health standards for bacteria must be reported to the County of Orange Health Care Agency, Regulatory Health Services, Environmental Health, Ocean Recreation Protection Program as soon as possible by the Copermittees.

B.2.b.8.d. Ambient Coastal Receiving Water Monitoring

The Copermittees shall collaborate to develop and implement a program to assess the overall health of the coastal receiving waters and monitor the impact of urban runoff on ambient receiving water quality. This monitoring shall include Dana Cove, the creek and stream mouths, the Pacific Ocean coastline of Orange County within the San Diego region, and all Clean Water Act section 303(d) water bodies or other environmentally sensitive areas as defined in F.1.b.(2)(a)vi of this Order.

B.3 Implementation of the Receiving Waters Monitoring Program

Upon approval by the SDRWQCB the Copermittees shall implement the Receiving Waters Monitoring Program.

B.4 Interim Implementation of the 99-04 Plan

Until approval of the Receiving Waters Monitoring Program by the SDRWQCB, the Copermittees shall continue to implement the 99-04 Plan as described in Appendix K of the proposed DAMP.

B.5 Submittal of Receiving Waters Monitoring Annual Reports

The Principal Permittee shall submit the Receiving Waters Monitoring Annual Report to the SDRWQCB prior to November 9th of each year, beginning on November 9, 2003.

B.6 Monitoring Annual Report Requirements

a. Monitoring reports shall provide the data/results, methods of evaluating the data, graphical summaries of the data, and an explanation/discussion of the data for each monitoring program component listed above.

b. Monitoring reports shall include an analysis of the findings of each monitoring program component listed above. The analysis shall identify and prioritize water quality problems. Based on the identification and prioritization of water quality problems, the analysis shall identify potential sources of the problems, and recommend future monitoring and BMP implementation measures for identifying and addressing the sources. The analysis shall also include an evaluation of the effectiveness of existing control measures.

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c. Monitoring reports shall include identification and analysis of any long-term trends in storm water or receiving water quality.

d. Monitoring reports shall provide an estimation of total pollutant loads (wet weather loads plus dry weather loads) due to urban runoff for each of the watersheds specified in Section J, Table 4 of Order No. R9-2002-0001.

e. Monitoring reports shall for each monitoring program component listed above, include an assessment of compliance with applicable water quality standards.

f. All monitoring reports shall use a standard report format and shall include the following:

1. A stand alone comprehensive executive summary addressing all sections of the monitoring report;
2. Comprehensive interpretations and conclusions; and
3. Recommendations for future actions.

g. All monitoring reports submitted to the Principal Permittee or the SDRWQCB shall contain the certified perjury statement described in Standard Reporting Requirements in Attachment C section B.9.d.

h. A committee (consisting of no less than three members) shall review all monitoring reports prior to submittal to the SDRWQCB. All review comments shall also be submitted to the SDRWQCB.

i. All monitoring reports shall be submitted in both electronic and paper formats.

j. All monitoring reports shall describe monitoring station locations by latitude and longitude coordinates, frequency of sampling, quality assurance/quality control procedures and sampling and analysis protocols.

k. Monitoring programs and reports shall comply with Section B.7 of Attachment B, as well as Attachment C.

B.7 Standard Monitoring Requirements

a. All monitoring activities shall meet the following requirements:

1. Monitoring and Records [40 CFR 122.41(j)(1)]

Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

2. Monitoring and Records [40 CFR 122.41(j)(2)] [California Water Code § 13383(a)]

The discharger 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 Order, and records of all data used to complete the application for this permit, for a period of at least three years from the date of the sample, measurement, report or application. This period may be extended by request of the SDRWQCB at any time.

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3. Monitoring and Records [40 CFR 122.21(j)(3)]

Records of monitoring information shall include the information requested in Attachment B and the following:

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. Monitoring and Records [40 CFR 122.21(j)(4)]

Monitoring results must be conducted according to test procedures approved under 40 CFR part 136 unless other test procedures have been specified in this Order.

5. Monitoring and Records [40 CFR 122.21(j)(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 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.

6. Monitoring and Records [40 CFR 122.41(k)(2)]

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.

7. Monitoring Reports [40 CFR 122.41(l)(4)

Monitoring results shall be reported at the intervals specified elsewhere in this Order.

8. Monitoring Reports [40 CFR 122.41(l)(4)(ii)]

If the discharger monitors any pollutant more frequently than required by the permit using test procedures approved under 40 CFR part 136, 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 SDRWQCB.

9. Monitoring Reports [40 CFR 122.41(l)(4)(iii)]

Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the SDRWQCB in the Order.

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ATTACHMENT C

STANDARD PROVISIONS REPORTING REQUIREMENTS, AND NOTIFICATIONS

A. STANDARD PROVISIONS

1. Duty To Comply [40 CFR 122.41(a)(1)]
   The discharger 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 Clean Water Act within the time provided in the regulations that establish these standards or prohibitions or standards for sewage sludge use or disposal, even if this Order has not yet been modified to incorporate the requirement.

2. Need to Halt or Reduce Activity Not a Defense [40 CFR 122.41(c)]
   It shall not be a defense for the 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. Upon reduction, loss, or failure of a treatment facility, the discharger shall, to the extent necessary to maintain compliance with this Order, control production or all discharges, or both, until the facility is restored or an alternative method of treatment is provided. This provision applies, for example, when the primary source of power of a treatment facility fails, is reduced, or is lost.

3. Duty to Mitigate [40 CFR 122.41(d)]
   The discharger shall take all reasonable steps to minimize or prevent any discharge or prevent any discharge or sludge use or disposal in violation of this Order which has a reasonable likelihood of adversely affecting human health or the environment.

4. Proper Operation and Maintenance [40 CFR 122.41(e)]
   The discharger 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 discharger to achieve compliance with the conditions of this Order. 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 the discharger only when the operation is necessary to achieve compliance with the conditions of this Order.

5. Permit Actions [40 CFR 122.41(f)] [California Water Code § 13381]
   This Order may be modified, revoked and reissued, or terminated for cause including, but not limited to, the following:

   a. Violation of any terms or conditions of this Order;
   b. Obtaining this Order by misrepresentation or failure to disclose fully all relevant facts;
   c. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge; or
   d. A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination.

   The filing of a request by the discharger for modification, revocation and reissuance, or termination of this Order, or a notification of planned changes or anticipated noncompliance does not stay any condition of this Order.

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6. Property Rights [40 CFR 122.41(g)] [California Water Code §13263(g)]
This Order does not convey any property rights of any sort or any exclusive privilege. The requirements prescribed herein do not authorize the commission of any act causing injury to persons or property, nor protect the discharger from liabilities under federal, state, or local laws, nor create a vested right for the discharger to continue the waste discharge.

7. Inspection and Entry [40 CFR 122.41(i)] [California Water Code § 13267(c)]
The discharger shall allow the SDRWQCB, or an authorized SDRWQCB representative, or an authorized representative of the USEPA (including an authorized contractor acting as a representative of the SDRWQCB or USEPA), upon presentation of credentials and other documents as may be required by law, to:

   a. Enter upon the discharger's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this Order;
   b. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this Order;
   c. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this Order; and
   d. Sample or monitor at reasonable times, for the purposes of assuring compliance with this Order or as otherwise authorized by the Clean Water Act or California Water Code, any substances or parameters at any location.

8. Bypass of Treatment Facilities [40 CFR 122.41(m)]

   a. Definitions

      (1) "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility.

      (2) "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.

   b. Bypass not Exceeding Limitations

      The discharger may allow any bypass to occur which does not cause effluent limitations of this Order or the concentrations of pollutants set forth in Ocean Plan Table A or Table B to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs c. and d. of this provision.

   c. Notice

      (1) Anticipated bypass. If the discharger 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.
      (2) Unanticipated bypass. The discharger shall submit notice of an unanticipated bypass as required in section B.7 of Attachment C.

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d. Prohibition of Bypass

Bypass is prohibited, and the SDRWQCB may take enforcement action against the discharger for bypass, unless:

(1) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(2) 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

(3) The discharger submitted notices as required under paragraph c. of this section. The SDRWQCB may approve an anticipated bypass, after considering its adverse effects, if the SDRWQCB determines that it will meet the three conditions listed above in paragraph d.(1) of this section.

9. Upset [40 CFR 122.41(n)]

a. Definition "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based effluent limitations because of factors beyond the reasonable control of the discharger. 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.

b. 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 c. of this section are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

c. Conditions Necessary for a Demonstration of Upset A discharger who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

(1) An upset occurred and that the discharger can identify the cause(s) of the upset;
(2) The permitted facility was at the time being properly operated;
(3) The discharger submitted notice of the upset as required in section B.7 of Attachment C of this Order; and
(4) The discharger complied with any remedial measures required under Provision A.5. of Attachment C of this Order.

d. Burden of Proof In any enforcement proceeding the discharger seeking to establish the occurrence of an upset has the burden of proof.

10. Other Effluent Limitations and Standards [40 CFR 122.44(b)(1)]
If any toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under Section 307(a) of the Clean Water Act for a toxic pollutant which is present in the discharge and that standard or prohibition is more stringent than any limitation on the pollutant in this Order, the SDRWQCB may institute proceedings under these regulations to modify or revoke and reissue the Order to conform to the toxic effluent standard or prohibition.

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11. The discharger shall take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with this Order, including such accelerated or additional monitoring as may be necessary to determine the nature and impact of the noncomplying discharge.

12. The provisions of this Order are severable, and if any provision of this Order, or the application of any provision of this Order to any circumstances, is held invalid, the application of such provision to other circumstances, and the remainder of this Order, shall not be affected thereby.

13. The discharger shall comply with any interim effluent limitations as established by addendum, enforcement action, or revised waste discharge requirements which have been, or may be, adopted by this SDRWQCB.

B. REPORTING REQUIREMENTS

1. Duty to Reapply [40 CFR 122.41(b)] This Order expires on **February 13, 2007**. If the discharger wishes to continue any activity regulated by this Order after the expiration date of this Order, the discharger must apply for and obtain new waste discharge requirements. The discharger must file a Report of Waste Discharge in accordance with Title 23, California Code of Regulations not later than **180 days** in advance of the expiration date of this Order as application for issuance of new waste discharge requirements.

2. Duty to Provide Information [40 CFR 122.41(h)] The discharger shall furnish to the SDRWQCB, SWRCB, or USEPA, within a reasonable time, any information which the SDRWQCB, SWRCB, or USEPA may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this Order, or to determine compliance with this Order. The discharger shall also furnish to the SDRWQCB, SWRCB, or USEPA, upon request, copies of records required to be kept by this Order.

3. Planned Changes [40 CFR 122.41(l)(1)] The discharger shall give notice to the SDRWQCB as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when:

   a. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source in 40 CFR Part 122.29(b);

   b. 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 this Order, nor to notification requirements under 40 CFR 122.42(a)(l); or

   c. The alteration or addition results in a significant change in the discharger's sludge use or disposal practices, and such alteration, addition, or change may justify the application of conditions in this Order that are different from or absent in the existing Order, 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.

4. Anticipated Non-Compliance [40 CFR 122.41(l)(2)] The discharger shall give advance notice to the SDRWQCB of any planned changes in the permitted facility or activity which may result in noncompliance with the requirements of this Order.

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5. Transfers [40 CFR 122.41(l)(3)] This Order is not transferable to any person except after notice to the SDRWQCB. The SDRWQCB may require modification or revocation and reissuance of this Order to change the name of the discharger and incorporate such other requirements as may be necessary under the Clean Water Act or the California Water Code in accordance with the following:

   a. Transfers by Modification [40 CFR 122.61(a)]
   Except as provided in paragraph b. of this reporting requirement, this Order may be transferred by the discharger to a new owner or operator only if this Order has been modified or revoked and reissued, or a minor modification made to identify the new discharger and incorporate such other requirements as may be necessary under the Clean Water Act or California Water Code.

   b. Automatic Transfers [40 CFR 122.61(b)]
   As an alternative to transfers under paragraph a. of this reporting requirement, any NPDES permit may be automatically transferred to a new discharger if:

      (1) The current discharger notifies the SDRWQCB at least 30 days in advance of the proposed transfer date in paragraph b.(2) of this reporting requirement;

      (2) The notice includes a written agreement between the existing and new dischargers containing a specific date for transfer of permit responsibility, coverage, and liability between them; and

      (3) The SDRWQCB does not notify the existing discharger and the proposed new discharger of his or her intent to modify or revoke and reissue the Order. A modification under this subparagraph may also be a minor modification under 40 CFR Part 122.63. If this notice is not received, the transfer is effective on the date specified in the agreement mentioned in paragraph b.(2) of this reporting requirement.

6. Twenty-four Hour Reporting [40 CFR 122.41(l)(6)]
Each Copermittee shall develop and submit criteria by which to evaluate events of non-compliance to determine whether they pose a threat to human or environmental health. These criteria shall be submitted in the Jurisdictional Urban Runoff Management Program Document and Annual Reports for SDRWQCB review. Using these criteria the discharger shall report any noncompliance with this Order or any noncompliance that may endanger human health or environmental health. Any information shall be provided orally to the SDRWQCB within **24 hours** from the time the discharger becomes aware of the circumstances. A written description of any noncompliance shall be submitted to the SDRWQCB within **five days** of such an occurrence and 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 recurrence of the noncompliance. The following shall be included as information which must be reported within 24 hours under this reporting requirement:

   a. Any unanticipated bypass which exceeds any effluent limitation in this Order;

   b. Any discharge of treated or untreated wastewater, including reclaimed or recycled wastewater, resulting from pipeline breaks, obstruction, surcharge or any other circumstance;

   c. Any discharge or spill of raw or potable water not authorized by this order or resulting from pipeline breaks, obstruction, surcharge or any other circumstance;

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d. Any upset which exceeds any effluent limitation in this Order;

e. Any spill or discharge of non-storm water not authorized by this Order. Non-storm water discharges not prohibited by the Copermittees pursuant to Section B of this Order need not be reported under this section; and

f. Any violation of this Order.

7. Other Non-Compliance [40 CFR 122.41(l)(7)]
The discharger shall report all instances of noncompliance not reported elsewhere under other sections of this Order at the time annual reports are submitted. The reports shall contain the information listed in part B.6 of Attachment C of this Order.

8. Other Information [40 CFR 122.41(l)(8)]
Where the discharger becomes aware that it failed to submit any relevant facts in a Report of Waste Discharge, or submitted incorrect information in a Report of Waste Discharge, or in any report to the SDRWQCB, it shall promptly submit such facts or information.

9. Signatory Requirements [40 CFR 122.41(k)(1) and 40 CFR 122.22]
All applications, reports, or information submitted to the SDRWQCB shall be signed and certified.

a. All Reports of Waste Discharge shall be signed as follows:

(1) For a corporation: by a responsible corporate officer. For the purpose of this section, a responsible corporate officer means: (a) a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation; or (b) the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

(2) For a partnership or sole proprietorship: by a general partner or the proprietor, respectively; or

(3) For a municipality, State, Federal or other public agency: by either a principal executive officer or ranking elected official. For purposes of this section, a principal executive officer of a Federal agency includes: (a) the chief executive officer of the agency; or (b) a senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., Regional Administrators of USEPA).

b. All reports required by this Order, and other information requested by the SDRWQCB shall be signed by a person described in paragraph a. of this reporting requirement,

or by a duly authorized representative of that person. A person is a duly authorized representative only if:

(1) The authorization is made in writing by a person described in paragraph a. of this reporting requirement;

(2) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of

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plant 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,

(3) The written authorization is submitted to the SDRWQCB.

c. If an authorization under paragraph b. of this reporting requirement is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of paragraph b. of this reporting requirement must be submitted to the SDRWQCB prior to or together with any reports, information, or applications to be signed by an authorized representative.

d. Any person signing a document under paragraph a. or b. of this reporting requirement 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 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.

10. Except for data determined to be confidential under 40 CFR Part 2, all reports prepared in accordance with the terms of this Order shall be available for public inspection at the offices of the SDRWQCB. As required by the Clean Water Act, Reports of Waste Discharge, this Order, and effluent data shall not be considered confidential.

11. The discharger shall submit reports and provide notifications as required by this Order to the following:

DAVE GIBSON
NORTHERN WATERSHED PROTECTION UNIT
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION
9174 SKY PARK COURT, SUITE 100
SAN DIEGO CA 92123-4340
Telephone: (858) 467-4387 Fax: (858) 571-6972

EUGENE BROMLEY
US ENVIRONMENTAL PROTECTION AGENCY
REGION IX
PERMITS ISSUANCE SECTION (W-5-1)
75 HAWTHORNE STREET
SAN FRANCISCO CA 94105

12. Unless otherwise directed, the discharger shall submit three copies of each report required under this Order to the SDRWQCB and one copy to USEPA.

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C. NOTIFICATIONS

1. California Water Code Section 13263(g)
   No discharge of waste into the waters of the state, whether or not such discharge is made pursuant to waste discharge requirements, shall create a vested right to continue such discharge. All discharges of waste into waters of the state are privileges, not rights.

2. The SDRWQCB has, in prior years, issued a limited number of individual NPDES permits for non-storm water discharges to municipal storm water conveyance systems. The SDRWQCB or SWRCB may in the future, upon prior notice to the Copermittee(s), issue an NPDES permit for any non-storm water discharge (or class of non-storm water discharges) to a municipal storm water conveyance system. Copermittees may prohibit any non-storm water discharge (or class of non-storm water discharges) to a municipal storm water conveyance system that is authorized under such separate NPDES permits.

3. Enforcement Provisions [40 CFR 122.41(a)(2)] [California Water Code §§ 13385 and 13387]
   The Clean Water Act provides that any person who violates section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any condition or limitation of this Order, 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 of this Order, is subject to criminal penalties of $2,500 to $25,000 per day of violation, or imprisonment of not more than one 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 two 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 three 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 six years, or both. Any person who knowingly violates section 301, 302, 303, 306, 307, 308, 318 or 405 of the Act, or any condition or limitation of this Order, and who knows at that time that he or she 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 Clean Water Act, 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.

4. Except as provided in Standard Provisions A.10. and A.11. in Attachment C of this Order, nothing in this Order shall be construed to relieve the discharger from civil or criminal penalties for noncompliance.

5. Nothing in this Order shall be construed to preclude the institution of any legal action or relieve the discharger from any responsibilities, liabilities, or penalties to which the discharger is or may be subject to under Section 311 of the Clean Water Act.

6. Nothing in this Order shall be construed to preclude institution of any legal action or relieve the discharger from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority preserved by Section 510 of the Clean Water Act.

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7. This Order shall become effective on **February 13, 2002**, provided the USEPA Regional Administrator has no objection. If the Regional Administrator objects to its issuance, this Order shall not become effective until such objection is withdrawn.

8. This Order supersedes Order No. 96-03 upon the effective date of this Order.

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ATTACHMENT D

GLOSSARY

Beneficial Uses - The uses of water necessary for the survival or well being of man, plants, and wildlife. These uses of water serve to promote the tangible and intangible economic, social, and environmental goals "Beneficial Uses" of the waters of the State that may be protected against 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. Existing beneficial uses are uses that were attained in the surface or ground water on or after November 28, 1975; and potential beneficial uses are uses that would probably develop in future years through the implementation of various control measures. "Beneficial Uses" are equivalent to "Designated Uses" under federal law. [California Water Code Section 13050(f)].

Best Available Technology (BAT) – BAT is the acronym for best available technology economically achievable. BAT is the technology-based standard established by congress in CWA section 402(p)(3)(A) for industrial dischargers of storm water. Technology-based standards establish the level of pollutant reductions that dischargers must achieve, typically by treatment or by a combination of treatment and best management practices, or BMPs. For example, secondary treatment (or the removal of 85% suspended solids and BOD) is the BAT for suspended solid and BOD removal from a sewage treatment plant. BAT generally emphasizes treatment methods first and pollution prevention and source control BMPs secondarily.

The best economically achievable technology that will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Environmental Protection Agency Administrator. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the permitting authority deems appropriate.

Best Conventional Technology (BCT) – BCT is an acronym for Best Conventional Technology. BCT is the treatment techniques, processes and procedure innovations, operating methods that eliminate amounts of chemical, physical, and biological characteristics of pollutant constituents to the degree of reduction attainable through the application of the best management practices to the maximum extent practicable.

Best Management Practices - Best Management Practices (BMPs) are defined in 40 CFR 122.2 as 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. In the case of municipal storm water permits, BMPs are typically used in place of numeric effluent limits.

Bioaccumulate - The progressive accumulation of contaminants in the tissues of organisms through any route including respiration, ingestion, or direct contact with contaminated water, sediment, pore water, or dredged material to a higher concentration than in the surrounding environment. Bioaccumulation occurs with exposure and is independent of the tropic level.

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Bioassessment - The use of biological community information to evaluate the biological integrity of a water body and its watershed. With respect to aquatic ecosystems, bioassessment is the collection and analysis of samples of the benthic macroinvertebrate community together with physical/habitat quality measurements associated with the sampling site and the watershed to evaluate the biological condition (i.e. biological integrity) of a water body.

Bioconcentration – A process by which there is a net accumulation of a chemical directly from water into aquatic organisms resulting from simultaneous uptake and elimination by gill or epithelial tissue. Bioconcentration differs from bioaccumulation in that bioaccumulation refers to the progressive concentration of contaminants in the tissues of organisms through multiple pathways.

Biocriteria - Under the Clean Water Act, numerical values or narrative expressions that define a desired biological condition for a water body that are legally enforceable. The U.S. EPA defines biocriteria as: "numerical values or narrative expressions that describe the reference biological integrity of aquatic communities inhabiting waters of a given designated aquatic life use...(that)...describe the characteristics of water body segments least impaired by human activities."

Biological Integrity - Defined in Karr J.R. and D.R. Dudley. 1981. Ecological perspective on water quality goals. Environmental Management 5:55-68 as: "A balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of natural habitat of the region." Also referred to as ecosystem health.

Biomagnication – The transfer and progressive increase in tissue concentrations of a contaminant along the food chain. Because some pollutants can be transferred to higher trophic levels, carnivores at the top of the food chain, such as predatory fish, birds, and mammals (including humans), obtain most of their pollution burden from aquatic ecosystems by ingestion. Thus, although such pollutants may only be present in receiving waters in low concentrations, they can have a significant impact to the integrity of the ecosystem through biomagnification.

Clean Water Act Section 402(p) - [33 USC 1342(p)] is the federal statute requiring municipal and industrial dischargers to obtain NPDES permits for their discharges of storm water.

Clean Water Act Section 303(d) Water Body - is an impaired water body in which water quality does not meet applicable water quality standards and/or is not expected to meet water quality standards, even after the application of technology based pollution controls required by the CWA. The discharge of urban runoff to these water bodies by the Copermittees is significant because these discharges can cause or contribute to violations of applicable water quality standards.

Contamination - As defined in the Porter-Cologne Water Quality Control Act, contamination is "an impairment of the quality of waters of the state by waste to a degree which creates a hazard to the 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."

Designated Waste - Designated waste is defined as a "nonhazardous waste which consists of pollutants which, under ambient environmental conditions at the waste management unit, could be released at concentrations in excess of applicable water quality objectives, or which could cause degradation of waters of the state." [CCR Title 27, Chapter 3, Subchapter 2, Article 2, Section 20210; WC Section 13173]

Effluent Limitations - Limitations on the volume of each waste discharge, and the quantity and concentrations of pollutants in the discharge. The limitations are designed to ensure that the

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discharge does not cause water quality objectives to be exceeded in the receiving water and does not adversely affect beneficial uses.

Effluent limitations are limitations of the quantity and concentrations of pollutants in a discharge. The limitations are designed to ensure that the discharge does not cause water quality objectives to be exceeded in the receiving water and does not adversely affect beneficial uses. In other words, an effluent limit is the maximum concentration of a pollutant that a discharge can contain. To meet effluent limitations, the effluent typically must undergo one or more forms of treatment to remove pollutants in order to lower the pollutant concentration below the limit. Effluent limits are typically numeric (e.g., 10 mg/l), but can also be narrative (e.g., no toxics in toxic amounts).

Erosion – When land is diminished or warn 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.

Grading - The cutting and/or filling of the land surface to a desired slope or elevation.

Hazardous Waste - Hazardous waste is defined as "any waste which, under Section 600 of Title 22 of this code, is required to be managed according to Chapter 30 of Division 4.5 of Title 22 of this code." [CCR Title 22, Division 4.5, Chapter 11, Article 1]

Illicit Discharge - 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 form the municipal separate storm sewer) and discharges resulting from fire fighting activities.

Inert Waste - Inert waste is defined as one that "does not contain hazardous waste or soluble pollutants at concentrations in excess of applicable water quality objectives, and does not contain significant quantities of decomposable waste." [CCR Title 27, Chapter 3, Subchapter 2, Article 2, Section 20230]

MEP – MEP is the acronym for Maximum Extent Practicable. MEP is the technology-based standard established by Congress in CWA section 402(p)(3)(B)(iii) that municipal dischargers of storm water (MS4s) must meet. Technology-based standards establish the level of pollutant reductions that dischargers must achieve, typically by treatment or by a combination of treatment and best management practices (BMPs). MEP generally emphasizes pollution prevention and source control BMPs primarily (as the first line of defense) in combination with treatment methods serving as a backup (additional line of defense). MEP considers economics and is generally, but not necessarily, less stringent than BAT. A definition for MEP is not provided either in the statute or in the regulations. Instead the 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 Urban Runoff Management Plan. Their total collective and individual activities conducted pursuant to the Urban Runoff Management 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 system maintenance). In the absence of a proposal acceptable to the SDRWQCB, the SDRWQCB defines MEP.

In a memo dated February 11, 1993, entitled "Definition of Maximum Extent Practicable," Elizabeth Jennings, Senior Staff Counsel, SWRCB addressed the achievement of the MEP standard as follows:

> *"To achieve the MEP standard, municipalities must employ whatever Best Management Practices (BMPs) are technically feasible (i.e., are likely to be effective) and are not cost*

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prohibitive. The major emphasis is on technical feasibility. Reducing pollutants to the MEP means choosing effective BMPs, and rejecting applicable BMPs only where other effective BMPs will serve the same purpose, or the BMPs would not be technically feasible, or the cost would be prohibitive. In selecting BMPs to achieve the MEP standard, the following factors may be useful to consider:

a. *Effectiveness: Will the BMPs address a pollutant (or pollutant source) of concern?*
b. *Regulatory Compliance: Is the BMP in compliance with storm water regulations as well as other environmental regulations?*
c. *Public Acceptance: Does the BMP have public support?*
d. *Cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefits to be achieved?*
e. *Technical Feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc?*

The final determination regarding whether a municipality has reduced pollutants to the maximum extent practicable can only be made by the Regional or State Water Boards, and not by the municipal discharger. If a municipality reviews a lengthy menu of BMPs and chooses to select only a few of the least expensive, it is likely that MEP has not been met. On the other hand, if a municipal discharger employs all applicable BMPs except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit derived, it would have met the standard. Where a choice may be made between two BMPs that should provide generally comparable effectiveness, the discharger may choose the least expensive alternative and exclude the more expensive BMP. However, it would not be acceptable either to reject all BMPs that would address a pollutant source, or to pick a BMP base solely on cost, which would be clearly less effective. In selecting BMPs the municipality must make a serious attempt to comply and practical solutions may not be lightly rejected. In any case, the burden would be on the municipal discharger to show compliance with its permit. After selecting a menu of BMPs, it is the responsibility of the discharger to ensure that all BMPs are implemented."

Municipal Storm Water Conveyance System – (See Municipal Separate Storm Sewer System or MS4).

Municipal Separate Storm Sewer System (MS4) – MS4 is an acronym for Municipal Separate Storm Sewer System. A Municipal Separate Storm Sewer System is a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, natural drainage features or channels, modified natural channels, 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 designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designated or used for collecting of conveying storm water; (iii) Which is not a combined sewer; (iv) Which is not part of the Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

Historic and current development make use of natural drainage patterns and features as conveyances for urban runoff. Urban streams used in this manner are part of the municipalities MS4 regardless of whether they are natural, man-made, or partially modified features. In these cases, the urban stream is both an MS4 and a receiving water.

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National Pollution Discharge Elimination System (NPDES) - These permits pertain to the discharge of waste to surface waters only. All State and Federal NPDES permits are also WDRs.

Non-hazardous Solid Waste - Non-hazardous solid waste means all putrescible and nonputrescible solid, semi-sold, 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, manure, vegetable or animal solid and semi-sold wastes and other discarded solid or semi-solid waste; provided that such wastes do not contain wastes which must be managed as hazardous wastes, or wastes which contain soluble pollutants in concentration which exceed applicable water quality objectives or could cause degradation of wasters of the state." [CCR Title 27, Chapter 3, Subchapter 2, Article 2, Section 20220]

Non Point Source (NPS) – Non point source refers to diffuse, widespread sources of pollution. These sources may be large or small, but are generally numerous throughout a watershed. Non Point Sources include but are not limited to urban, agricultural, or industrial areas, roads, highways, construction sites, communities served by septic systems, recreational boating activities, timber harvesting, mining, livestock grazing, as well as physical changes to stream channels, and habitat degradation. NPS pollution can occur year round any time rainfall, snowmelt, irrigation, or any other source of water runs over land or through the ground, picks up pollutants from these numerous, diffuse sources and deposits them into rivers, lakes, and coastal waters or introduces them into ground water.

Non-Storm Water - Non-storm water consists of all discharges to and from a storm water conveyance system that do not originate from precipitation events (i.e., all discharges from a conveyance system other than storm water). Non-storm water includes illicit discharges, non-prohibited discharges, and NPDES permitted discharges. An illicit discharge is defined at 40 CFR 122.26(b)(2) as any discharge to a municipal storm water conveyance system that is not composed entirely of storm water except discharges pursuant to a separate NPDES permit and discharges resulting from emergency fire fighting activities.

Nuisance - As defined in the Porter-Cologne Water Quality Control Act a nuisance is "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."

Numeric effluent limitations - The typical method by which effluent limits are prescribed for pollutants in waste discharge requirements implementing the federal NPDES regulations. When numeric effluent limits are met at the "end-of-pipe", the effluent discharge generally will not cause water quality standards to be exceeded in the receiving waters (i.e., water quality standards will also be met).

Person - A person is defined as an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof. [40 CFR 122.2].

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.

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Pollution - As defined in the Porter-Cologne Water Quality Control Act, pollution is "the alteration of the quality of the waters of the State by waste, to a degree that unreasonably affects the either of the following: A) The waters for beneficial uses; or 2) Facilities that serve these beneficial uses." Pollution may include contamination.

Pollutant - A pollutant is broadly defined 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.

Pollution Prevention - Pollution prevention is defined as practices and processes that reduce or eliminate the generation of pollutants, in contrast to source control, treatment, or disposal.

Post-Construction BMPs - A subset of BMPs including structural and non-structural controls which detain, retain, filter, or educate to prevent the release of pollutants to surface waters during the final functional life of development.

Pre-Development Runoff Conditions - The 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-induces land activities occurred. This definition pertains to redevelopment as well as initial development.

Receiving Water Limitations - Waste discharge requirements issued by the SDRWQCB typically include both: (1) "Effluent Limitations" (or "Discharge Limitations") that specify the technology-based or water-quality-based effluent limitations; and (2) "Receiving Water Limitations" that specify the water quality objectives in the Basin Plan as well as any other limitations necessary to attain those objectives. In summary, the "Receiving Water Limitations" provision is the provision used to implement the requirement of CWA section 301(b)(1)(C) that NPDES permits must include any more stringent limitations necessary to meet water quality standards.

Sediment - Soil, sand, and minerals washed from land into water. Sediment resulting from anthropogenic sources (i.e. human induced land disturbance activities) is considered a pollutant. This Order regulates only the discharges of sediment from anthropogenic sources and does not regulate naturally occurring sources of sediment. Sediment can destroy fish-nesting areas, clog animal habitats, and cloud waters so that sunlight does not reach aquatic plants.

Storm Water - "Storm water" is as defined urban runoff and snowmelt runoff consisting only of those discharges which originate from precipitation events. Storm water is that portion of precipitation that flows across a surface to the storm drain system or receiving waters. Examples of this phenomenon include: the water that flows off a building's roof when it rains (runoff from an impervious surface); the water that flows into streams when snow on the ground begins to melt (runoff from a semi-pervious surface); and the water that flows from a vegetated surface when rainfall is in excess of the rate at which it can infiltrate into the underlying soil (runoff from a pervious surface). When all factors are equal, runoff increases as the perviousness of a surface decreases. During precipitation events in urban areas, rain water picks up and transports pollutants through storm water conveyance systems, and ultimately to waters of the United States.

Toxicity - Adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies). The water quality objectives for toxicity provided in the Water Quality Control Plan, San Diego Basin, Region 9, (Basin Plan), state in part... *"All waters shall be free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life....The survival of aquatic life in surface waters subjected to a waste*

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discharge or other controllable water quality factors, shall not be less than that for the same water body in areas unaffected by the waste discharge".... Urban runoff discharges from MS4s are considered toxic when (1) the toxic effect observed in an acute toxicity test exceeds zero Toxic Units Acute (Tua=0); or (2) the toxic effect observed in a chronic toxicity test exceeds one Toxic Unit Chronic (Tuc=1). Urban runoff discharges from MS4s often contain pollutants that cause toxicity.

Total Maximum Daily Load (TMDL) - The TMDL is the maximum amount of a pollutant that can be discharged into a water body from all sources (point and non-point) and still maintain water quality standards. Under Clean Water Act section 303(d), TMDLs must be developed for all water bodies that do not meet water quality standards after application of technology-based controls.

Urban Runoff - Urban runoff is defined 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).

Waste - As defined in California Water Code Section 13050(d), "waste includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal."

Article 2 of CCR Title 23, Chapter 15 (Chapter 15) contains a waste classification system which applies to solid and semi-solid waste which cannot be discharged directly or indirectly to water of the state and which therefore must be discharged to land for treatment, storage, or disposal in accordance with Chapter 15. There are four classifications of waste (listed in order of highest to lowest threat to water quality): hazardous waste, designated waste, nonhazardous solid waste, and inert waste.

Water Quality Objective - Numerical or narrative limits on constituents or characteristics of water designated to protect designated beneficial uses of the water. [California Water Code Section 13050 (h)]. California's water quality objectives are established by the State and Regional Water Boards in the Water Quality Control Plans.

As stated in the Porter-Cologne Requirements for discharge (CWC 13263): "(Waste discharge) 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 objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241."

A more comprehensive list of legal authority containing water quality objectives applicable to this Order can be found in Finding 37 and in Section VII Directives Discussion Underlying Broad Legal Authority for Order R9-2002-0001 pp. 76-78.

Numeric or narrative limits for pollutants or characteristics of water designed to protect the beneficial uses of the water. In other words, a water quality objective is the maximum concentration of a pollutant that can exist in a receiving water and still generally ensure that the beneficial uses of the receiving water remain protected (i.e., not impaired). Since water quality objectives are designed specifically to protect the beneficial uses, when the objectives are violated the beneficial uses are, by definition, no longer protected and become impaired. This is a fundamental concept under the Porter Cologne Act. Equally fundamental is Porter Cologne's definition of pollution. A condition of pollution exists when the water quality needed to support designated beneficial uses has become unreasonably affected or impaired; in other words, when

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the water quality objectives have been violated. These underlying definitions (regarding beneficial use protection) are the reason why all waste discharge requirements implementing the federal NPDES regulations require compliance with water quality objectives. (Water quality objectives are also called water quality criteria in the Clean Water Act.)

Water Quality Standards - are defined 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.

Waters of the State - Any water, surface or underground, including saline waters within the boundaries of the State [California Water Code Section 13050 (e)]. The definition of the Waters of the State is broader than that for the Waters of the United States in that all water in the State is considered to be a Waters of the State regardless of circumstances or condition. Under this definition, a Municipal Separate Storm Sewer System (MS4) is always considered to be a Waters of the State.

Waters of the United States - Waters of the United States can be broadly defined as navigable surface waters and all tributary surface waters to navigable surface waters. Groundwater is not considered to be a Waters of the United States.

As defined in the 40 CFR 122.2, the Waters of the U.S. are defined as: **"(a) All 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;** (b) All interstate waters, including interstate "wetlands;" (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for industrial purposes by industries in interstate commerce; (d) All impoundments of waters otherwise defined as waters of the United States under this definition; **(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;** (f) The territorial seas; and (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with the EPA."

Watershed - That geographical area which drains to a specified point on a water course, usually a confluence of streams or rivers (also known as drainage area, catchment, or river basin).

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ATTACHMENT E

DRY WEATHER MONITORING PROGRAM SPECIFICATIONS - URBAN RUNOFF

E.1 Dry Weather Monitoring Program

Each Copermittees shall review and revise as necessary its Dry Weather Monitoring Program to comply with section F.5 of this Order. The Dry Weather Monitoring Program for each Copermittee shall meet or exceed the specifications of this Attachment. The objectives of the Dry Weather Monitoring Program are:

- Assessing compliance with Order No. R9-2002-0001;
- Detect and eliminate illicit discharges and illegal connections to the MS4; and
- Characterize urban runoff within the MS4 system with respect to water quality constituents that may cause or contribute to exceedances of receiving water quality objectives when discharged to receiving waters.

E.2 Dry Weather Monitoring Program Document

Based upon a review of its Detection/Elimination of Illegal Discharges and Illicit Connections Program, each Copermittee shall revise or develop a Dry Weather Monitoring Program Document that meets or exceeds the specifications listed in section E.4 of this Attachment. The Dry Weather Monitoring Program shall be designed and implemented to address the objectives listed in section E.1 of this Attachment. Each Copermittee shall submit its Dry Weather Monitoring Program to the Principal Permittee as part of its Jurisdictional Urban Runoff Management Program Document on the date prescribed by the Principal Permittee. The Principal Permittee shall collectively submit the dry weather monitoring maps and procedures to the SDRWQCB within **365** days of adoption of this Order.

E.3 Implementation of the Dry Weather Monitoring Program

Each Copermittee shall implement its Dry Weather Monitoring Program by May 1, 2003. Following the adoption of this Order and prior to implementation of the Dry Weather Monitoring Program under the Jurisdictional URMP, each Copermittee shall continue to implement the Illicit Discharge and Illegal Connection programs and commitments described in the Orange County Water Quality Monitoring Program (99-04 Plan) and the proposed Drainage Area Management Plan (DAMP).

E.4 Dry Weather Monitoring Program Specifications

Each Copermittee shall develop or revise its Dry Weather Monitoring Program to meet or exceed the following requirements:

a. Develop MS4 Map: Each Copermittee shall develop or obtain an up-to-date labeled map of its entire municipal separate storm sewer system (MS4) and the corresponding drainage watersheds within its jurisdiction. The use of a Geographic Information System (GIS) is highly recommended, but not required. The accuracy of the MS4 map shall be confirmed and updated at least annually during monitoring activities.

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b. Monitoring Stations: Based upon a review of its past Dry Weather Monitoring Programs, each Copermittee shall select dry weather monitoring stations within its jurisdiction to be monitored in the Dry Weather Monitoring Program.

(1) Each Copermittee shall develop or revise its program to describe the rationale used to determine the number and locations of stations necessary to comply with the Order.
(2) Each Copermittee shall confirm that each major drainage area within its jurisdiction contains at least one station.
(3) Stations shall be either major outfalls or other outfall points (or any other point of access such as manholes) located throughout the MS4 to provide adequate coverage of the entire MS4 system.
(4) Each Copermittee shall clearly identify each dry weather monitoring station on its MS4 Map as either a separate GIS layer or a map overlay hereafter referred to as a Dry Weather Monitoring Stations Map.

c. Determining Sampling Frequency: Dry weather analytical and field screening monitoring shall be conducted at each identified station at least twice between May 1st and September 30th of each year or as more frequently as the Copermittee determines is necessary to comply with the requirements of Section F.5 of the Order.

(1) Each Copermittee shall develop or revise written procedures that describe the criteria and process used to determine the number and frequency of inspections, field screening and analytical monitoring to be performed.
(2) Any changes in Dry Weather Monitoring inspection or sampling frequency shall be described and reported in detail annually in the Dry Weather Monitoring Report section of the Jurisdictional URMP Annual Report.

d. Develop Dry Weather Analytical Monitoring Procedures: Each Copermittee shall develop or revise written procedures for dry weather analytical and field screening monitoring (consistent with 40 CFR part 136), that shall include field observations, field screening monitoring, and analytical monitoring.

(1) The Dry Weather Monitoring Program shall be designed to emphasize frequent, geographically widespread inspections, monitoring, and follow up investigations to detect illicit discharges and illegal connections. At a minimum, the procedures must be based on or incorporate the following guidelines and criteria:
(a) At each site inspected or sampled, record general information such as time since last rain, quantity of last rain, site descriptions (i.e., conveyance type, dominant watershed land uses), flow estimation (i.e., width of water surface, approximate depth of water, approximate flow velocity, flow rate), and visual observations (e.g., odor, color, clarity, floatables, deposits/stains, vegetation condition, structural condition, and biology).
(b) If flow or ponded runoff is observed at a station and there has been at least seventy-two (72) hours of dry weather, shall make observations and collect at least one (1) set of grab samples for field screening and/or analytical testing that meets or exceeds the requirements of section E.4.d.1.d (Field Screening Parameters) or E.4.d.1.e (Analytical Monitoring Parameters).
(c) Perform field screening analysis on all sites with ponded or flowing water and at a minimum collect samples at no less than 25% of these sites for analytical testing.
(d) Field Screening Monitoring Parameters: At a minimum, conduct field screening analysis of the following constituents:
(1) Specific conductance (calculate estimated Total Dissolved Solids).
(2) Turbidity
(3) pH

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(4) Reactive Phosphorous
(5) Nitrate Nitrogen
(6) Ammonia Nitrogen
(7) Phenol
(8) Surfactants (MBAS)

(e) Analytical Monitoring Parameters: At a minimum, collect samples for analytical laboratory analysis of the following constituents:
(1) Total Hardness
(2) Oil and Grease
(3) Diazinon and Chlorpyrifos
(4) Cadmium (Dissolved)
(5) Copper (Dissolved)
(6) Lead (Dissolved)
(7) Zinc (Dissolved)
(8) Enterococcus Bacteria
(9) Total Coliform Bacteria
(10) Fecal Coliform Bacteria

(f) If the station is dry (no flowing or ponded runoff), make and record all applicable observations and select another station from the list of alternate stations for monitoring.

(2) The Dry Weather Monitoring Program shall include criteria for dry weather inspection, analytical and field screening monitoring results whereby exceedance of the criteria will require follow-up investigations to be conducted to identify the source causing the exceedance of the criteria.
(3) Dry weather analytical and field screening monitoring stations identified to exceed dry weather monitoring criteria for any constituents shall continue to be screened in subsequent years.
(4) The Dry Weather Monitoring Program shall include procedures for source identification follow up investigations in the event of exceedance of dry weather analytical and field screening monitoring result criteria. These procedures shall be consistent with procedures required in section F.5.c. of this Order.
(5) The Dry Weather Monitoring Program shall include procedures to eliminate detected illicit discharges and connections. These procedures shall be consistent with each Copermittee's Illicit Discharge and Elimination component of its Jurisdictional Urban Runoff Management Plan as discussed in section F.5 of this Order.
(6) During monitoring, the accuracy of its MS4 map and shall be confirmed. Correct any inaccuracies in either the MS4 map or the Dry Weather Monitoring Stations Map and resubmit the corrected maps in the next annual report.

E.5 Summarize and Report Dry Weather Monitoring Results

As part of its individual Jurisdictional URMP Annual Report, each Copermittee shall summarize and report on its Dry Weather Monitoring Program results. The data shall be presented in tabular and graphical form. The reporting shall include all inspection, field screening, and analytical monitoring results. Each Copermittee shall also report all follow up and elimination activities for potential illicit discharges and connections undertaken by the Copermittee during that year. Dry weather analytical monitoring reports shall comply with all monitoring and standard reporting requirements in Attachments B and C of Order R9-2002-0001. The Principal Permittee shall submit to the SDRWQCB the individual Dry Weather Monitoring reports as part of the unified Jurisdictional URMP Annual Report prior to November 9, 2003, and every year thereafter.

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TAB "2"

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California Regional Water Quality Control Board
San Diego Region

Waste Discharge Requirements for Discharges of Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watershed of the County of Orange, The Incorporated Cities of Orange County, and The Orange County Flood Control District Within the San Diego Region

Order No. R9-2009-0002
NPDES NO. CAS0108740

December 16, 2009

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To request copies of the Orange County Municipal Storm Water Permit, please contact Ben Neill, Water Resources Control Engineer at (858) 467 – 2983, bneill@waterboards.ca.gov

Documents also are available at: http://www.waterboards.ca.gov/sandiego

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WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES OF RUNOFF FROM THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s) DRAINING THE WATERSHED OF THE COUNTY OF ORANGE, THE INCORPORATED CITIES OF ORANGE COUNTY, AND THE ORANGE COUNTY FLOOD CONTROL DISTRICT WITHIN THE SAN DIEGO REGION

Adopted by the
California Regional Water Quality Control Board
San Diego Region
on December 16, 2009

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STATE OF CALIFORNIA

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LINDA S. ADAMS, Agency Secretary, California Environmental Protection Agency

California Regional Water Quality Control Board
San Diego Region

David King *Vice Chair*	Recreation / Wildlife
Eric Anderson	Irrigated Agriculture
Wayne Rayfield	Water Quality
Grant Destache	Industrial Water Use
George Loveland	Water Supply
Marc Luker	Undesignated (Public)

David W. Gibson, *Executive Officer*
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This permit was prepared under the direction of

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The California Regional Water Quality Control Board, San Diego Region (hereinafter Regional Board), finds that:

A. BASIS FOR THE ORDER

1. This Order is based on the federal Clean Water Act (CWA), the Porter-Cologne Water Quality Control Act (Division 7 of the Water Code, 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 Resources Control Board (State Board), the Water Quality Control Plan for the San Diego Basin adopted by the Regional Board, the California Toxics Rule, and the California Toxics Rule Implementation Plan.

2. This Order reissues National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0108740, which was first adopted by the Regional Board on July 16, 1990 (Order No. 90-38), and then reissued on August 8, 1996 (Order No. 96-03) and February 13, 2002 (Order No. R9-2002-01). On August 21, 2006, in accordance with Order No. R9-2002-01, the County of Orange, as the Principal Copermittee, submitted a Report of Waste Discharge (ROWD) for reissuance of the municipal separate storm sewer system (MS4) Permit.

3. This Order is consistent with the following precedential Orders adopted by the State Water Resources Control Board (State Board) addressing MS4 NPDES Permits: Order 99-05, Order WQ-2000-11, Order WQ 2001-15, Order WQO 2002-0014, and Order WQ-2009-0008 (*SWRCB/OCC FILE A-1780).*

4. The Fact Sheet / Technical Report for the Order No. R9-2009-0002, NPDES No. CAS0108740, Waste Discharge Requirements for Discharges of Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of Orange, the Incorporated Cities of Orange County, and the Orange County Flood Control District Within the San Diego Region includes cited regulatory and legal references and additional explanatory information and data 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 into these findings.

B. REGULATED PARTIES

1. Each of the persons in Table 1 below, hereinafter called Copermittees or dischargers, owns or operates an MS4, through which it discharges runoff into waters of the United States within the San Diego 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

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violation of a water quality standard; or (4) an MS4 which is a significant contributor of pollutants to waters of the United States (waters of the U.S).

Table 1. Municipal Copermittees

1. City of Aliso Viejo	8. City of Mission Viejo
2. City of Dana Point	9. City of Rancho Santa Margarita
3. City of Laguna Beach	10. City of San Clemente
4. City of Laguna Hills	11. City of San Juan Capistrano
5. City of Laguna Niguel	12. County of Orange
6. City of Laguna Woods	13. Orange County Flood Control District
7. City of Lake Forest	

C. DISCHARGE CHARACTERISTICS

1. Runoff discharged from an MS4 contains waste, as defined in the California Water Code (CWC), and pollutants that adversely affect the quality of the waters of the State. The discharge of runoff from an MS4 is a "discharge of pollutants from a point source" into waters of the U.S. as defined in the CWA.

2. MS4 storm water and non-storm water discharges are likely to contain pollutants that cause or threaten to cause a violation of water quality standards, as outlined in the Regional Board's Water Quality Control Plan for the San Diego Basin (Basin Plan). Storm water and non-storm water discharges from the MS4 are subject to the conditions and requirements established in the San Diego Basin Plan for point source discharges. These surface water quality standards must be complied with at all times, irrespective of the source and manner of discharge.

3. The most common categories of pollutants in runoff include 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 (decaying vegetation, animal waste); detergents; and trash.

4. The discharge of pollutants and/or increased flows from MS4s may cause or threaten to cause the concentration of pollutants to exceed applicable receiving water quality objectives and/or impair or threaten to impair designated beneficial uses resulting in a condition of pollution (i.e., unreasonable impairment of water quality for designated beneficial uses), contamination, or nuisance.

5. Pollutants in runoff can threaten and adversely affect human health. Human illnesses have been clearly linked to recreating near storm drains flowing to coastal waters. Also, runoff pollutants in receiving waters can bioaccumulate in the tissues of invertebrates and fish, which may be eventually consumed by humans.

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6. Runoff discharges from MS4s often contain pollutants that cause toxicity to aquatic organisms (i.e., adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies). Toxic pollutants impact the overall quality of aquatic systems and beneficial uses of receiving waters.

7. The Copermittees discharge runoff into lakes, drinking water reservoirs, rivers, streams, creeks, bays, estuaries, coastal lagoons, the Pacific Ocean, and tributaries thereto within one of the eleven hydrologic units (San Juan Hydrologic Unit) comprising the San Diego Region as shown in Tables 2a and 2b. Some of the receiving water bodies have been designated as impaired by the Regional Board and the United States Environmental Protection Agency (USEPA) in 2006 pursuant to CWA section 303(d). Also shown in the Tables are the watershed management areas (WMAs) as defined in the Regional Board report, Watershed Management Approach, January 2002.

Table 2a. Common Watersheds and CWA Section 303(d) Impaired Waters

Regional Board Watershed Management Area (WMA)	**Hydrologic Area (HA) or Hydrologic Subarea (HSA) of the San Juan Hydrologic Unit**	**Major Receiving Water Bodies**	**303(d) Pollutant(s)/stressor or Water Quality Effect[1]**
Laguna Coastal Streams	Laguna HA, excluding Aliso HSA and Dana Point HSA	Laguna Canyon Creek, Pacific Ocean	Bacterial indicators Sediment toxicity
Aliso Creek	Aliso HSA	Aliso Creek, English Canyon, Pacific Ocean	Toxicity Phosphorus Bacterial indicators Benzo[b]fluoranthene Dieldrin Sediment Toxicity
Dana Point Coastal Streams	Dana Point HSA	Dana Point Harbor, Salt Creek, Pacific Ocean	Bacterial indicators
San Juan Creek	Mission Viejo HA	San Juan Creek, Trabuco Creek, Oso Creek, Canada Gobernadora, Bell Canyon, Verdugo Canyon, Pacific Ocean	Bacterial indicators DDE Chloride Sulfates Total dissolved solids

[1] The listed 303(d) pollutant(s) do not necessarily reflect impairment of the entire corresponding WMA or all corresponding major surface water bodies. The specific impaired portions of each WMA are listed in the State Water Resources Control Board's 2006 Section 303(d) List of Water Quality Limited Segments.

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Table 2a. Common Watersheds and CWA Section 303(d) Impaired Waters

Regional Board Watershed Management Area (WMA)	Hydrologic Area (HA) or Hydrologic Subarea (HSA) of the San Juan Hydrologic Unit	Major Receiving Water Bodies	303(d) Pollutant(s)/stressor or Water Quality Effect[1]
San Clemente Coastal Streams	San Clemente HA	Prima Deshecha, Segunda Deshecha, Pacific Ocean	Bacterial indicators Phosphorus Turbidity
San Mateo Creek	San Mateo HA	San Mateo Creek, Christianitos Creek, Pacific Ocean	

Table 2b. Common Watersheds and Municipalities

Municipality	Laguna Coastal Streams	Aliso Creek	Dana Point Coastal Streams	San Juan Creek	San Clemente Coastal Streams	San Mateo Creek
Aliso Viejo	☑	☑				
Dana Point			☑	☑		
Laguna Beach	☑	☑				
Laguna Hills *		☑		☑		
Laguna Niguel		☑	☑	☑		
Laguna Woods *		☑				
Lake Forest *		☑				
Mission Viejo		☑		☑		
Rancho Santa Margarita				☑		
San Clemente					☑	☑
San Juan Capistrano				☑		
County of Orange *	☑	☑	☑	☑	☑	☑
Orange County Flood Control District *	☑	☑	☑	☑	☑	
* Municipality also includes areas within watersheds of the Santa Ana Regional Board that are outside the scope of this Order						

8. Trash is a persistent pollutant which can enter receiving waters from the MS4 resulting in accumulation and transport in receiving waters over time. Trash poses a serious threat to the Beneficial Uses of the receiving waters, including, but not limited to, human health, rare and endangered species, navigation and human recreation.

9. The Copermittees' water quality monitoring data submitted to date documents persistent violations of Basin Plan water quality objectives for various runoff-related pollutants (fecal coliform bacteria, total suspended solids, turbidity, metals, etc.) at

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various watershed monitoring stations. Persistent toxicity has also been observed at some watershed monitoring stations. In addition, bioassessment data indicates that the majority of urbanized receiving waters have Poor to Very Poor Index of Biotic Integrity ratings. In sum, the above findings indicate that runoff discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in Orange County.

10. When natural vegetated pervious ground cover is converted to impervious surfaces such as paved highways, streets, rooftops, and parking lots, the natural absorption and infiltration abilities of the land are lost. Therefore, runoff leaving a developed area is significantly greater in runoff volume, velocity, and peak flow rate than pre-development runoff from the same area. Runoff durations can also increase as a result of flood control and other efforts to control peak flow rates. Increased volume, velocity, rate, and duration of runoff, and decreased natural clean sediment loads, greatly accelerate the erosion of downstream natural channels. Significant declines in the biological integrity and physical habitat of streams and other receiving waters have been found to occur with as little as a 3-5 percent conversion from natural to impervious surfaces. The increased runoff characteristics from new development must be controlled to protect against increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

11. Development creates new pollution sources as human population density increases and brings with it proportionately higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, household hazardous wastes, pet wastes, trash, etc. which can either be washed or directly dumped into the MS4. As a result, the runoff leaving the developed urban area is significantly greater in pollutant load than the pre-development runoff from the same area. These increased pollutant loads must be controlled to protect downstream receiving water quality.

12. Development and urbanization especially threaten environmentally sensitive areas (ESAs), such as water bodies designated as supporting a RARE beneficial use (supporting rare, threatened or endangered species) and CWA 303(d)-impaired water bodies. Such areas have a much lower capacity to withstand pollutant shocks than might be acceptable in other areas. In essence, development that is ordinarily insignificant in its impact on the environment may become significant in a particularly sensitive environment. Therefore, additional control to reduce storm water pollutants from new and existing development may be necessary for areas adjacent to or discharging directly to an ESA.

13. Although dependent on several factors, the risks typically associated with properly managed infiltration of runoff (especially from residential land use areas) are not significant. The risks associated with infiltration can be managed by many techniques, including (1) designing landscape drainage features that promote infiltration of runoff, but do not "inject" runoff (injection bypasses the natural processes of filtering and transformation that occur in the soil); (2) taking reasonable

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steps to prevent the illegal disposal of wastes; (3) protecting footings and foundations; (4) ensuring that each drainage feature is adequately maintained in perpetuity; and (5) pretreatment.

14. Non-storm water (dry weather) discharge from the MS4 is not considered a storm water (wet weather) discharge and therefore is not subject to regulation under the Maximum Extent Practicable (MEP) standard from CWA 402(p)(3)(B)(iii), which is explicitly for "Municipal ... *Stormwater Discharges* (emphasis added)" from the MS4. Non-storm water discharges, per CWA 402(p)(3)(B)(ii), are to be effectively prohibited. Such dry weather non-storm water discharges have been shown to contribute significant levels of pollutants and flow in arid, developed Southern California watersheds and are to be effectively prohibited under the Clean Water Act.

15. Non-storm water discharges to the MS4 granted an influent exception [i.e., which are exempt from the effective prohibition requirement set forth in CWA section 402(p)(3)(B)(ii)] under 40 CFR 122. 26 are included withinthis Order. Any exempted discharges identified by Copermittees as a source of pollutants are subsequently required to be *addressed* (emphasis added) as illicit discharges through prohibition and incorporation into existing IC/ID programs. The Copermittees have identified landscape irrigation, irrigation water and lawn water, previously exempted discharges, as a source of pollutants and conveyance of pollutants to waters of the United States.

D. RUNOFF MANAGEMENT PROGRAMS

1. General

a. This Order specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in storm water runoff to the maximum extent practicable (MEP). However, since MEP is a dynamic performance standard, which evolves over time as runoff management knowledge increases, the Copermittees' runoff management programs must continually be assessed and modified to incorporate improved programs, control measures, best management practices (BMPs), etc. in order to achieve the evolving MEP standard. Absent evidence to the contrary, this continual assessment, revision, and improvement of runoff management program implementation is expected to ultimately achieve compliance with water quality standards in the Region.

b. The Copermittees have generally been implementing the jurisdictional runoff management programs required pursuant to Order No. 2002-01 since February 13, 2003. Prior to that, the Copermittees were regulated by Order No. 96-03 since August 8, 1996. Runoff discharges, however, continue to cause or contribute to violations of water quality standards as evidenced by the Copermittees monitoring results.

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c. This Order contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in storm water runoff to the MEP and achieve water quality standards. Some of the new or modified requirements, such as the revised Watershed Runoff Management Program section, are designed to specifically address high priority water quality problems. Other new or modified requirements address program deficiencies that have been noted during audits, report reviews, and other Regional Board compliance assessment activities.

d. Updated Jurisdictional Runoff Management Plans (JRMPs) and Watershed Runoff Management Plans (WRMPs), which describe the Copermittees' runoff management programs in their entirety, are needed to guide the Copermittees' runoff management efforts and aid the Copermittees in tracking runoff management program implementation. It is practicable for the Copermittees to update the JRMPs and WRMPs within one year, since significant efforts to develop these programs have already occurred.

e. Pollutants can be effectively reduced in storm water runoff by the application of a combination of pollution prevention, source control, and treatment control BMPs. Pollution prevention is the reduction or elimination of pollutant generation at its source and is the best "first line of defense." Source control BMPs (both structural and non-structural) minimize the contact between pollutants and flows (e.g., rerouting run-on around pollutant sources or keeping pollutants on-site and out of receiving waters). Treatment control BMPs remove pollutants that have been mobilized by wet-weather or dry-weather flows.

f. Runoff needs to be addressed during the three major phases of urban development (planning, construction, and use) in order to reduce the discharge of pollutants from storm water to the MEP, effectively prohibit non-storm water discharges and protect receiving waters. Development which is not guided by water quality planning policies and principles can unnecessarily result in increased pollutant load discharges, flow rates, and flow durations which can negatively impact receiving water beneficial uses. Construction sites without adequate BMP implementation result in sediment runoff rates which greatly exceed natural erosion rates of undisturbed lands, causing siltation and impairment of receiving waters. Existing development generates substantial pollutant loads which are discharged in runoff to receiving waters.

g. Annual reporting requirements included in this Order are necessary to meet federal requirements and to evaluate the effectiveness and compliance of the Copermittees' programs.

h. This Order establishes Storm Water Action Levels (SALs) for selected pollutants based on USEPA Rain Zone 6 (arid southwest) Phase I MS4 monitoring data for pollutants in storm water. The SALs were computed as the 90th percentile of the data set, utilizing the statistical based population approach, one of three

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approaches recommended by the California Water Board's Storm Water Panel in its report, 'The Feasibility of Numerical Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities (June 2006). SALs are identified in Section D of this Order. Copermittees shall implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water from the permitted areas so as not to exceed the SALs. Exceedance of SALs may indicate inadequacy of programmatic measures and BMPs required in this Order.

2. **Development Planning**

a. The Standard Storm Water Mitigation Plan (SSMP) requirements contained in this Order are consistent with Order WQ-2000-11 adopted by the State Water Resources Control Board (State Board) on October 5, 2000. In the precedential order, the State Board found that the design standards, which essentially require that runoff generated by 85 percent of storm events from specific development categories be infiltrated or treated, reflect the MEP standard. The order also found that the SSMP requirements are appropriately applied to the majority of the Priority Development Project categories contained in Section D.1 of this Order. The State Board also gave Regional Water Quality Control Boards the needed discretion to include additional categories and locations, such as retail gasoline outlets (RGOs), in SSMPs.

b. Controlling runoff pollution by using a combination of onsite source control and site design BMPs augmented with treatment control BMPs before the runoff enters the MS4 is important for the following reasons: (1) Many end-of-pipe BMPs (such as diversion to the sanitary sewer) are typically ineffective during significant storm events. Whereas, onsite source control BMPs can be applied during all runoff conditions; (2) End-of-pipe BMPs are often incapable of capturing and treating the wide range of pollutants which can be generated on a sub-watershed scale; (3) End-of-pipe BMPs are more effective when used as polishing BMPs, rather than the sole BMP to be implemented; (4) End-of-pipe BMPs do not protect the quality or beneficial uses of receiving waters between the pollutant source and the BMP; and (5) Offsite end-of-pipe BMPs do not aid in the effort to educate the public regarding sources of pollution and their prevention.

c. Use of Low-Impact Development (LID) site design BMPs at new development, redevelopment and retrofit projects can be an effective means for minimizing the impact of storm water runoff discharges from the development projects on receiving waters. LID is a site design strategy with a goal of maintaining or replicating the pre-development hydrologic regime through the use of design techniques. LID site design BMPs help preserve and restore the natural hydrologic cycle of the site, allowing for filtration and infiltration which can greatly reduce the volume, peak flow rate, velocity, and pollutant loads of storm water runoff. Current runoff management, knowledge, practices and technology have

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resulted in the use of LID BMPs as an acceptable means of meeting the storm water MEP standard.

d. Retail Gasoline Outlets (RGOs) are significant sources of pollutants in storm water runoff. RGOs are points of convergence for motor vehicles for automotive related services such as repair, refueling, tire inflation, and radiator fill-up and consequently produce significantly higher loadings of hydrocarbons and trace metals (including copper and zinc) than other developed areas.

e. Industrial sites are significant sources of pollutants in runoff. Pollutant concentrations and loads in runoff from industrial sites are similar or exceed pollutant concentrations and loads in runoff from other land uses, such as commercial or residential land uses. As with other land uses, LID site design, source control, and treatment control BMPs are needed at industrial sites in order to meet the MEP standard. These BMPs are necessary where the industrial site is larger than 10,000 square feet. The 10,000 square feet threshold is appropriate, since it is consistent with requirements in other Phase I NPDES storm water regulations throughout California.

f. If not properly designed or maintained, certain BMPs implemented or required by municipalities for runoff management may create a habitat for vectors (e.g. mosquitoes and rodents). Proper BMP design and maintenance to avoid standing water, however, can prevent the creation of vector habitat. Nuisances and public health impacts resulting from vector breeding can be prevented with close collaboration and cooperative effort between municipalities, the Orange County Vector Control District, and the California Department of Public Health during the development and implementation of runoff management programs.

g. The increased volume, velocity, frequency and discharge duration of storm water runoff from developed areas has the potential to greatly accelerate downstream erosion, impair stream habitat in natural drainages, and negatively impact beneficial uses. Development and urbanization increase pollutant loads in storm water runoff and the volume of storm water runoff. Impervious surfaces can neither absorb water nor remove pollutants and thus lose the purification and infiltration provided by natural vegetated soil. Hydromodification measures for discharges to hardened channels are needed for the future restoration of the hardened channels to their natural state, thereby restoring the chemical, physical, and biological integrity and Beneficial Uses of local receiving waters.

3. **Construction and Existing Development**

a. 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, each Copermittee is responsible for enforcing its local permits, plans, and ordinances, and the Regional Board is

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responsible for enforcing the General Construction Activities Storm Water Permit, State Board Order 99-08 DWQ, NPDES No. CAS000002 (General Construction Permit) and the General Industrial Activities Storm Water Permit, State Board Order 97-03 DWQ, NPDES No. CAS000001 (General Industrial Permit) and any reissuance of these permits. NPDES municipal regulations require that municipalities develop and implement measures to address runoff from industrial and construction activities. Those measures may require the implementation of additional BMPs than are required under the statewide general permits for activities subject to both State and local regulation.

b. Identification of sources of pollutants in runoff (such as municipal areas and activities, industrial and commercial sites/sources, construction sites, and residential areas), development and implementation of BMPs to address those sources, and updating ordinances and approval processes are necessary for the Copermittees to ensure that discharges of pollutants from its MS4 in storm water are reduced to the MEP and that non-storm water discharges are not occurring. Inspections and other compliance verification methods are needed to ensure minimum BMPs are implemented. Inspections are especially important at high risk areas for pollutant discharges.

c. Historic and current development makes use of natural drainage patterns and features as conveyances for runoff. Urban streams used in this manner are part of the municipalities MS4 regardless of whether they are natural, anthropogenic, or partially modified features. In these cases, the urban stream is both an MS4 and receiving water.

d. As operators of the MS4s, the Copermittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or control. These discharges may cause or contribute to a condition of contamination or a violation of water quality standards.

e. Waste and pollutants which are deposited and accumulate in MS4 drainage structures will be discharged from these structures to waters of the U.S. unless they are removed. These discharges may cause or contribute to, or threaten to cause or contribute to, a condition of pollution in receiving waters. For this reason, pollutant discharges from storm water into MS4s must be reduced using a combination of management measures, including source control, and an effective MS4 maintenance program must be implemented by each Copermittee.

f. Enforcement of local runoff related ordinances, permits, and plans is an essential component of every runoff management program and is specifically required in the federal storm water regulations and this Order. Each Copermittee is individually responsible for adoption and enforcement of ordinances and/or policies, implementation of identified control measures/BMPs needed to prevent

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or reduce pollutants in storm water runoff, and for the allocation of funds for the capital, operation and maintenance, administrative, and enforcement expenditures necessary to implement and enforce such control measures/BMPs under its jurisdiction. Education is an important aspect of every effective runoff management program and the basis for changes in behavior at a societal level. Education of municipal planning, inspection, and maintenance department staffs is especially critical to ensure that in-house staffs understand how their activities impact water quality, how to accomplish their jobs while protecting water quality, and their specific roles and responsibilities for compliance with this Order. Public education, designed to target various urban land users and other audiences, is also essential to inform the public of how individual actions affect receiving water quality and how adverse effects can be minimized.

g. Public participation during the development of runoff management programs is necessary to ensure that all stakeholder interests and a variety of creative solutions are considered.

h. Retrofitting existing development with storm water treatment controls, including LID, is necessary to address storm water discharges from existing development that may cause or contribute to a condition of pollution or a violation of water quality standards. Although SSMP BMPs are required for redevelopment, the current rate of redevelopment will not address water quality problems in a timely manner. Cooperation with private landowners is necessary to effectively identify, implement and maintain retrofit projects for the preservation, restoration, and enhancement of water quality.

4. **Watershed Runoff Management**

a. Since runoff within a watershed can flow from and through multiple land uses and political jurisdictions, watershed-based runoff management can greatly enhance the protection of receiving waters. Such management provides a means to focus on the most important water quality problems in each watershed. By focusing on the most important water quality problems, watershed efforts can maximize protection of beneficial use in an efficient manner. Effective watershed-based runoff management actively reduces pollutant discharges and abates pollutant sources causing or contributing to watershed water quality problems. Watershed-based runoff management that does not actively reduce pollutant discharges and abate pollutant sources causing or contributing to watershed water quality problems can necessitate implementation of the iterative process outlined in section A.3 of the Tentative Order. Watershed management of runoff does not require Copermittees to expend resources outside of their jurisdictions. Watershed management requires the Copermittees within a watershed to develop a watershed-based management strategy, which can then be implemented on a jurisdictional basis.

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b. Some runoff issues, such as general education and training, can be effectively addressed on a regional basis. Regional approaches to runoff management can improve program consistency and promote sharing of resources, which can result in implementation of more efficient programs.

c. It is important for the Copermittees to coordinate their water quality protection and land use planning activities to achieve the greatest protection of receiving water bodies. Copermittee coordination with other watershed stakeholders, especially the State of California Department of Transportation, the United States Department of Defense, and water and sewer districts, is also important.

E. STATUTE AND REGULATORY CONSIDERATIONS

1. The Receiving Water Limitations (RWL) language specified in this Order is consistent with language recommended by the USEPA and established in State Board Water Quality Order 99-05, *Own Motion Review of the Petition of Environmental Health Coalition to Review Waste Discharge Requirements Order No. 96-03, NPDES Permit No. CAS0108740*, adopted by the State Board on June 17, 1999. The RWL in this Order require compliance with water quality standards, which for storm water discharges is to be achieved through an iterative approach requiring the implementation of improved and better-tailored BMPs over time. Compliance with receiving water limits based on applicable water quality standards is necessary to ensure that MS4 discharges will not cause or contribute to violations of water quality standards and the creation of conditions of pollution.

2. The Water Quality Control Plan for the San Diego Basin (Basin Plan), identifies the following beneficial uses for surface waters in Orange County: Municipal and Domestic Supply (MUN)[2], Agricultural Supply (AGR), Industrial Process Supply (PROC), Industrial Service Supply (IND), Ground Water Recharge (GWR), Contact Water Recreation (REC1), Non-contact Water Recreation (REC2), Warm Freshwater Habitat (WARM), Cold Freshwater Habitat (COLD), Wildlife Habitat (WILD), Rare, Threatened, or Endangered Species (RARE), Freshwater Replenishment (FRSH), Hydropower Generation (POW), and Preservation of Biological Habitats of Special Significance (BIOL). The following additional beneficial uses are identified for coastal waters of Orange County: Navigation (NAV), Commercial and Sport Fishing (COMM), Estuarine Habitat (EST), Marine Habitat (MAR), Aquaculture (AQUA), Migration of Aquatic Organisms (MIGR), Spawning, Reproduction, and/or Early Development (SPWN), and Shellfish Harvesting (SHELL).

3. This Order is in conformance with State Board Resolution No. 68-16, *Statement of Policy with Respect to Maintaining High Quality Waters in California*, and the federal Antidegradation Policy described in 40 CFR 131.12.

[2] Subject to exceptions under the "Sources of Drinking Waters" Policy (Resolution No. 89-33)

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4. Section 6217(g) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) requires coastal states with approved coastal zone management programs to address non-point pollution impacting or threatening coastal water quality. CZARA addresses five sources of non-point pollution: agriculture, silviculture, urban, marinas, and hydromodification. This NPDES permit addresses the management measures required for the urban category, with the exception of septic systems. The adoption and implementation of this NPDES permit relieves the Copermittee from developing a non-point source plan, for the urban category, under CZARA. The Regional Board addresses septic systems through the administration of other programs.

5. Section 303(d)(1)(A) of the CWA requires that "Each state must identify those waters within its boundaries for which the effluent limitations...are not stringent enough to implement any water quality standard (WQS) applicable to such waters." The CWA also requires states to establish a priority ranking of impaired water bodies known as Water Quality Limited Segments and to establish Total Maximum Daily Loads (TMDLs) for such waters. This priority list of impaired water bodies is called the Section 303(d) List. The current Section 303(d) List was approved by the State Board on October 25, 2006. On June 28, 2007 the 2006 303(d) list for California was given final approval by the United States Environmental Protection Agency (USEPA).

6. This Order 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 Order implements federally mandated requirements under federal Clean Water Act section 402. (33 U.S.C. § 1342(p)(3)(B).) Second, the local agency Copermittees' obligations under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental and new dischargers who are issued NPDES permits for storm water and non-storm water discharges. Third, the local agency Copermittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order. Fourth, the Copermittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in federal Clean Water Act section 301, subdivision (a) (33 U.S.C. § 1311(a)) and in lieu of numeric restrictions on their storm water discharges. Fifth, the local agencies' 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. Likewise, the provisions of this Order to implement total maximum daily loads (TMDLs) are federal mandates. The federal Clean Water Act requires TMDLs to be developed for water bodies that do not meet federal water quality standards. (33 U.S.C. sec. 1313(d).) Once the U.S. Environmental Protection Agency or a state develops a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions of any applicable wasteload allocation. (40 C.F.R. sec. 122.44(d)(1)(vii)(B).)

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7. Runoff treatment and/or mitigation must occur prior to the discharge of runoff into receiving waters. Treatment BMPs must not be constructed in waters of the U.S. or State unless the runoff flows are sufficiently pretreated to protect the values and functions of the water body. Federal regulations at 40 CFR 131.10(a) state that in no case shall a state adopt waste transport or waste assimilation as a designated use for any waters of the U.S. Authorizing the construction of an runoff treatment facility within a water of the U.S., or using the water body itself as a treatment system or for conveyance to a treatment system, would be tantamount to accepting waste assimilation as an appropriate use for that water body. Furthermore, the construction, operation, and maintenance of a pollution control facility in a water body can negatively impact the physical, chemical, and biological integrity, as well as the beneficial uses, of the water body. Without federal authorization (e.g., pursuant to Clean Water Act Section 404), waters of the U.S. may not be converted into, or used as, waste treatment or conveyance facilities. Similarly, waste discharge requirements pursuant to California Water Code Section 13260 are required for the conversion or use of waters of the State as waste treatment or conveyance facilities. Diversion from waters of the U.S./State to treatment facilities and subsequent return to waters of the U.S. is allowable, provided that the effluent complies with applicable NPDES requirements.

8. The issuance of waste discharge requirements and an NPDES permit for the discharge of runoff from MS4s to waters of the U.S. is exempt from the requirement for preparation of environmental documents under the California Environmental Quality Act (CEQA) (Public Resources Code, Division 13, Chapter 3, section 21000 et seq.) in accordance with the CWC section 13389.

9. Multiple water bodies in Orange County have been identified as impaired and placed on the 303(d) list. In 2004, Bacteria Impaired Waters TMDL Project II included six bacteria impaired shorelines in Dana Point Harbor and San Diego Bay: Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park, B Street, G Street Pier, Tidelands Park, and Chula Vista Marina in San Diego Bay. Since then, only Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay can be confirmed as still impaired by indicator bacteria. On June 11, 2008 the Regional Board adopted a Basin Plan amendment to incorporate *Bacteria Impaired Waters TMDL Project II for San Diego Bay and Dana Point Harbor Shorelines*. On June 16, 2009, the State Board approved the Basin Plan amendment. This action meets requirements of section 303(d) of the Clean Water Act (CWA). The Basin Plan amendment process is authorized under section 13240 of the Water Code. The State's Office of Administrative Law (OAL) approved the TMDLs on September 15, 2009. The effective date of the TMDLs is the date of OAL approval. USEPA approved the TMDLs on October 26, 2009.

10. Storm water discharges from developed and developing areas in Orange County are significant sources of certain pollutants that cause, may be causing, threatening to cause or contributing to water quality impairment in the waters of Orange County.

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Furthermore, as delineated in the CWA section 303(d) list in Table 3, the Regional Board has found that there is a reasonable potential that municipal storm water and non-storm water discharges from MS4s cause or may cause or contribute to an excursion above water quality standards for the following pollutants: Indicator Bacteria, Phosphorous, Toxicity and Turbidity. In accordance with CWA section 303(d), the Regional Board is required to establish Total Maximum Daily Loads (TMDLs) for these pollutants to these waters to eliminate impairment and attain water quality standards. Therefore, certain early pollutant control actions and further pollutant impact assessments by the Copermittees are warranted and required pursuant to this Order.

Table 3. 2006 Section 303(d) Listed Waterbodies in So. Orange County

Waterbody Pollutant	
Aliso Creek	Indicator Bacteria, Phosphorus, Toxicity
Aliso Creek Mouth	Indicator Bacteria
Dana Point Harbor	Indicator Bacteria
English Canyon Creek	Benzo[b]fluoranthene, Dieldrin, Sediment Toxicity
Laguna Canyon Channel	Sediment Toxicity
Oso Creek (at Mission Viejo Golf Course)	Chloride, Sulfates, Total Dissolved Solids
Pacific Ocean Shoreline, Aliso HSA	Indicator Bacteria
Pacific Ocean Shoreline, Dana Point HSA	Indicator Bacteria
Pacific Ocean Shoreline, Laguna Beach HSA	Indicator Bacteria
Pacific Ocean Shoreline, Lower San Juan HSA	Indicator Bacteria
Pacific Ocean Shoreline, San Clemente HA	Indicator Bacteria
Pacific Ocean Shoreline, San Joaquin Hills HSA	Indicator Bacteria
Prima Deshecha Creek	Phosphorus, Turbidity
San Juan Creek	DDE, Indicator Bacteria
San Juan Creek (mouth)	Indicator Bacteria
Segunda Deshecha Creek	Phosphorus, Turbidity

11. This Order incorporates only those MS4 Waste Load Allocations (WLAs) developed in TMDLs that have been adopted by the Regional Water Board and have been approved by the State Board, Office of Administrative Law and U.S. EPA. Approved TMDL WLAs are to be addressed using water quality-based effluent limitations (WQBELs) calculated as numeric limitations (either in the receiving waters and/or at the point of MS4 discharge) and/or as BMPs. In most cases, the numeric limitation must be achieved to ensure the adequacy of the BMP program. Waste load

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allocations for storm water and non-storm water discharges have been included within this Order only if the TMDL has received all necessary approvals. This Order establishes WQBELs and conditions consistent with the requirements and assumptions of the WLAs in the TMDLs as required by 40 CFR 122.44(d)(1)(vii)(B).

A TMDL is the total amount of a particular pollutant that a water body can receive and still meet Water Quality Standards (WQSs), which are comprised of Water Quality Objectives (WQOs), Beneficial Uses and the States Policy on Maintaining High Quality Waters[3]. The WQOs serve as the primary basis for protecting the associated Beneficial Use. The Numeric Target of a TMDL interprets and applies the numeric and/or narrative WQOs of the WQSs as the basis for the WLAs. This Order addresses TMDLs through Water Quality Based Effluent Limitations (WQBELs) that must be consistent with the assumptions and requirements of the WLA[4]. Federal guidance[5] states that when adequate information exists, storm water permits are to incorporate numeric water quality based effluent limitations. In most cases, the numeric target(s) of a TMDL are a component of the WQBELs. When the numeric target is based on one or more numeric WQOs, the numeric WQOs and underlying assumptions and requirements will be used in the WQBELs as numeric effluent limitations by the end of the TMDL compliance schedule, unless additional information is required. When the numeric target interprets one or more narrative WQOs, the numeric target may assess the efficacy and progress of the BMPs in meeting the WLAs and restoring the Beneficial Uses by the end of the TMDL compliance schedule.

This Order fulfills a component of the TMDL Implementation Plan adopted by this Regional Board on June 11, 2008 for indicator bacteria in Baby Beach by establishing WQBELs expressed as both BMPs to achieve the WLAs and as numeric limitations[6] for the City of Dana Point and the County of Orange. The establishment of WQBELs expressed as BMPs should be sufficient to achieve the WLA specified in the TMDL. The Waste Load Allocations (WLAs) and Numeric Targets are the necessary metrics to ensure that the BMPs achieve appropriate concentrations of bacterial indicators in the receiving waters.

[3] State Water Resources Control Board, Resolution No. 68-16
[4] 40 CFR 122.44(d)(1)(vii)(B)
[5] USEPA, *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits,* 61 FR 43761, August 26, 1996
[6] The Waste Load Allocations are defined in Resolution No. R9-2008-0027, A Resolution to Adopt an Amendment to the *Water Quality Control Plan for the San Diego Basin (9)* to Incorporate Total Maximum Daily Loads for Indicator Bacteria, Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay.

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12. This Order requires each Copermittee to effectively prohibit all types of unauthorized discharges of non-storm water into its MS4. However, historically pollutants have been identified as present in dry weather non-storm water discharges from the MS4s through 303(d) listings, monitoring conducted by the Copermittees under Order No. R9-2002-0001, and there are others expected to be present in dry weather non-storm water discharges because of the nature of these discharges. This Order includes action levels for pollutants in non-storm water, dry weather, discharges from the MS4 designed to ensure that the requirement to effectively prohibit all types of unauthorized discharges of non-storm water in the MS4 is being complied with. Action levels in the Order are based upon numeric or narrative water quality objectives and criteria as defined in the Basin Plan, the Water Quality Control Plan for Ocean Waters of California (Ocean Plan), and the State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP). An exceedance of an action level requires specified responsive action by the Copermittees. This Order describes what actions the Copermittees must take when an exceedance of an action level is observed. Exceedances of non-storm water action levels do not alone constitute a violation of this Order but could indicate non-compliance with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4 or other prohibitions established in this Order. Failure to undertake required source investigation and elimination action following an exceedance of 2a non-storm water action level (NAL or action level) is a violation of this Order. The Regional Board recognizes that use of action levels will not necessarily result in detection of all unauthorized sources of non-storm water discharges because there may be some discharges in which pollutants do not exceed established action levels. However, establishing NALs at levels appropriate to protect water quality standards is expected to lead to the identification of significant sources of pollutants in dry weather non-storm water discharges.

13. In addition to federal regulations cited in the Fact Sheet / Technical Report for the Order NO. R9-2009-0002, monitoring and reporting required under Order No. R9-2009-0002 is required pursuant to authority under CWC section 13383.

F. PUBLIC PROCESS

1. The Regional Board has notified the Copermittees, all known interested parties, and the public of its intent to consider adoption of an Order prescribing waste discharge requirements that would serve to renew an NPDES permit for the existing discharge of runoff.

2. The Regional Board has held public hearings on April 11, 2007, February 13, 2008, July 1, 2009, and November 18, 2009 and heard and considered all comments pertaining to the terms and conditions of this Order.

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IT IS HEREBY ORDERED that the Copermittees, in order to meet the provisions contained in Division 7 of the California Water Code (CWC) and regulations adopted thereunder, and the provisions of the Clean Water Act (CWA) and regulations adopted thereunder, must each comply with the following:

A. PROHIBITIONS AND RECEIVING WATER LIMITATIONS

1. Discharges into and from municipal separate storm sewer systems (MS4s) in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in waters of the state are prohibited.

2. Storm water discharges from MS4s containing pollutants which have not been reduced to the maximum extent practicable (MEP) are prohibited.[7]

3. Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses, water quality objectives developed to protect beneficial uses, and the State policy with respect to maintaining high quality waters) are prohibited.

   a. Each Copermittee must comply with section A.3 and section A.4 as it applies to Prohibition 5 in Attachment A of this Order through timely implementation of control measures and other actions to reduce pollutants in storm water discharges in accordance with this Order, including any modifications. If exceedance(s) of water quality standards persist notwithstanding implementation of this Order, the Copermittee must assure compliance with section A.3 and section A.4 as it applies to Prohibition 5 in Attachment A of this Order by complying with the following procedure:

      (1) Upon a determination by either the Copermittee or the Regional Board that storm water MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard, the Copermittee must notify the Regional Board within 30 days and thereafter submit a 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 exceedance of water quality standards. The report may be incorporated in the Annual Report unless the Regional Board directs an earlier submittal. The report must include an implementation schedule. The Regional Board may require modifications to the report;

[7] This prohibition does not apply to MS4 discharges which receive subsequent treatment to reduce pollutants to the MEP prior to entering receiving waters (e.g., low flow diversions to the sanitary sewer).

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(2) Submit any modifications to the report required by the Regional Board within 30 days of notification;

(3) Within 30 days following approval of the report described above by the Regional Board, the Copermittee must revise its Jurisdictional Runoff Management Program and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required; and

(4) Implement the revised Jurisdictional Runoff Management Program and monitoring program in accordance with the approved schedule.

b. The Copermittee must repeat the procedure set forth above to comply with the receiving water limitations for continuing or recurring exceedances of the same water quality standard(s) unless directed to do otherwise by the Regional Board Executive Officer.

c. Nothing in section A.3 must prevent the Regional Board from enforcing any provision of this Order while the Copermittee prepares and implements the above report.

4. In addition to the above prohibitions, discharges from MS4s are subject to all Basin Plan prohibitions cited in Attachment A to this Order.

B. NON-STORM WATER DISCHARGES

1. Each Copermittee must effectively prohibit all types of non-storm water discharges into its MS4 unless such discharges are either authorized by a separate National Pollutant Discharge Elimination System (NPDES) permit; or not prohibited in accordance with sections B.2 and B.3 below.

2. The following categories of non-storm water discharges are not prohibited unless a Copermittee or the Regional Board identifies the discharge category as a source of pollutants to waters of the U.S. Where the Copermittee(s) have identified a category as a source of pollutants, the category shall be addressed as an illicit discharge and prohibited through ordinance, order or similar means. The Regional Board may identify categories of discharge that either requires prohibition or other controls. For such a discharge category, the Copermittee, under direction of the Regional Board, must either prohibit the discharge category or develop and implement appropriate control measures to prevent the discharge of pollutants to the MS4 and report to the Regional Board pursuant to Section K.1 and K.3 of this Order.

a. Diverted stream flows;
b. Rising ground waters;
c. Uncontaminated ground water infiltration [as defined at 40 CFR 35.2005(20)] to

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MS4s;
- **d.** Uncontaminated pumped ground water[8];
- **e.** Foundation drains[8];
- **f.** Springs;
- **g.** Water from crawl space pumps[8];
- **h.** Footing drains[8];
- **i.** Air conditioning condensation;
- **j.** Flows from riparian habitats and wetlands;
- **k.** Water line flushing[9,10];
- **l.** Discharges from potable water sources not subject to NPDES Permit No. CAG679001, other than water main breaks;
- **m.** Individual residential car washing; and
- **n.** Dechlorinated swimming pool discharges[11].

3. Emergency fire fighting flows (i.e., flows necessary for the protection of life or property) do not require BMPs and need not be prohibited. As part of the Jurisdictional Runoff Management Plan (JRMP), each Copermittee must develop and implement a program to address pollutants from non-emergency fire fighting flows (i.e., flows from controlled or practice blazes and maintenance activities) identified by the Copermittee to be significant sources of pollutants to waters of the United States.

a. Building fire suppression system maintenance discharges (e.g. sprinkler line flushing) contain waste. Therefore, such discharges are to be prohibited by the Copermittees as illicit discharges through ordinance, order, or similar means.

4. Each Copermittee must examine all dry weather effluent analytical monitoring results collected in accordance with section F.4 of this Order and Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2009-0002 to identify water quality problems which may be the result of any non-prohibited discharge category(ies) identified above in section B.2. Follow-up investigations must be conducted as necessary to identify and control, pursuant to section B.2, any non-prohibited discharge category(ies) listed above.

[8] Requires enrollment under Order R9-2008-002. Discharges into the MS4 require authorization from the owner and operator of the MS4 system.
[9] This exemption does not include fire suppression sprinkler system maintenance and testing discharges. Those discharges may be regulated under Section B.3.
[10] Requires enrollment under Order R9-2002-0020.
[11] Including saline swimming pool discharges directly to a saline water body.

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C. NON-STORM WATER DRY WEATHER ACTION LEVELS

1. Each Copermittee, beginning no later than May 1, 2011, shall implement the non-storm water dry weather action level (NAL) monitoring as described in Attachment E of this Order.

2. In response to an exceedance of an NAL, each Copermittee must investigate and identify the source of the exceedance in a timely manner. However, if any Copermittee identifies exceedances of NALs that prevent them from adequately conducting source investigations in a timely manner, then the Copermittees may submit a prioritization plan and timeline that identifies the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the Copermittees must submit an action report dependant on the source of the pollutant exceedance as follows:

   a. If the Copermittee identifies the source of the exceedance as natural (non-anthropogenically influenced) in origin and in conveyance into the MS4; then the Copermittee shall report their findings and documentation of their source investigation to the Regional Board within fourteen days of the source identification.

   b. If the Copermittee identifies the source of the exceedance as an illicit discharge or connection, then the Copermittees must eliminate the discharge to their MS4 and report the findings, including any enforcement action(s) taken, and documentation of the source investigation to the Regional Board within fourteen days of the source identification. If the Copermittee is unable to eliminate the source of discharge within fourteen days, then the Copermittee must submit, as part of their action report, their plan and timeframe to eliminate the source of the exceedance. Those dischargers seeking to continue such a discharge must become subject to a separate NPDES permit prior to continuing any such discharge.

   c. If the Copermittee identifies the source of the exceedance as an exempted category of non-storm water discharge, then the Copermittees must determine if this is an isolated circumstance or if the category of discharges must be addressed through the prevention or prohibition of that category of discharge as an illicit discharge. The Copermittee must submit their findings in including a description of the steps taken to address the discharge and the category of discharge, to the Regional Board for review with the next subsequent annual report. Such description shall include relevant updates to or new ordinances, orders, or other legal means of addressing the category of discharge. The Copermittees must also submit a summary of their findings with the Report of Waste Discharge.

   d. If the Copermittee identifies the source of the exceedance as a non-storm water discharge in violation or potential violation of an existing separate NPDES permit

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(e.g. the groundwater dewatering permit), then the Copermittee must report, within three business days, the findings to the Regional Board including all pertinent information regarding the discharger and discharge characteristics.

e. If the Copermittee is unable to identify the source of the exceedance after taking and documenting reasonable steps to do so, then the Copermittee must identify the pollutant as a high priority pollutant of concern in the tributary subwatershed, perform additional focused sampling and update their programs within a year to reflect this priority. The Copermittee's annual report shall include these updates to their programs including, where applicable, updates to their watershed workplans (Section G.2), retrofitting consideration (Section F.3.d) and program effectiveness work plans (Section J.4).

f. The Copermittees or any interested party, may evaluate existing NALs and propose revised NALs for future Board consideration.

3. An exceedance of an NAL does not alone constitute a violation of the provisions of this Order, but an exceedance of an NAL may indicate lack of compliance with the requirement that Copermittees effectively prohibit all types of unauthorized non-storm water discharges into the MS4 or other prohibitions set forth in Sections A and B of this Order. Failure to timely implement required actions specified in this Order following an exceedance of an NAL constitutes a violation of this Order. However, neither compliance with NALs nor compliance with required actions following observed exceedances, excuses any non-compliance with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4s or any non-compliance with the prohibitions in Sections A and B of this Order. NALs provide an assessment of the effectiveness of the prohibition of non-storm water discharges and of the appropriateness of exempted non-storm water discharges. During any annual reporting period in which one or more exceedances of NALs have been documented the Copermittee must submit with their next scheduled annual report, a report describing whether and how the observed exceedances did or did not result in a discharge form the MS4 that caused, or threatened to cause or contribute to a condition of pollution, contamination, or nuisance in the receiving waters.

4. Monitoring of effluent will occur at the end-of-pipe prior to discharge into the receiving waters, with a focus on Major Outfalls, as defined in 40 CFR 122.26(B 5-6) and Attachment E of this Order. The Copermittees must develop their monitoring plans to sample a representative percentage of major outfalls and identified stations within each hydrologic subarea. At a minimum, outfalls that exceed any NALs once during any year must be monitored in the subsequent year. Any station that does not exceed an NAL for 3 years may be replaced with a different station.

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5. Each Copermittee shall monitor for the non-storm water dry weather action levels, which are incorporated into this Order as follows:

   a. Action levels for discharges to inland surface waters:

Table 4.a.1: General Constituents

Parameter	Units	AMAL	MDAL	Instantaneous Maximum	Basis
Fecal Coliform	MPN/ 100 ml	200[A] 400[B]	-		BPO
Enterococci	MPN/ 100 ml	33	-	104[C]	BPO/OP
Turbidity NTU		-	20		BPO
pH	Units	Within limit of 6.5 to 8.5 at all times			BPO
Dissolved Oxygen	mg/L	Not less than 5.0 in WARM waters and not less than 6.0 in COLD waters			BPO
Total Nitrogen	mg/L	-	1.0	See MDEL	BPO
Total Phosphorus	mg/L	-	0.1	See MDEL	BPO
Methylene Blue Active Substances mg/L		-	0.5	See MDEL	BPO

A – Based on a minimum of not less than five samples for any 30-day period
B – No more than 10 percent of total samples may exceed 400 per 100 ml during any 30 day period
C – This Value has been set to Ocean Plan Criteria for Designated Beach Areas
BPO – Basin Plan Objective OP – Ocean Plan
MDAL – Maximum Daily Action Level AMAL – Average Monthly Action Level

Table 4.a.2: Priority Pollutants

		Freshwater (CTR)		Saltwater (CTR)	
Parameter	Units	MDAL	AMAL	MDAL	AMAL
Cadmium ug/L		*	*	16	8
Copper ug/L		*	*	5.8	2.9
Chromium III	ug/L	*	*	-	-
Chromium VI (hexavalent)	ug/L	16	8.1	83	41
Lead ug/L		*	*	14	2.9
Nickel ug/L		*	*	14	6.8
Silver ug/L		*	*	2.2	1.1
Zinc ug/L		*	*	95	47

CTR – California Toxic Rule
* - Action Levels developed on a case-by-case basis (see below)

The NALs for Cadmium, Copper, Chromium (III), Lead, Nickel, Silver and Zinc will be developed on a case-by-case basis because the freshwater criteria are based on site-specific water quality data (receiving water hardness). For these priority pollutants, the following equations (40 CFR 131.38.b.2) will be required:

Cadmium (Total Recoverable) = exp(0.7852[ln(hardness)] -2.715)
Chromium III (Total Recoverable) = exp(0.8190[ln(hardness)] + .6848)
Copper (Total Recoverable) = exp(0.8545[ln(hardness)] - 1.702)
Lead (Total Recoverable) = exp(1.273[ln(hardness)] - 4.705)

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Nickel (Total Recoverable) = exp(.8460[ln(hardness)] + 0.0584)
Silver (Total Recoverable) = exp(1.72[ln(hardness)] - 6.52)
Zinc (Total Recoverable) = exp(0.8473[ln(hardness)] + 0.884)

b. Action levels for discharges to bays, harbors and lagoons/estuaries:

Table 4.b: General Constituents

Parameter	Units	AMAL	MDAL	Instantaneous Maximum	Basis
Total Coliform	MPN/100 ml	1,000	-	10,000	BPO
Fecal Coliform	MPN/100 ml	200[A],400[B] -			BPO
Enterococci MPN/100	ml	35	-	104[C]	BPO
Turbidity NTU		75	-	225	OP
pH	Units	Within limit of 6.0 to 9.0 at all times			OP
Priority Pollutants	ug/L	See limitations in Table 4.a.2			

A – Based on a minimum of not less than five samples for any 30-day period
B – No more than 10 percent of total samples may exceed 400 per 100 ml during any 30 day period
C – Designated Beach Areas
OP – California Ocean Plan 2005 BPO – Basin Plan Objective
MDAL – Maximum Daily Action Level AMAL – Average Monthly Action Level

c. Action levels for discharges to the surf zone:

Table 4.c: General Constituents

Parameter	Units	AMAL	MDAL	Instantaneous Maximum	Basis
Total Coliform	MPN/100 ml	1,000	-	10,000 1,000[A]	OP
Fecal Coliform	MPN/100 ml	200[B] -		400	OP
Enterococci MPN/100	ml	35	-	104[C]	OP

A – Total coliform density shall not exceed 1,000 per 100 ml when the ratio of fecal/total coliform exceeds 0.1
B – During any 30 day period
C – Designated Beach Areas
OP – California Ocean Plan 2005

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D. STORM WATER ACTION LEVELS

1. Beginning Year 3 after Order adoption date, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the United States that exceed the Storm Water Action Levels (SALs) for the pollutants listed in Table 5 (below) will require each Copermittee to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutants(s) to the MEP standard. The Copermittees must utilize the exceedance information when adjusting and executing annual work plans, as required by this Order. Copermittees shall take the magnitude, frequency, and number of constituents exceeding the SAL(s), in addition to receiving water quality data and other information, into consideration when reacting to SAL exceedances in an iterative manner. Failure to appropriately consider and react to SAL exceedances in an iterative manner creates a presumption that the Copermittee(s) have not complied with the MEP standard.

Table 5. Storm Water Action Levels

Pollutant Action	Level
Turbidity (NTU)	126
Nitrate & Nitrite total (mg/L)	2.6
P total (mg/L)	1.46
Cd total (µg/L) 3.0	–
Cu total (µg/L) 127	
Pb total (µg/L) 250	
Ni total (µg/L) 54	
Zn total (µg/L) 976	

2. The end-of-pipe assessment points for the determination of SAL compliance are all major outfalls, as defined in 40 CFR 122.26(b)(5) and (b)(6). The Copermittees must develop their monitoring plans to sample a representative percent of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceed SALs must be monitored in the subsequent year. Any station that does not exceed an SAL for 3 years may be replaced with a different station. SAL samples must be 24 hour time weighted composites.

3. The absence of SAL exceedances does not relieve the Copermittees from implementing all other required elements of this Permit.

4. This Permit does not regulate natural sources and conveyances of constituents listed in Table 5. To be relieved of the requirements to prioritize pollutant/watershed combinations for BMP updates and to continue monitoring a station, the Copermittee must demonstrate that the likely and expected cause of the SAL exceedance is not anthropogenic in nature.

5. The SALs will be reviewed and updated at the end of every permit cycle. The data collected pursuant to D.2 above can be used to create SALs based upon local data.

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It is the goal of the SALs, through the iterative and MEP process, to have outfall storm water discharges meet all applicable water quality standards.

E. LEGAL AUTHORITY

1. Each Copermittee must establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means. Nothing herein shall authorize a Co-Permittee or other discharger regulated under the terms of this order to divert, store or otherwise impound water if such action is reasonably anticipated to harm downstream water right holders in the exercise of their water rights. This legal authority must, at a minimum, authorize the Copermittee to:

   a. Control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to its MS4 and control the quality of runoff from industrial and construction sites. This requirement applies both to industrial and construction sites which have coverage under the statewide general industrial or construction storm water permits, as well as to those sites which do not. Grading ordinances must be updated and enforced as necessary to comply with this Order;
   b. Prohibit all identified illicit discharges not otherwise allowed pursuant to section B.2;
   c. Prohibit and eliminate illicit connections to the MS4;
   d. Control the discharge of spills, dumping, or disposal of materials other than storm water to its MS4;
   e. Require compliance with conditions in Copermittee ordinances, permits, contracts or orders (i.e., hold dischargers to its MS4 accountable for their contributions of pollutants and flows);
   f. Utilize enforcement mechanisms to require compliance with Copermittee storm water ordinances, permits, contracts, or orders;
   g. Control the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements among Copermittees. Control of the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements with other owners of the MS4 such as the State of California Department of Transportation, the United States Department of Defense, or Native American Tribes is encouraged;
   h. Carry out all inspections, surveillance, and monitoring necessary to determine compliance and noncompliance with local ordinances and permits and with this Order, including the prohibition on illicit discharges to the MS4. This means the Copermittee must have authority to enter, monitor, inspect, take measurements, review and copy records, and require regular reports from industrial facilities discharging into its MS4, including construction sites;
   i. Require the use of BMPs to prevent or reduce the discharge of pollutants into MS4s from storm water to the MEP; and

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j. Require documentation on the effectiveness of BMPs implemented to reduce the discharge of storm water pollutants to the MS4 to the MEP.

2. Each Copermittee must submit within 365 days of adoption of this Order, a statement certified by its chief legal counsel that the Copermittee has taken the necessary steps to obtain and maintain full legal authority to implement and enforce each of the requirements contained in 40 CFR 122.26(d)(2)(i)(A-F) and this Order except for the updated requirements for low impact development and hydromodification in section F.1. Each Copermittee must submit as part of its updated SSMP, a statement certified by its chief legal counsel that the Copermittee has taken the necessary steps to obtain and maintain full legal authority to implement and enforce the low impact development and hydromodification requirements in section F.1. These statements must include:

   a. Identification of all departments within the jurisdiction that conduct runoff related activities, and their roles and responsibilities under this Order. Include an up to date organizational chart specifying these departments and key personnel.
   b. Citation of runoff related ordinances and the reasons they are enforceable;
   c. Identification of the local administrative and legal procedures available to mandate compliance with runoff related ordinances and therefore with the conditions of this Order;
   d. A description of how runoff related ordinances are implemented and appealed; and
   e. Description of whether the municipality can issue administrative orders and injunctions or if it must go through the court system for enforcement actions.

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F. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM (JRMP)

Each Copermittee must implement all requirements of section F of this Order no later than 365 days after adoption of the Order, unless otherwise specified in this Order. Prior to 365 days after adoption of the Order, each Copermittee must at a minimum implement its Jurisdictional RMP document, as the document was developed and amended to comply with the requirements of Order No. R9-2002-001.
Each Copermittee must develop and implement an updated JRMP for its jurisdiction. Each updated JRMP must meet the requirements of section F of this Order, reduce the discharge of storm water pollutants from the MS4 to the MEP, and prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.

1. DEVELOPMENT PLANNING COMPONENT

Each Copermittee must implement a program which meets the requirements of this section and (1) reduces Development Project discharges of storm water pollutants from the MS4 to the MEP; (2) prevents Development Project discharges from the MS4 from causing or contributing to a violation of water quality standards; (3) prevents illicit discharges into the MS4; and (4) manages increases in runoff discharge rates and durations from Development Projects that are likely to cause increased erosion of stream beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

a. GENERAL PLAN

Each Copermittee must revise as needed its General Plan or equivalent plan (e.g., Comprehensive, Master, or Community Plan) for the purpose of providing effective water quality and watershed protection principles and policies that direct land-use decisions and require implementation of consistent water quality protection measures for all development and redevelopment projects.

b. ENVIRONMENTAL REVIEW PROCESS

Each Copermittee must revise as needed its current environmental review processes to accurately evaluate water quality impacts and cumulative impacts and identify appropriate measures to avoid, minimize and mitigate those impacts for all Development Projects.

c. APPROVAL PROCESS CRITERIA AND REQUIREMENTS FOR ALL DEVELOPMENT PROJECTS

For all proposed Development Projects, each Copermittee during the planning process, and prior to project approval and issuance of local permits, must prescribe the necessary requirements so that Development Project discharges of storm water pollutants from the MS4 will be reduced to the MEP, will not cause or

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contribute to a violation of water quality standards, and will comply with Copermittee's ordinances, permits, plans, and requirements, and with this Order. Performance Criteria: Discharges from each approved development project must be subject to the following management measures:

(1) Source control BMPs that reduce storm water pollutants of concern in runoff, including prevention of illicit discharges into the MS4; prevention of irrigation runoff; storm drain system stenciling or signage; properly designed outdoor material storage areas; properly designed outdoor work areas; and properly designed trash storage areas;

(2) The following LID BMPs listed below shall be implemented at all Development Projects where applicable and feasible.

(a) Conserve natural areas, including existing trees, other vegetation, and soils.
(b) Construct streets, sidewalks, or parking lot aisles to the minimum widths necessary, provided that public safety is not compromised.
(c) Minimize the impervious footprint of the project.
(d) Minimize soil compaction to landscaped areas.
(e) Minimize disturbances to natural drainages (e.g., natural swales, topographic depressions, etc.)
(f) Disconnect impervious surfaces through distributed pervious areas.

(3) Buffer zones for natural water bodies, where feasible. Where buffer zones are infeasible, require project proponent to implement other buffers such as trees, access restrictions, etc;

(4) Measures necessary so that grading or other construction activities meet the provisions specified in section F.2 of this Order; and

(5) Submittal of proof of a mechanism under which ongoing long-term maintenance of all structural post-construction BMPs will be conducted.

(6) Infiltration and Groundwater Protection

To protect groundwater quality, each Copermittee must apply restrictions to the use of treatment control BMPs that are designed to primarily function as centralized infiltration devices (such as large infiltration trenches and infiltration basins). Such restrictions must be designed so that the use of such infiltration treatment control BMPs must not cause or contribute to an exceedance of groundwater quality objectives. At a minimum, each treatment control BMP designed to primarily function as a centralized infiltration device must meet the restrictions below, unless it is demonstrated that a restriction is not necessary to protect groundwater quality. The Copermittees may collectively or individually develop alternative restrictions on the use of

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treatment control BMPs which are designed to primarily function as centralized infiltration devices. Alternative restrictions developed by the Copermittees can partially or wholly replace the restrictions listed below. The restrictions are not intended to be applied to small infiltration systems dispersed throughout a development project.

(a) Runoff must undergo pretreatment such as sedimentation or filtration prior to infiltration;

(b) All dry weather flows containing significant pollutant loads must be diverted from infiltration devices and treated through other BMPs;

(c) Pollution prevention and source control BMPs must be implemented at a level appropriate to protect groundwater quality at sites where infiltration treatment control BMPs are to be used;

(d) Infiltration treatment control BMPs must be adequately maintained so that they remove storm water pollutants to the MEP;

(e) The vertical distance from the base of any infiltration treatment control BMP to the seasonal high groundwater mark must be at least 10 feet. Where groundwater basins do not support beneficial uses, this vertical distance criteria may be reduced, provided groundwater quality is maintained;

(f) The soil through which infiltration is to occur must have physical and chemical characteristics (such as appropriate cation exchange capacity, organic content, clay content, and infiltration rate) which are adequate for proper infiltration durations and treatment of runoff for the protection of groundwater beneficial uses;

(g) Infiltration treatment control BMPs must not be used for areas of industrial or light industrial activity; areas subject to high vehicular traffic (25,000 or greater average daily traffic on main roadway or 15,000 or more average daily traffic on any intersecting roadway); automotive repair shops; car washes; fleet storage areas (bus, truck, etc.); nurseries; and other high threat to water quality land uses and activities as designated by each Copermittee unless first treated or filtered to remove pollutants prior to infiltration and a comprehensive site-specific evaluation has been conducted; and

(h) Infiltration treatment control BMPs must be located a minimum of 100 feet horizontally from any water supply wells.

(7) Where feasible, landscaping with native or low water species shall be preferred in areas that drain to the MS4 or to waters of the United States.

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d. Standard Storm Water Mitigation Plans (SSMPs) – Approval Process Criteria and Requirements for Priority Development Projects

Within two years of adoption of this Order, the Copermittees must submit an updated model SSMP, to the Regional Board's Executive Officer for a 30 day public review and comment period. The Regional Board's Executive Officer has the discretion to determine the necessity of a public hearing. Within 180 days of determination that the Model SSMP is in compliance with this Permit's provisions, each Copermittee must update their own local SSMP, and amended ordinances consistent with the model SSMP, and shall submit both (local SSMP and amended ordinances) to the Regional Board. The model SSMP must meet the requirements of section F.1.d of this Order to (1) reduce Priority Development Project discharges of storm water pollutants from the MS4 to the MEP, and (2) prevent Priority Development Project runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.[12]

(1) Definition of Priority Development Project (PDP):

Priority Development Projects are:

(a) All new Development Projects that fall under the project categories or locations listed in section F.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 and the existing development and/or the redevelopment project falls under the project categories or locations listed in section F.1.d.(2). Where redevelopment results in an increase of less than fifty percent of the impervious surfaces of a previously existing development, and the existing development was not subject to SSMP requirements, the numeric sizing criteria discussed in section F.1.d.(6) applies only to the addition or replacement, and not to the entire development. Where redevelopment results in an increase of more than fifty percent of the impervious surfaces of a previously existing development, the numeric sizing criteria applies to

[12] Updated SSMP and hydromodification requirements must apply to all priority projects or phases of priority projects which have not yet begun grading or construction activities at the time any updated SSMP or hydromodification requirement commences. If lawful prior approval of a project exists, whereby application of an updated SSMP or hydromodification requirement to the project is illegal, the updated SSMP or hydromodification requirement need not apply to the project. Updated Development Planning requirements set forth in Sections F.1. (a) through (h) of this Order must apply to all projects or phases of projects, unless, at the time any updated Development Planning requirement commences, the projects or project phases meet any one of the following conditions: (i) the project or phase has begun grading or construction activities; or (ii) a Copermittee determines that lawful prior approval rights for a project or project phase exist, whereby application of the Updated Development Planning requirement to the project is legally infeasible. Where feasible, the Permittees must utilize the SSMP and hydromodification update periods to ensure that projects undergoing approval processes include application of the updated SSMP and hydromodification requirements in their plans.

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the entire development.

(c) One acre threshold: In addition to the Priority Development Project Categories identified in section F.1.d.(2), Priority Development Projects must also include all other pollutant-generating Development Projects that result in the disturbance of one acre or more of land within three years of adoption of this Order.[13] As an alternative to this one-acre threshold, the Copermittees may collectively identify a different threshold, provided the Copermittees' threshold is at least as inclusive of Development Projects as the one-acre threshold.

(2) Priority Development Project Categories

Where a new Development Project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SSMP requirements.

(a) New development projects that create 10,000 square feet or more of impervious surfaces (collectively over the entire project site) including commercial, industrial, residential, mixed-use, and public projects. This category includes development projects on public or private land which fall under the planning and building authority of the Copermittees.

(b) 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.

(c) 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 must meet all SSMP requirements except for structural treatment BMP and numeric sizing criteria requirement F.1.d.(6) and hydromodification requirement F.1.h.

(d) 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.

(e) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges

[13] Pollutant generating Development Projects are those projects that generate pollutants at levels greater than natural background levels.

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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 percent 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.

(f) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to 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.

(g) 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.

(h) 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.

(3) Pollutants of Concern

As part of its local SSMP, each Copermittee must implement an updated procedure for identifying pollutants of concern for each Priority Development Project. The procedure must address, at a minimum: (1) Receiving water quality (including pollutants for which receiving waters are listed as impaired under CWA section 303(d)); (2) Land-use type of the Development Project and pollutants associated with that land use type; and (3) Pollutants expected to be present on site.

(4) Low Impact Development BMP Requirements

Each Copermittee must require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss.

(a) The following LID BMPs must be implemented:

(i) Each Copermittee must require LID BMPs or make a finding of infeasibility for each Priority Development Project in accordance with the LID waiver program in Section F.1.d.(8);

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(ii) Each Copermittee must incorporate formalized consideration, such as thorough checklists, ordinances, and/or other means, of LID BMPs into the plan review process for Priority Development Projects;

(iii) The review of each Priority Development Project must include an assessment of potential collection of storm water for on-site or off-site reuse opportunities;

(iv) The review of each Priority Development Project must include an assessment of techniques to infiltrate, filter, store, evaporate, or retain runoff close to the source of runoff; and

(v) Within 2 years after adoption of this Order, each Copermittee must review its local codes, policies, and ordinances and identify barriers therein to implementation of LID BMPs. Following the identification of these barriers to LID implementation, where feasible, the Copermittee must take, by the end of the permit cycle, appropriate actions to remove such barriers.

(b) The following LID BMPs must be implemented at all Priority Development Projects where technically feasible as required below:

(i) Maintain or restore natural storage reservoirs and drainage corridors (including depressions, areas of permeable soils, swales, and ephemeral and intermittent streams.

(ii) Projects with landscaped or other pervious areas must, where feasible, drain runoff from impervious areas (rooftops, parking lots, sidewalks, walkways, patios, etc) into pervious areas prior to discharge to the MS4. The amount of runoff from impervious areas that is to drain to pervious areas shall not exceed the total capacity of the project's pervious areas to infiltrate or treat runoff, taking into consideration the pervious areas' geologic and soil conditions, slope, and other pertinent factors.

(iii) Projects with landscaped or other pervious areas must, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate or treat runoff from impervious areas, prior to discharge to the MS4. Soil compaction for these areas shall be minimized. The amount of the impervious areas that are to drain to pervious areas must be based upon the total size, soil conditions, slope, and other pertinent factors.

(iv) Projects with low traffic areas and appropriate soil conditions must construct walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such as pervious concrete, porous asphalt, unit pavers, and granular materials.

(c) To protect ground water resources any infiltration LID BMPs must comply with Section F.1.(c)(6).

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(d) LID BMPs sizing criteria:

(i) LID BMPs shall be sized and designed to ensure onsite retention without runoff, of the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Map[14] ("design capture volume");

(ii) If onsite retention LID BMPs are technically infeasible per section F.1.d.(7)(b), LID biofiltration BMPs may treat any volume that is not retained onsite by the LID BMPs. The LID biofiltration BMPs must be designed for an appropriate surface loading rate to prevent erosion, scour and channeling within the BMP. Due to the flow through design of biofiltration BMPs, the total volume of the BMP, including pore spaces and prefilter detention volume, must be sized to hold at least 0.75 times the design storm volume that is not retained onsite by LID retention BMPs;

(iii) If it is shown to be technically infeasible to treat the remaining volume up to and including the design capture volume using LID BMPs (retention or biofiltration), the project must implement conventional treatment control BMPs in accordance with Section F.1.d.(6) below and must participate in the LID waiver program in Section F.1.d.(7).

(e) All LID BMPs shall be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies.

(5) Source Control BMP Requirements

Each Copermittee must require each Priority Development Project to implement source control BMPs. The source control BMPs to be required must:

(a) Prevent illicit discharges into the MS4;
(b) Minimize storm water pollutants of concern in runoff;
(c) Eliminate irrigation runoff;
(d) Include storm drain system stenciling or signage;
(e) Include properly designed outdoor material storage areas;
(f) Include properly designed outdoor work areas;
(g) Include properly designed trash storage areas;
(h) Include water quality requirements applicable to individual priority project categories.

[14] The isopluvial map is available from the County of Orange. The map can also be found as Figure A-1 Exhibit 7.II in the Model WQMP (September 2003), page 5 of 57 at http://www.ocwatersheds.com/documents/2003_DAMP_Exhibit_7_II_Model_WQMP_Attachments.pdf

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(6) Treatment Control BMP Requirements[15]

Each Copermittee must require each Priority Development Project to implement treatment control BMPs that meet the following requirements:

(a) All treatment control BMPs for a single Priority Development Project must collectively be sized to comply with the following numeric sizing criteria:

(i) Volume-based treatment control BMPs must be designed to mitigate (infiltrate, filter, or treat) the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Isopluvial Map[16]; or

(ii) Flow-based treatment control BMPs must be designed to mitigate (infiltrate, filter, or treat) either: a) the maximum flow rate of runoff produced from a rainfall intensity of 0.2 inch of rainfall per hour, for each hour of a storm event; or b) the maximum flow rate of runoff produced by the 85th percentile hourly rainfall intensity (for each hour of a storm event), as determined from the local historical rainfall record, multiplied by a factor of two.

(b) Treatment control BMPs for all Priority Development Projects must mitigate (treat through infiltration, settling, filtration or other unit processes) the required volume or flow of runoff from all developed portions of the project, including landscaped areas.

(c) All treatment control BMPs must be located so as to remove pollutants from runoff prior to its discharge to any waters of the U.S. Multiple Priority Development Projects may use shared treatment control BMPs as long as construction of any shared treatment control BMP is completed prior to the use or occupation of any Priority Development Project from which the treatment control BMP will receive runoff.

(d) All treatment control BMPs for Priority Development Projects must, at a minimum:

(i) Be ranked with high or medium pollutant removal efficiency for the project's most significant pollutants of concern, as the pollutant removal efficiencies are identified in the Copermittees' Model

[15] This section only applies to those PDPs not implementing LID capable of meeting the design storm criteria for the entire site and meeting technical infeasibility eligibility. Low-Impact Development (LID) and other site design BMPs that are correctly designed to effectively remove pollutants from runoff are considered treatment control BMPs.

[16] The isopluvial map is available from the County of Orange. The map can also be found as Figure A-1 Exhibit 7.II in the Model WQMP (September 2003), page 105 of 157 at http://www.ocwatersheds.com/StormWater/PDFs/2003_DAMP/2003_DAMP_Section_7_New_Development_Significant_Redevelopment.pdf.

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SSMP. Treatment control BMPs with a low removal efficiency ranking must only be approved by a Copermittee when a feasibility analysis has been conducted which exhibits that implementation of treatment control BMPs with high or medium removal efficiency rankings are infeasible for a Priority Development Project or portion of a Priority Development Project.

(ii) Be correctly sized and designed so as to remove storm water pollutants to the MEP.

(e) Target removal of pollutants of concern from runoff.

(f) Be implemented close to pollutant sources, and prior to discharging into waters of the U.S.

(g) Not be constructed within a waters of the U.S. or waters of the State.

(h) Include proof of a mechanism under which ongoing long-term maintenance will be conducted to ensure proper maintenance for the life of the project. The mechanisms may be provided by the project proponent or Copermittee.

(i) Be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies.

(7) Low Impact Development (LID) BMP Waiver Program

The Copermittees must develop, collectively or individually, a LID waiver program for incorporation into local SSMPs, which would allow a Priority Development Project to substitute implementation of all or a portion of required LID BMPs in section F.1.d(4) with implementation of treatment control BMPs and a mitigation project, payment into an in-lieu funding program, and/or watershed equivalent BMP(s) consistent with Section F.1.d.(11). The Copermittees shall submit the LID waiver program as part of their updated model SSMP. At a minimum, the program must meet the requirements below:

(a) Prior to implementation, the LID waiver program must clearly exhibit that it will not allow PDPs to result in a net impact (after consideration of any mitigation and in-lieu payments) from pollutant loadings over and above the impact caused by projects meeting LID requirements;

(b) For each PDP participating, a technical feasibility analysis must be included demonstrating that it is technically infeasible to implement LID BMPs that comply with the requirements of Section F.1.(d)(4). The

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Copermittee(s) must develop criteria for the technical feasibility analysis including a cost benefit analysis, examination of LID BMPs considered and alternatives chosen. Each PDP participating must demonstrate that LID BMPs were implemented as much as feasible given the site's unique conditions. Analysis must be made of the pollutant loading for each project participating in the LID substitution program. The estimated impacts from not implementing the required LID BMPs in section F.1.d.(4) must be fully mitigated. Technical infeasibility may result from conditions including, but not limited to:

(i) Locations that cannot meet the infiltration and groundwater protection requirements in section F.1.c.(6). Where infiltration is technically infeasible, the project must still examine the feasibility of other onsite retention LID BMPs;
(ii) Smart growth and infill or redevelopment locations where the density and/or nature of the project would create significant difficulty for compliance with the onsite volume retention requirements; and
(iii) Other site, geologic, soil or implementation constraints identified in the Copermittees updated local SSMP document.

(c) The LID waiver program must include mechanisms to verify that each Priority Development Project participating in the program is in compliance with all applicable SSMP requirements;

(d) The LID waiver program must develop and implement a review process verifying that the BMPs to be implemented meet the designated design criteria. The review process must also verify that each Priority Development Project participating in the program is in compliance with all applicable SSMP requirements.

(e) The LID waiver program must include performance standards for treatment control BMPs specified in compliance with section F.1.(d)(6).

(f) Each PDP that participates in the LID waiver program must mitigate for the pollutant loads expected to be discharged due to not implementing the LID BMPs in section F.1.d.(4). Mitigation projects must be implemented within the same hydrologic subarea as the PDP. Mitigation projects outside of the hydrologic subarea but within the same hydrologic unit may be approved provided that the project proponent demonstrates that mitigation projects within the same hydrologic subarea are infeasible and that the mitigation project will address similar beneficial use impacts as expected from the PDPs pollutant load types and amount. Offsite mitigation projects may include green streets projects, existing development retrofit projects, retrofit incentive programs, regional BMPs and stream restoration. Project applicants seeking to utilize these

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alternative compliance provisions may propose other offsite mitigation projects, which the Copermittees may approve if they meet the requirements of this subpart.

(g) A Copermittee may choose to implement a pollutant credit system as part of the LID waiver program provided that such a credit system clearly exhibits that it will not allow PDPs to result in a net impact from pollutant loadings over and above the impact caused by projects meeting LID requirements. Any credit system that a Copermittee chooses to implement must be submitted to the Executive Officer for review and approval as part of the waiver program.

(h) The LID waiver program shall include a storm water mitigation fund developed by the Copermittee(s) to be used for water quality improvement projects which may serve in lieu of the PDP's required mitigation in section F.1.d.(8)(e). The LID waiver program's storm water mitigation fund shall, at a minimum, identify;

(i) The entity or entities that will manage the storm water mitigation fund (i.e., assume full responsibility);
(ii) The range and types of acceptable projects for which storm water mitigation funds may be expended;
(iii) The entity or entities that will assume full responsibility for each water quality improvement project, including its successful completion; and
(iv) How the dollar amount of storm water mitigation fund contributions will be determined. In-lieu payments must be proportional to the additional pollutant load discharged by not fully implementing LID.

(i) Each Copermittee must notify the Regional Board in their annual report of each PDP choosing to participate in the LID waiver program. The annual report must include the following information:

(i) Name of the developer of the participating PDP;
(ii) Site location;
(iii) Reason for LID waiver including technical feasibility analysis;
(iv) Description of BMPs implemented;
(v) Total amount deposited, if any, into the storm water mitigation fund described in section F.1.d.(8)(f);
(vi) Water quality improvement project(s) proposed to be funded; and
(vii) Timeframe for implementation of water quality improvement projects.

(8) Site Design and Treatment Control BMP Design Standards

As part of its local SSMP, each Copermittee must develop and require Priority

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Development Projects to implement sitting, design, and maintenance criteria for each site design and treatment control BMP listed in its local SSMP to determine feasibility and applicability and so that implemented site design and treatment control BMPs are constructed correctly and are effective at pollutant removal, runoff control, and vector minimization. LID techniques, such as soil amendments, must be incorporated into the criteria for appropriate treatment control BMPs. Development of BMP design worksheets which can be used by project proponents is encouraged.

(9) Implementation Process

As part of its local SSMP, each Copermittee must implement a process to verify compliance with SSMP requirements. The process must identify at what point in the planning process Priority Development Projects will be required to meet SSMP requirements and at a minimum, the Priority Development Project must implement the required post-construction BMPs prior to occupancy and/or the intended use of any portion of that project.. The process must also include identification of the roles and responsibilities of various municipal departments in implementing the SSMP requirements, as well as any other measures necessary for the implementation of SSMP requirements.

(10) Treatment BMP Review

(a) The Copermittees must review and update the BMPs that are listed in their local SSMPs as options for treatment control during the third year of implementation of this Order. At a minimum, the update must include removal of obsolete or ineffective BMPs and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update must also add appropriate LID BMPs to any tables or discussions in the local SSMPs addressing pollutant removal efficiencies of treatment control BMPs. In addition, the update must include review and revision where necessary of treatment control BMP pollutant removal efficiencies.

(b) The update must incorporate findings from BMP effectiveness studies conducted by the Copermittees for projects funded wholly or in part by the State Board or Regional Board.

(c) Each Copermittee must implement a mechanism for annually incorporating findings from local treatment BMP effectiveness studies (e.g., ones conducted by, or on-behalf of, public agencies in Orange County) into SSMP project reviews and permitting

(11) Where a development project, greater than 100 acres in total project size or smaller than 100 acres in size yet part of a larger common plan of

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development that is over 100 acres, has been prepared using watershed and/or sub-watershed based water quality, hydrologic, and fluvial geomorphologic planning principles that implement regional LID BMPs in accordance with the sizing and location criteria of this Order and acceptable to the Regional Board, such standards shall govern review of projects with respect to Section F.1 of this Order and shall be deemed to satisfy this Order's requirements for LID site design, buffer zone, infiltration and groundwater protection standards, source control, treatment control, and hydromodification control standards. Regional BMPs must clearly exhibit that they will not result in a net impact from pollutant loadings over and above the impact caused by capture and retention of the design storm. Regional BMPs may be used provided that the BMPs capture and retain the volume of runoff produced from the 24-hour 85th percentile storm event as defined in section F.1.d.(6)(a)(i) and that such controls are located upstream of receiving waters. Any volume that is not retained by the LID BMPs, up to the design capture volume, must be treated using LID biofiltration. Where regional LID implementation has been shown to be technically infeasible (per section F.1.d.7.b) any volume up to and including the design capture volume, not retained by LID BMPs, nor treated by LID biofiltration, must be treated using conventional treatment control BMPs in accordance with Section F.1.d.(6) and participation in the LID waiver program in Section F.1.d.(7).

e. BMP CONSTRUCTION VERIFICATION

Prior to occupancy and/or intended use of any portion of the Priority Development Project subject to SSMP requirements, each Copermittee must inspect the constructed site design, source control, and treatment control BMPs to verify that they have been constructed and are operating in compliance with all specifications, plans, permits, ordinances, and this Order.

f. BMP MAINTENANCE TRACKING

(1) Each Copermittee must develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance within its jurisdiction since July 2001. LID BMPs implemented on a lot by lot basis at a single family residential home, such as rainbarrels, are not required to be tracked or inventoried. At a minimum, the database must include information on BMP type, location, watershed, date of construction, party responsible for maintenance, maintenance certifications or verifications, inspections, inspection findings, and corrective actions, including whether the site was referred to the Vector Control District.

(2) Each Copermittee must establish a mechanism not only to track post-construction BMPs, but also to ensure that appropriate easements and ownerships are properly recorded in public records and the information is

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conveyed to all appropriate parties when there is a change in project or site ownership.

(3) Each Copermittee must verify that approved post-construction BMPs are operating effectively and have been adequately maintained by implementing the following measures:

(a) An annual inventory of all approved BMPs within the Copermittee's jurisdiction. LID BMPs implemented on a lot by lot basis at a single family residential home, such as rainbarrels, are not required to be tracked or inventoried. The inventory must also include all BMPs approved for Priority Development Projects since July 2001;

(b) The designation of high priority BMPs. High-priority designation must include consideration of BMP size, recommended maintenance frequency, likelihood of operational and maintenance issues, location, receiving water quality, and other pertinent factors;

(c) Verify implementation, operation, and maintenance of BMPs by inspection, self-certification, surveys, or other equally effective approaches with the following conditions:

(i) The implementation, operation, and maintenance of at least 90 percent of approved and inventoried final project public and private SSMPs (a.k.a. WQMPs) must be verified annually. All post-construction BMPs shall be verified within every four year period;
(ii) Operation and maintenance verifications must be required prior to each rainy season;
(iii) All (100 percent) projects with BMPs that are high priority must be inspected by the Copermittee annually prior to each rainy season;
(iv) All (100 percent) public agency projects with BMPs must be inspected by the Copermittee annually;
(v) At least 50 percent of projects with drainage insert treatment control BMPs must be inspected by the Copermittee annually;
(vi) Appropriat e follow-up measures (including re-inspections, enforcement, maintenance, etc.) must be conducted to ensure the treatment BMPs continue to reduce storm water pollutants as originally designed;
(vii) All inspections must verify effective operation and maintenance of the treatment control BMPs, as well as compliance with all ordinances, permits, and this Order; and

(viii) Inspections must note observations of vector conditions, such as mosquitoes. Where conditions are identified as contributing to mosquito production, the Copermittee must notify the Orange County Vector Control District.

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g. Enforcement of Development Sites

Each Copermittee must enforce its storm water ordinance for all Development Projects and at all development sites as necessary to maintain compliance with this Order. Copermittee ordinances or other regulatory mechanisms must include appropriate sanctions to achieve compliance. Sanctions must include the following or their equivalent: Non-monetary penalties, fines, bonding requirements, and/or permit or occupancy denials for non-compliance.

h. Hydromodification Limitations on Increases of Runoff Discharge Rates and Durations[17]

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. The HMP shall be incorporated into the local SSMP and implemented by each Copermittee so that estimated post-project runoff discharge rates and durations shall not exceed pre-development discharge rates and durations. Where the proposed project is located on an already developed site, the pre-project discharge rate and duration shall be that of the pre-developed, naturally occurring condition. The HMP shall be submitted to the Executive Officer within 2 years of permit adoption. The HMP will be made available for public review and comment and the Executive Officer will determine the need for a public hearing.

(1) The HMP must:

(a) Identify a method for assessing susceptibility of channel segments which receive runoff discharges from Priority Development Projects. The geomorphic stability within the channel shall be assessed. A performance standard shall be created that ensures that the geomorphic stability within the channel not be compromised as a result of receiving runoff discharges from Priority Development Projects.

(b) Utilize continuous simulation of the entire rainfall record (or other analytical method proposed by the Copermittees and deemed acceptable

[17] Updated SSMP and hydromodification requirements shall apply to all priority projects or phases of priority projects which have not yet begun grading or construction activities at the time any updates SSMP or hydromodification requirement commences. If a Copermittee determines that lawful prior approval of a project exists, whereby application of an updated SSMP or hydromodification requirement to the project is legally infeasible, the updated SSMP or hydromodification requirement need not apply to the project. The Copermittees shall utilize the SSMP and hydromodification update periods to ensure that projects undergoing approval processes include application of the updated SSMP and hydromodification requirements in their plans.

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by the Regional Board) to identify a range of runoff flows[18] for which priority Development Project post-project runoff flow rates and durations shall not exceed pre-development (naturally occurring) runoff flow rates and durations by more than 10 percent, where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses. In addition, the identified range of runoff flow rates and durations must compensate for the loss of sediment supply due to the development. 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. In the case of an artificially hardened (concrete lined, rip rap, etc.) channel, 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 of a comparable soft-bottomed channel.

(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 (naturally occurring) runoff flow rates and durations by more than 10 percent for the range of runoff flows identified under section F.1.h.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses; (2) do not result in channel conditions which do not meet the channel standard developed under section F.1.h.(1)(a) for channel segments downstream of Priority Development Project discharge points; and (3) compensate for the loss of sediment supply due to development.

(d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent runoff from the projects from increasing and/or continuing unnatural rates of erosion of channel beds and banks, silt pollutants generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

(e) Include a review of pertinent literature.

(f) Identify areas within the San Juan Hydrologic Unit where historic hydromodification has resulted in a negative impact to benthic macroinvertebrate and benthic periphyton by identifying areas with low or very low Index of Biotic Integrity (IBI) scores.

[18] The identified range of runoff flows to be controlled should be expressed in terms of peak flow rates of rainfall events, such as "10% of the pre-development 2-year runoff event up to the pre-project 10-year runoff event."

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(g) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects. This protocol must include the use of the IBI score as a metric for assessing impacts and improvements to downstream watercourses.

(h) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.

(i) 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.

(j) Include technical information supporting any standards and criteria proposed.

(k) 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.

(l) Include a description of pre- and post-project monitoring and other program evaluation, including IBI score, to be conducted to assess the effectiveness of implementation of the HMP.

(m) Include mechanisms for assessing and addressing cumulative impacts within a watershed on channel morphology.

(n) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.

(2) In addition to the hydrologic control measures that must be implemented per section F.1.h.(1)(c), the HMP must include a suite of management measures to be used on Priority Development Projects to protect and restore downstream beneficial uses and prevent or further prevent adverse physical changes to downstream channels. The measures must be based on a prioritized consideration of the following elements in this order:

(a) Hydrologic control measures;
(b) On-site management controls;
(c) Regional controls located upstream of receiving waters; and
(d) In-stream controls.

Where stream channels are adjacent to, or are to be modified as part of a Priority Development Project, management measures must include buffer zones and setbacks. Under no circumstances will in-stream controls include the use of non-naturally occurring hardscape materials such as concrete,

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riprap, gabions, etc. The suite of management measures shall also include stream restoration as a viable option to achieve the channel standard in section F.1.h.(1)(a).

(3) Each individual Copermittee has the discretion to not require Section F.1.h. at Priority Development Projects where the project:

(a) Discharges storm water runoff into underground storm drains discharging directly to bays or the ocean; or
(b) Discharges storm water runoff into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to ocean waters, enclosed bays, estuaries, or water storage reservoirs and lakes.

(4) HMP Reporting and Implementation

(a) Within 2 years of adoption of the Order, the Copermittees shall submit to the Regional Board a draft HMP that has been reviewed by the public, including the analysis that identifies the appropriate limiting range of flow rates per section F.1.h.(1)(b).

(b) Within 180 days of receiving Regional Board comments on the draft HMP, the Copermittees shall submit a final HMP that addressed the Regional Board's comments.

(c) Within 90 days of receiving a finding of adequacy from the Executive Officer, each Copermittee shall incorporate and implement the HMP for all Priority Development Projects.

(d) Prior to approval of the HMP by the Regional Board, the early implementation measures likely to be included in the HMP shall be encouraged by the Copermittees.

(5) Interim Hydromodification Criteria

Within one year of adoption of this Order, each Copermittee must ensure that all Priority Development Projects are implementing the following criteria by comparing the pre-development (naturally occurring) and post-project flow rates and durations using a continuous simulation hydrologic model such as US EPA's Hydrograph Simulation Program-Fortran (HSPF):

(a) For flow rates from 10 percent of the 2-year storm event to the 5 year storm event, the post-project peak flows shall not exceed pre-development (naturally occurring) peak flows.

(b) For flow rates from the 5 year storm event to the 10 year storm event the post-project peak flows may exceed pre-development (naturally

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occurring) flows by up to 10 percent for a 1-year frequency interval.

The interim hydromodification criteria do not apply to Priority Development Projects where the project discharges (1) storm water runoff into underground storm drains discharging directly to bays or the ocean, or (2) storm water runoff into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to ocean waters, enclosed bays, estuaries, or water storage reservoirs and lakes.

Within one year of adoption of this Order, each Copermittee must submit a signed, certification statement to the Regional Board verifying implementation of the interim hydromodification criteria.

(6) No part of section F.1.h shall alleviate the Copermittees responsibilities for implementing Low Impact Development BMPs as required under section F.1.d.(4).

i. Training And Education

(1) Municipal Departments and Personnel Education

Municipal Development Planning: Each Copermittee must implement an education program so that its planning and development review staffs and contractors (and Planning Boards and Elected Officials, if applicable) have an understanding of:

(a) Federal, State, and local water quality laws and regulations applicable to Development Projects;

(b) The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization); and

(c) Methods of minimizing impacts to receiving water quality resulting from development, including:

(i) Storm water management plan development and review;
(ii) Local sensitive water bodies, including 303(d)-impairments and ESAs;
(iii) Methods to control downstream erosion impacts;
(iv) Identification of pollutants of concern;
(v) Site design BMP techniques;
(vi) Source control BMPs;
(vii) Selection of the most effective treatment control BMPs for the pollutants of concern; and
(viii) Public heath concerns related to storm water management infrastructure.

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(2) Project Applicants, Developers, Contractors, Property Owners, and other Responsible Parties

(a) Each Copermittee must implement a New Development / Redevelopment education program using all media as appropriate to:

(i) Measurably increase the knowledge of the target communities regarding MS4s, impacts of runoff on receiving waters, and potential BMP solutions for the target audience; and
(ii) To measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment.

(b) Each Copermittee must educate each target community on the following topics where appropriate:

(i) The importance of educating all construction workers in the field about storm water issues and BMPs though formal or informal training;
(ii) Federal, State, and local water quality laws and regulations applicable to new development and redevelopment activities;
(iii) Site design, source control, pollution prevention, and treatment BMPs;
(iv) General runoff concepts; and
(v) Other topics of local importance, including local water quality conditions, impaired waterbodies and environmentally sensitive areas.

2. CONSTRUCTION COMPONENT

Each Copermittee must implement a construction program which meets the requirements of this section, prevents illicit discharges into the MS4, implements and maintains structural and non-structural BMPs to reduce pollutants in storm water runoff from construction sites to the MS4, reduces construction site discharges of storm water pollutants from the MS4 to the MEP, and prevents construction site discharges from the MS4 from causing or contributing to a violation of water quality standards.

a. Ordinance Update

Within 365 days of adoption of this Order, each Copermittee must review and update its grading ordinances and other ordinances as necessary to achieve full compliance with this Order, including requirements for the implementation of all designated BMPs and other measures.

b. Source Identification

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Each Copermittee must maintain an updated watershed based inventory of all construction sites within its jurisdiction. The use of an automated database system, such as Geographical Information Systems (GIS) is required.

c. Site Planning and Project Approval Process

Each Copermittee must incorporate consideration of potential water quality impacts prior to approval and issuance of construction and grading permits.

(1) Each construction and grading permit must require proposed construction sites to implement designated BMPs and other measures so that illicit discharges into the MS4 are prevented and storm water pollutants discharged from the site will be reduced to the maximum extent practicable and will not cause or contribute to a violation of water quality standards.

(2) Prior to permit issuance, the project proponent's runoff management plan (or equivalent construction BMP plan) must be required to comply, and reviewed to verify compliance, with the local grading ordinance, other applicable local ordinances, and this Order.

(3) Prior to permit issuance, each Copermittee must verify that project proponents subject to California's statewide General NPDES Permit for Storm Water Discharges Associated With Construction Activities, (hereinafter General Construction Permit), have existing coverage under the General Construction Permit.

d. BMP Implementation

(1) Designate BMPs: Each Copermittee must designate a minimum set of BMPs and other measures to be implemented at all construction sites. The designated minimum set of BMPs must include:

(a) Management Measures:

(i) Pollution prevention, where appropriate;
(ii) Development and implementation of a site-specific runoff management plan;
(iii) Minimization of areas that are cleared and graded to only the portion of the site that is necessary for construction;
(iv) Minimization of exposure time of disturbed soil areas;
(v) Minimization of grading during the wet season and correlation of grading with seasonal dry weather periods to the extent feasible;
(vi) Limitation of grading to a maximum disturbed area as determined by each Copermittee before either temporary or permanent erosion controls are implemented to prevent storm water pollution. The Copermittee has the option of temporarily increasing the size of

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disturbed soil areas by a set amount beyond the maximum, if the individual site is in compliance with applicable storm water regulations and the site has adequate control practices implemented to prevent storm water pollution;

(vii) Temporary stabilization and reseeding of disturbed soil areas as rapidly as feasible;

(viii) Wind erosion controls;

(ix) Tracking controls;

(x) Non-stormwater management measures to prevent illicit discharges and control storm water pollution sources;

(xi) Waste management measures;

(xii) Preservation of natural hydrologic features where feasible;

(xiii) Preservation of riparian buffers and corridors where feasible;

(xiv) Evaluation and maintenance of all BMPs, until removed; and

(xv) Retention, reduction, and proper management of all storm water pollutant discharges on site to the MEP standard.

(b) Erosion and Sediment Controls:

(i) Erosion prevention. Erosion prevention is to be used as the most important measure for keeping sediment on site during construction;

(ii) Sediment controls. Sediment controls are to be used as a supplement to erosion prevention for keeping sediment on-site during construction;

(iii) Slope stabilization must be used on all active slopes during rain events regardless of the season and on all inactive slopes during the rainy season and during rain events in the dry season; and

(iv) Permanent revegetation or landscaping as early as feasible.

(c) Designate enhanced BMPs[19] for 303(d) impairments and ESAs: Each Copermittee must implement, or require implementation of, enhanced measures to address the exceptional threat to water quality posed by all construction sites tributary to CWA section 303(d) water body segments impaired for sediment or turbidity. Each Copermittee must also implement, or require implementation of, enhanced, site-specific measures for construction sites within or adjacent to or discharging directly to coastal lagoons, the ocean, or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).

(i) Active Sediment Treatment (AST): Each Copermittee must require implementation of advanced treatment for sediment at construction

[19] Enhanced BMPs are control actions specifically targeted to the pollutant or condition of concern and of higher quality and effectiveness than the minimum control measures otherwise required. Enhanced in this Order means better, not simply more, BMPs.

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sites (or portions thereof) that are determined by the Copermittee to be an exceptional threat to water quality. In evaluating the threat to water quality, the following factors must be considered by the Copermittee:

[a] Soil erosion potential or soil type;
[b] The site's slopes;
[c] Project size and type;
[d] Sensitivity of receiving water bodies;
[e] Proximity to receiving water bodies;
[f] Non-storm water discharges;
[g] Ineffectiveness of other BMPs;
[h] Proximity and sensitivity of aquatic threatened and endangered species of concern;
[i] Known effects of AST chemicals; and
[j] Any other relevant factors.

(d) Implement BMPs: Each Copermittee must implement, or require the implementation of, the designated minimum BMPs and any additional measures necessary to comply with this Order at each construction site within its jurisdiction year round. BMP implementation requirements, however, can vary based on wet and dry seasons. Dry season BMP implementation must plan for and address unseasonal rain events that may occur during the dry season (May 1 through September 30).

e. INSPECTION OF CONSTRUCTION SITES

Each Copermittee must conduct construction site inspections for compliance with its ordinances (grading, storm water, etc.), permits (construction, grading, etc.), and this Order. Priorities for inspecting sites must consider the nature and size of the construction activity, topography, and the characteristics of soils and receiving water quality.

(1) During the wet season, each Copermittee must inspect at least biweekly (every two weeks), all construction sites within its jurisdiction meeting any of the following criteria:

(a) All sites 30 acres or more in size with rough grading or active slopes occurring during the wet season;

(b) All sites one acre or more, and tributary to a CWA section 303(d) water body segment impaired for sediment or within or directly adjacent to, or discharging directly to, the ocean or a receiving water within an ESA; and

(c) Other sites determined by the Copermittees or the Regional Board as a significant threat to water quality. In evaluating threat to water quality, the following factors must be considered: (1) soil erosion potential; (2) site

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slope; (3) project size and type; (4) sensitivity of receiving water bodies; (5) proximity to receiving water bodies; (6) non-storm water discharges; (7) past record of non-compliance by the operators of the construction site; and (8) any other relevant factors.

(2) During the wet season, each Copermittee must inspect at least monthly, all construction sites with one acre or more of soil disturbance not meeting the criteria specified above in section F.2.e.(1).

(3) During the wet season, each Copermittee must inspect construction sites less than one acre in size as needed to ensure compliance with its ordinances and this Order.

(4) Each Copermittee must inspect all construction sites as needed during the dry season. Sites meeting the criteria in section F.2.e.(1) must be inspected at least once in August or September each year.

(5) Re-inspections: Based upon site inspection findings, each Copermittee must implement all follow-up actions (i.e., re-inspection, enforcement) necessary to comply with this Order. Reinspection frequencies must be determined by each Copermittee based upon the severity of deficiencies, the nature of the construction activity, and the characteristics of soils and receiving water quality.

(6) Inspections of construction sites must include, but not be limited to:

(a) Check for coverage under the General Construction Permit (Notice of Intent (NOI) and/or Waste Discharge Identification No.) during initial inspections;
(b) Assessment of compliance with Copermittee ordinances and permits related to runoff, including the implementation and maintenance of designated minimum BMPs;
(c) Assessment of BMP effectiveness;
(d) Visual observations for non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff;
(e) Education and outreach on storm water pollution prevention, as needed; and
(f) Creation of a written or electronic inspection report.

(7) The Copermittees must track the number of inspections for each inventoried construction site throughout the reporting period to verify that each site is inspected at the minimum frequencies required.

f. E NFORCEMENT OF CONSTRUCTION SITES

(1) Each Copermittee must develop and implement an escalating enforcement

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process that achieves prompt corrective actions at construction sites for violations of the Copermittee's water quality protection permit requirements and ordinances. This enforcement process must include authorizing the Copermittee's construction site inspectors to take immediate enforcement actions when appropriate and necessary. The enforcement process must include appropriate sanctions such as stop work orders, non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance.

(2) Each Copermittee must be able to respond to complaints received from third-parties and to ensure the Regional Board that corrective actions have been implemented.

g. REPORTING OF NON-COMPLIANT SITES

(1) In addition to the notification requirements in Attachment B, each Copermittee must notify the Regional Board when the Copermittee issues a stop work order or other high level enforcement to a construction site in its jurisdiction as a result of storm water violations.

(2) Each Copermittee shall annually notify the Regional Board, prior to the commencement of the wet season, of all construction sites with alleged violations. Information may be provided as part of the JRMP annual report if submitted prior to the rainy season. Information provided shall include, but not be limited to, the following:

(a) WDID number if enrolled under the General Construction Permit
(b) Site Location, including address
(c) Current violations or suspected violations

h. TRAINING AND EDUCATION

(1) Municipal Staff and Contractors: Requirements for municipal staff and contractors are described in the Municipal Component section of this Order.

(2) Construction Site Owner / Operator Responsibilities:

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee must implement a program to educate project applicants, developers, contractors, property owners, and other responsible parties. The education program must provide an understanding of the topics listed below, as appropriate for the audience being educated.

(a) The importance of educating all construction workers in the field about storm water issues and BMPs though formal or informal training;

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(b) Federal, State, and local water quality laws and regulations applicable to construction and grading activities;
(c) Site design, source control, pollution prevention, and treatment BMPs;
(d) General runoff concepts; and
(e) Other topics of local importance, including local water quality conditions, impaired waterbodies and environmentally sensitive areas.

3. EXISTING DEVELOPMENT COMPONENT

a. MUNICIPAL

Each Copermittee must implement a municipal program which meets the requirements of this section, prevents illicit discharges into the MS4, reduces municipal discharges of storm water pollutants from the MS4 to the MEP, and prevents municipal discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Source Identification / Inventory

Each Copermittee must maintain an updated watershed-based inventory of municipal areas and activities. The inventory must include the name, address (if applicable), and a description of the area/activity; which pollutants are potentially generated by the area/activity; whether the area/activity is adjacent to an ESA; and identification of whether the area/activity is tributary to a CWA section 303(d) water body segment and generates pollutants for which the water body segment is impaired. The use of an automated database system, such as Geographical Information Systems (GIS) is required when applicable.

(2) General BMP Implementation

(a) Pollution Prevention: Each Copermittee must implement pollution prevention methods in its municipal program and must require their use by appropriate municipal departments, personnel, and contractors, where appropriate.

(b) Designate Minimum BMPs: Each Copermittee must designate a minimum set of BMPs for all municipal areas and activities. The designated minimum BMPs for municipal areas and activities must be area or activity specific as appropriate. BMPs must be designated for special events that are expected to generate significant trash and litter.

(c) Designate BMPs for ESAs and 303(d) Impairments: Each Copermittee must designate enhanced measures for municipal areas and activities tributary to CWA section 303(d) impaired water body segments when an area or activity generates pollutants for which the water body segment is

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impaired. Each Copermittee must also designate additional controls for municipal areas and activities within or directly adjacent to or discharging directly to coastal lagoons, the ocean, or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).

(d) Implement BMPs: Each Copermittee must implement, or require the implementation of, the designated minimum and enhanced BMPs and any additional measures necessary based on its inventory to comply with this Order for each municipal area or activity within its jurisdiction.

(3) BMP Implementation for Management of Pesticides, Herbicides, and Fertilizers

Each Copermittee must implement BMPs to reduce the contribution of storm water pollutants associated with the application, storage, and disposal of pesticides, herbicides and fertilizers from municipal areas and activities to MS4s and receiving waters. Such BMPs must include, at a minimum:

(a) Educational activities, permits, certifications and other measures for municipal applicators and distributors;
(b) Integrated Pest Management (IPM) measures that rely on non-chemical solutions;
(c) The use of native vegetation;
(d) Schedules for irrigation and chemical application; and
(e) The collection and proper disposal of unused pesticides, herbicides, and fertilizers.

(4) BMP implementation for Flood Control Structures

(a) Each Copermittee must implement procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies.
(b) Each Copermittee must include water quality protection measures, where feasible, when retrofitting existing flood control structural devices.
(c) Each Copermittee must evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device. The inventory and evaluation must be completed by and submitted to the Regional Board in the 2nd year JRMP Annual Report.

(5) BMP Implementation for Sweeping of Municipal Areas

Where municipal area sweeping is implemented as an MS4 BMP for municipal roads, streets, highways, and parking facilities, each Copermittee must design and implement the program based on the following criteria:

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(a) Optimize pickup of trash and debris based on land uses, trash collection schedules, seasonal factors (e.g., special events, tourism, etc.) and inspections of municipal areas/activities.

(6) Operation and Maintenance of Municipal Separate Storm Sewer System (MS4) and Structural Controls

(a) Treatment Controls: Each Copermittee must implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce storm water pollutant discharges to or from its MS4s and related drainage structures.

(b) MS4 and Facilities: Each Copermittee must implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities must, at a minimum, include:

(i) Inspection and removal of accumulated waste at least once a year between May 1 and September 30 of each year for all MS4 facilities;
(ii) Additional cleaning as necessary between October 1 and April 30 of each year for facilities that receive or collect high volumes of trash and debris;
(iii) Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less that every other year;
(iv) Open channels must be cleaned of observed anthropogenic litter in a timely manner;
(v) Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed;
(vi) Proper disposal of waste removed pursuant to applicable laws; and
(vii) Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

(7) Infiltration From Sanitary Sewer to MS4/Provide Preventive Maintenance of Both

(a) Each Copermittee must implement controls and measures to prevent and eliminate infiltration of seepage from municipal sanitary sewers to MS4s through thorough, routine preventive maintenance of the MS4. Each Copermittee that operates both a municipal sanitary sewer system and a MS4 must implement controls and measures to prevent and eliminate infiltration of seepage from the municipal sanitary sewers to the MS4s that must include overall sanitary sewer and MS4 surveys and thorough, routine preventive maintenance of both.

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(b) Each Copermittee must implement controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary. Such controls must include:

(i) Adequate plan checking for construction and new development,
(ii) Incident response training for municipal employees that identify sanitary sewer spills;
(iii) Code enforcement inspections;
(iv) MS4 maintenance and inspections;
(v) Interagency coordination with sewer agencies; and
(vi) Proper education of municipal staff and contractors conducting field operations on the MS4 or municipal sanitary sewer (if applicable).

(8) Inspection of Municipal Areas and Activities

(a) At a minimum, each Copermittee must inspect the following high priority municipal areas and activities annually:

(i) Roads, Streets, Highways, and Parking Facilities;
(ii) Flood Management Projects and Flood Control Devices;
(iii) Areas and activities tributary to a CWA section 303(d) impaired water body segment, where an area or activity generates pollutants for which the water body segment is impaired.
(iv) Areas and activities within or adjacent to or discharging directly to coastal lagoons, the ocean, or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order);
(v) Municipal Facilities:
  [a] Active or closed municipal landfills;
  [b] Publicly owned treatment works (including water and wastewater treatment plants) and sanitary sewage collection systems;
  [c] Solid waste transfer facilities;
  [d] Land application sites;
  [e] Corporate yards including maintenance and storage yards for materials, waste, equipment and vehicles; and
  [f] Household hazardous waste collection facilities.
(vi) Municipa l airfields;
(vii) Parks and recreation facilities;
(viii) Special event venues following special events (festivals, sporting events, etc.);
(ix) Power washing; and
(x) Other municipal areas and activities that the Copermittee determines may contribute a significant pollutant load to the MS4.

(b) Other municipal areas and activities must be inspected as needed and in response to water quality data, valid public complaints, and findings from

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municipal or contract staff.

(c) Based upon site inspection findings, each Copermittee must implement all follow-up actions necessary to comply with this Order.

(9) Enforcement of Municipal Areas and Activities

Each Copermittee must enforce its storm water ordinance for all municipal areas and activities as necessary to maintain compliance with this Order.

(10) Training and Education

Each Copermittee must ensure that all municipal personnel and contractors that have responsibilities for selecting, implementing, and evaluating BMPs for municipal areas and activities are adequately trained and educated to perform such tasks.

(a) Municipal Departments and Personnel Education

(i) Municipal Construction Activities: Each Copermittee must 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:

[a] Federal, State, and local water quality laws and regulations applicable to construction and grading activities;
[b] 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);
[c] Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities;
[d] The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application;
[e] Current advancements in BMP technologies;
[f] SSMP Requirements including treatment options, site design, source control, and applicable tracking mechanisms; and
[g] Other topics of local importance, including local water quality conditions, impaired water bodies, environmentally sensitive areas, and public health and disease vector issues associated with runoff.

(ii) Municipal Industrial/Commercial Activities: Each Copermittee must train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at

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least once a year. Training must cover inspection and enforcement procedures, BMP implementation, and review of monitoring data

(iii) Municipal Other Activities: Each Copermittee must 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.

b. C OMMERCIAL □INDUSTRIAL

Each Copermittee must implement a commercial / industrial program that meets the requirements of this section, prevents illicit discharges into the MS4, reduces commercial / industrial discharges of storm water pollutants from the MS4 to the MEP, and prevents commercial / industrial discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Source Identification

(a) Each Copermittee must maintain an updated watershed-based inventory of all industrial and commercial sites/sources within its jurisdiction (regardless of ownership) that could contribute a significant pollutant load to the MS4. The inventory must include the following minimum information for each industrial and commercial site/source: name; address; pollutants potentially generated by the site/source; and identification of whether the site/source is tributary to a Clean Water Act section 303(d) water body segment and generates pollutants for which the water body segment is impaired; and a narrative description including SIC codes which best reflects the principal products or services provided by each facility.

At a minimum, the following sites/sources must be included in the inventory:

(i) Commercial Sites/Sources:

[a] Automobile repair, maintenance, fueling, or cleaning;
[b] Airplane repair, maintenance, fueling, or cleaning;
[c] Boat repair, maintenance, fueling, or cleaning;
[d] Equipment repair, maintenance, fueling, or cleaning;
[e] Automobile and other vehicle body repair or painting;
[f] Mobile automobile or other vehicle washing;
[g] Automobile (or other vehicle) parking lots and storage facilities;
[h] Retail or wholesale fueling;
[i] Pest control services;
[j] Eating or drinking establishments, including food markets;

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[k] Mobile carpet, drape or furniture cleaning;
[l] Cement mixing or cutting;
[m] Masonry;
[n] Painting and coating;
[o] Botanical or zoological gardens and exhibits;
[p] Landscaping;
[q] Nurseries and greenhouses;
[r] Golf courses, parks and other recreational areas/facilities;
[s] Cemeteries;
[t] Pool and fountain cleaning;
[u] Marinas;
[v] Portable sanitary services;
[w] Building material retailers and storage;
[x] Animal facilities;
[y] Mobile pet services;
[z] Power washing services; and
[aa] Other sites and sources with a history of un-authorized discharges to the MS4.

(ii) Industrial Sites/Sources:

[a] Industrial Facilities, as defined at 40 CFR § 122.26(b)(14), including those subject to the General Industrial Permit or other individual NPDES permit;
[b] Operating and closed landfills;
[c] Facilities subject to SARA Title III; and
[d] Hazardous waste treatment, disposal, storage and recovery facilities.

(iii) ESAs and 303(d) Listed Waterbodies: All other commercial or industrial sites/sources tributary to a CWA Section 303(d) impaired water body segment, where the site/source generates pollutants for which the water body segment is impaired. All other commercial or industrial sites/sources within or directly adjacent to or discharging directly to coastal lagoons, the ocean, or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).

(iv) All other commercial or industrial sites/sources that the Copermittee determines may contribute a significant pollutant load to the MS4.

(2) General BMP Implementation

(a) Pollution Prevention: Each Copermittee must require the use of pollution prevention methods by industrial and commercial sites/sources.

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(b) Designate / Update Minimum BMPs: Each Copermittee must designate a minimum set of BMPs for all industrial and commercial sites/sources. Where BMPs have already been designated, each Copermittee must review its existing BMPs for adequacy. The designated minimum BMPs must be specific to facility types and pollutant-generating activities, as appropriate.

(c) Designate Enhanced BMPs for ESAs and 303(d) Impairments: Each Copermittee must designate enhanced measures for industrial and commercial sites/sources tributary to CWA section 303(d) impaired water body segments (where a site/source generates pollutants for which the water body segment is impaired). Each Copermittee must also designate additional controls for industrial and commercial sites/sources within or directly adjacent to or discharging directly to coastal lagoons, the ocean, or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).

(d) Implement BMPs: Each Copermittee must implement, or require the implementation of, the designated minimum and enhanced BMPs and any additional measures necessary based on inspections, incident responses, and water quality data to comply with this Order at each industrial and commercial site/source within its jurisdiction.

(3) <u>BMP Implementation for Mobile Businesses</u>

(a) Each Copermittee must develop and implement a program to reduce the discharge of storm water pollutants from mobile businesses to the MEP and to prohibit non-storm water discharges pursuant to Section B of this Order. Each Copermittee must keep as part of their commercial source inventory a listing of mobile businesses known to operate within its jurisdiction. The program must include:

(i) Development and implementation of minimum standards and BMPs to be required for each of the various types of mobile businesses;
(ii) Development and implementation of an enforcement strategy which specifically addresses the unique characteristics of mobile businesses;
(iii) Notification of those mobile businesses known to operate within the Copermittee's jurisdiction of the minimum standards and BMP requirements and local ordinances;
(iv) Development and implementation of an outreach and education strategy; and
(v) Inspection of mobile businesses as needed to implement the program.

(b) If they choose to, the Copermittees may cooperate in developing and implementing their programs for mobile businesses, including sharing of mobile business inventories, BMP requirements, enforcement action

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information, and education.

(4) Inspection of Industrial and Commercial Sites/Sources

Each Copermittee must conduct industrial and commercial site inspections for compliance with its ordinances, permits, and this Order.

(a) Inspection Procedures: Inspections must include but not be limited to:

(i) Review of BMP implementation plans, if the site uses or is required to use such a plan;

(ii) Review of facility monitoring data, if the site monitors its runoff;

(iii) Check for coverage under the General Industrial Permit (Notice of Intent (NOI) and/or Waste Discharge Identification Number), if applicable;

(iv) Assessment of compliance with Copermittee ordinances and permits related to runoff;

(v) Assessment of BMP implementation, maintenance and effectiveness;

(vi) Visual observations for non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff; and

(vii) Education and training on storm water pollution prevention, as conditions warrant.

(b) Each Copermittee shall annually notify the Regional Board, prior to the commencement of the wet season, of all Industrial Sites and Industrial Facilities subject to the General Industrial Permit or other individual NPDES permit with alleged violations. Information may be provided as part of the JRMP annual report if submitted prior to the rainy season. Information provided shall include, but not be limited to, the following:

(i) WDID number if enrolled under the General Industrial Permit;
(ii) Site Location, including address;
(iii) Current violations or suspected violations; and
(iv) Past Violation history.

(c) Frequencies: At a minimum, 20 percent of the sites inventoried as required in section F.3.b.(1) above (excluding mobile sources and food facilities) must be inspected each year. Mobile businesses must be

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inspected pursuant to the enforcement strategy developed pursuant to section F.3.b.(3). Other inspection frequencies must be based upon findings of the Copermittee's existing program and the following factors:

(i) Type of activity (SIC code);
(ii) Materials used at the facility;
(iii) Wastes generated;
(iv) Pollutant discharge potential;
(v) Non-storm water discharges;
(vi) Size of facility;
(vii) Proximity to receiving water bodies;
(viii) Sensitivity of receiving water bodies;
(ix) Whether the facility is subject to the General Industrial Permit or an individual NPDES permit;
(x) Whether the facility has filed a No Exposure Certification/Notice of Non-Applicability;
(xi) Facility design;
(xii) Total area of the site, area of the site where industrial or commercial activities occur, and area of the site exposed to rainfall and runoff;
(xiii) The facility's compliance history; and
(xiv) Any other relevant factors.

(d) Food Facilities: Each food facility must be inspected annually for compliance with the Copermittee's water quality ordinances and this Order. Each inspection of a food facility must, at a minimum, address the following concerns:

(i) Trash storage and disposal;
(ii) Grease storage and disposal;
(iii) Washwater discharges to the MS4 (e.g., from floor mats, driveways, sidewalks, etc.);
(iv) Identification of outdoor sewer and MS4 connections; and
(v) Education of property managers when grease and/or trash facilities are shared by multiple facilities.

(e) Third-Party Inspections: Each Copermittee may develop and implement a third party inspection program for verifying industrial and commercial site/source compliance with its ordinances, permits, and this Order. To the extent that third party inspections are conducted to fulfill the requirements of this Order, the Copermittee will be responsible for conducting and documenting quality assurance and quality control of the third-party inspections.

(i) Each inspection conducted by a third-party must, at a minimum, result in the following:

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[a] Photo documentation of potential storm water violations identified during the third party inspection;
[b] Reporting to the Copermittee of identified significant potential violations, including imminent or observed illegal discharges, within 24 hours of the third party inspection;
[c] Reporting to the Copermittee of all inspection findings within one week of the inspection being conducted; and
[d] Copermittee follow-up and/or enforcement actions for identified potential storm water violations within two business days of the inspection or potential violation report receipt.

(f) Based upon site inspection findings, each Copermittee must implement all follow-up actions and enforcement necessary to comply with this Order.

(g) To the extent that the Regional Board has conducted an inspection of an industrial site during a particular year, the requirement for the responsible Copermittee to inspect this facility during the same year will be satisfied.

(h) The Copermittees must track the number of inspections for the inventoried industrial and commercial sites/sources throughout the reporting period to verify that the sites/sources are inspected at the minimum frequencies listed in this Order.

(5) Enforcement of Industrial and Commercial Sites/Sources

Each Copermittee must enforce its storm water ordinance for all industrial and commercial sites/sources as necessary to maintain compliance with this Order. Copermittee ordinances or other regulatory mechanisms must include appropriate sanctions to achieve compliance. Sanctions must include the following or their equivalent: Non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance.

(6) Training and Education for Owners and Operators of Commercial and Industrial Activities

(a) Each Copermittee must implement an education program using all media as appropriate to (1) measurably increase the knowledge of owners and operators of commercial and industrial activities regarding MS4s, impacts of 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 storm water pollutant releases and eliminate prohibited non-storm water discharges to MS4s and the environment. At a minimum, the education program must meet the requirements of this section and address the following issues:

(i) Laws, regulations, permits, & requirements;

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(ii) Best management practices;
(iii) General runoff concepts; and

(iv) Other topics, including public reporting mechanisms, water conservation, low-impact development techniques.

(b) BMP Notification: At least twice during the five-year period of this Order, each Copermittee must notify the owner/operator of each inventoried industrial and commercial site/source of the BMP requirements applicable to the site/source.

c. RESIDENTIAL

Each Copermittee must implement a residential program which meets the requirements of this section, prevents illicit discharges into the MS4, reduces residential discharges of storm water pollutants from the MS4 to the MEP, and prevents residential discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Threat to Water Quality Prioritization

Each Copermittee must identify residential areas and activities that pose a high threat to water quality. At a minimum, these must include:

(a) Automobile repair, maintenance, washing, and parking;
(b) Home and garden care activities and product use (pesticides, herbicides, and fertilizers);
(c) Disposal of trash, pet waste, green waste, and household hazardous waste (e.g., paints, cleaning products);
(d) Any other residential source that the Copermittee determines may contribute a significant pollutant load to the MS4;
(e) Any residential areas tributary to a CWA section 303(d) impaired water body, where the residence generates pollutants for which the water body is impaired; and
(f) Any residential areas within or directly adjacent to or discharging directly to a coastal lagoon, the ocean, or other receiving waters within an environmentally sensitive area (as defined in Attachment C of this Order).

(2) BMP Implementation

(a) Pollution Prevention: Each Copermittee must actively encourage the use of pollution prevention methods by residents.

(b) Designate BMPs: Each Copermittee must designate minimum BMPs for high-threat-to-water quality residential areas and activities. The designated minimum BMPs for high-threat-to-water quality residential

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areas and activities must be area or activity specific.

(c) Hazardous Waste BMPs: Each Copermittee must facilitate the proper management and disposal of used oil, toxic materials, and other household hazardous wastes. Such facilitation must include educational activities, public information activities, and establishment of collection sites operated by the Copermittee or a private entity. Curbside collection of household hazardous wastes is encouraged.

(d) Implement BMPs: Each Copermittee must implement, or require implementation of, the designated minimum BMPs and any additional measures necessary to comply with Sections A and B of this Order.

(e) Each Copermittee must implement, or require implementation of, BMPs for residential areas and activities that have not been designated a high threat to water quality, as necessary.

(3) Enforcement of Residential Areas and Activities

Each Copermittee must enforce its storm water ordinance for all residential areas and activities as necessary to maintain compliance with this Order.

(4) Evaluation of Oversight of Residential Areas and Activities

Each Copermittee must annually review the effectiveness of efforts to reduce residential discharges of storm water pollutants from the MS4 and eliminate illicit residential discharges into the MS4. The evaluation must consider findings from monitoring data, municipal employee comments, inspections, complaints, and other appropriate sources.

(5) Common Interest Areas (CIA) / Home Owner Association (HOA) Areas

Each Copermittee must implement measures specifically to ensure that runoff within common interest developments, including areas managed by associations, meets the objectives of this section and Order.

(a) BMP Implementation: Each Copermittee must implement management measures based on a review of pertinent factors, including:

(i) Current maintenance duties and procedures used by CIA/HOA maintenance associations within its jurisdiction;
(ii) Whether streets and storm drains are publicly or privately owned within the CIA/HOA;
(iii) Whether the CIA/HOA area has been identified as a high priority residential area;
(iv) Proximity to 303(d)-listed waterbodies, the ocean, environmentally

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sensitive areas;
(v) Evaluation of water quality monitoring data;
(vi) Evaluation of existing illegal discharge/illicit connection activities;
(vii) Other activities conducted or authorized by the HOA that may pose a significant risk to inland or coastal receiving waters.

(b) Legal Authority and Enforcement: Within one year of adoption of this Order, each Copermittee must review its Municipal Code to determine the most appropriate method to implement and enforce runoff management measures within CIA/HOA areas.

(6) Residential Education Program

(a) Each Copermittee must implement a Residential Education Program using all media as appropriate to (1) measurably increase the knowledge regarding MS4s, impacts of 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 storm water and eliminate prohibited non-storm water pollutant releases to MS4s and the environment.

(b) Copermittee educational programs must emphasize underserved target audiences, residents and managers of CIA/HOA areas, high-risk behaviors, and "allowable" behaviors and discharges. At a minimum, the education program must meet the requirements of this section and address the following issues:

(i) Laws, regulations, permits, and requirements;
(ii) Best management practices;
(iii) General runoff concepts;
(iv) Existing water quality, including local water quality conditions, impaired waterbodies and environmentally sensitive areas; and
(v) Other topics, including public reporting mechanisms, water conservation, low-impact development techniques, and public health and disease vector issues associated with runoff.

d. Retrofitting Existing Development

Each Copermittee must develop and implement a retrofitting program which meets the requirements of this section. The goals of the existing development retrofitting program are to reduce impacts from hydromodification, promote LID, support riparian and aquatic habitat restoration, reduce the discharges of storm water pollutants from the MS4 to the MEP, and prevent discharges from the MS4 from causing or contributing to a violation of water quality standards. Where feasible, at the discretion of the Copermittee, the existing development retrofitting program may be coordinated with flood control projects and infrastructure

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improvement programs.

(1) Source Identification

The Copermittee must identify and inventory existing developments (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting. Potential retrofitting candidates must include but are not limited to:

(a) Development that contributes pollutants of concern to a TMDL or a ESA;
(b) Receiving waters channelized or otherwise hardened;
(c) Development tributary to receiving waters that are channelized or otherwise hardened;
(d) Developments tributary to receiving waters that are significantly eroded;
(e) Developments tributary to an ASBS or SWQPA; and
(f) Development that causes hydraulic constriction.

(2) Each Copermittee shall evaluate and rank the inventoried existing developments to prioritize retrofitting. Criteria for evaluation must include but is not limited to:

(a) Feasibility;
(b) Cost effectiveness;
(c) Pollutant removal effectiveness;
(d) Impervious area potentially treated;
(e) Maintenance requirements;
(f) Landowner cooperation;
(g) Neighborhood acceptance;
(h) Aesthetic qualities; and
(i) Efficacy at addressing concern.

(3) Each Copermittee must consider the results of the evaluation in prioritizing work plans for the following year. Highly feasible projects expected to benefit water quality should be given a high priority to implement source control and treatment control BMPs. Where feasible, the retrofit projects should be designed in accordance with the SSMP requirements within sections F.1.d.(3) through F.1.d.(8). In addition, the Copermittee shall encourage retrofit projects to implement where feasible the Hydromodification requirements in Section F.1.h.

(4) When requiring retrofitting on existing development, the Copermittees will cooperate with private landowners to encourage retrofitting projects. The Copermittee may consider the following practices in cooperating and encouraging private landowners to retrofit their existing development:

(a) Demonstration retrofit projects;
(b) Retrofits on public land and easements;

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(c) Education and outreach;
(d) Subsidies for retrofit projects;
(e) Requiring retrofit projects as mitigation or ordinance compliance;
(f) Public and private partnerships; and
(g) Fees for existing discharges to the MS4.

(5) The completed retrofit BMPs shall be tracked and inspected in accordance with section F.1.f.

(6) Where constraints on retrofitting preclude effective BMP deployment on existing developments at locations critical to protect receiving waters, a Copermittee may propose a regional mitigation project to improve water quality. Such regional projects may include but are not limited to:

(a) Regional water quality treatment BMPs;
(b) Urban creek or wetlands restoration and preservation;
(c) Daylighting and restoring underground creeks;
(d) Localized rainfall storage and reuse to the extent such projects are fully protective of downstream water rights;
(e) Hydromodification project; and
(f) Removal of invasive plant species.

(7) A retrofit project or regional mitigation project may qualify as a Watershed Water Quality Activity provided it meets the requirements in section G. Watershed Runoff Management Program.

4. ILLICIT DISCHARGE DETECTION AND ELIMINATION

Each Copermittee must implement a program which meets the requirements of this section to actively detect and eliminate illicit discharges and disposal into the MS4. The program must address all types of illicit discharges and connections excluding those non-storm water discharges not prohibited by the Copermittee in accordance with section B of this Order.

a. Prevent And Detect Illicit Discharges And Connections

Each Copermittee must implement measures to prevent and detect illicit discharges to the MS4.

(1) Legal Authority: Each Copermittee must retain legal authority to prevent and eliminate illicit discharges and connections to the MS4.

(2) Inspections: Each Copermittee must include use of appropriate municipal personnel and contractors to assist in identifying illicit discharges and connections during their daily activities.

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(a) Inspections for illegal discharges and connections must be conducted during routine maintenance of all MS4 facilities.

(b) Municipal staff and contractors conducting non-MS4 field operations must be trained to report suspected illegal discharges and connections to proper municipal staff.

b. MAINTAIN MS4 MAP

Each Copermittee must maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction. The use of GIS is required. The accuracy of the MS4 map must be confirmed during dry weather field screening and analytical monitoring and must be updated at least annually. The GIS layers of the MS4 map must be submitted with the updated Jurisdictional Runoff Management Plan within 365 days after adoption of this Order.

c. FACILITATE PUBLIC REPORTING OF ILLICIT DISCHARGES AND CONNECTIONS - PUBLIC HOTLINE

Each Copermittee must promote, publicize and facilitate public reporting of illicit discharges or water quality impacts associated with discharges into or from MS4s. Each Copermittee must facilitate public reporting through development and operation of a public hotline. Public hotlines can be Copermittee-specific or shared by Copermittees. All storm water hotlines must be capable of receiving reports in both English and Spanish 24 hours per day and seven days per week.

d. DRY WEATHER FIELD SCREENING AND ANALYTICAL MONITORING

Each Copermittee must conduct dry weather field screening and analytical monitoring of MS4 outfalls and other portions of its MS4 within its jurisdiction to detect illicit discharges and connections in accordance with Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2009-0002 in Attachment E of this Order.

e. INVESTIGATION INSPECTION AND FOLLOW-UP

Each Copermittee must implement procedures to investigate and inspect portions of the MS4 that, based on the results of field screening, analytical monitoring, or other appropriate information, indicate a reasonable potential of containing illicit discharges, illicit connections, or other sources of pollutants in non-storm water.

(1) Develop response criteria for data: Each Copermittee must develop, update, and use numeric criteria action levels (or other actions level criteria where appropriate) to determine when follow-up investigations will be performed in response to water quality monitoring. The criteria must include required

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non-storm water action levels (see Section C) and a consideration of 303(d)-listed waterbodies and environmentally sensitive areas (ESAs) as defined in Attachment C.

(2) Respond to data: Each Copermittee must investigate portions of the MS4 for which water quality data or conditions indicates a potential illegal discharge or connection.

(a) Obvious illicit discharges (i.e. color, odor, or significant exceedances of action levels) must be investigated immediately.

(b) Field screen data: Within two business days of receiving dry weather field screening results that exceed action levels, the Copermittees must either initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation shall be included in the Annual Report.

(c) Analytical data: Within five business days of receiving analytical laboratory results that exceed action levels, the Copermittees must either initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation shall be included in the Annual Report.

(3) Respond to notifications: Each Copermittee must respond to and resolve each reported incident (e.g., public hotline, staff notification, etc.) in a timely manner. Criteria may be developed to assess the validity of, and prioritize the response to, each report.

f. Elimination Of Illicit Discharges And Connections

Each Copermittee must take immediate action to initiate steps necessary to eliminate all detected illicit discharges, illicit discharge sources, and illicit connections after detection. Elimination measures may include an escalating series of enforcement actions for those illicit discharges that are not a serious threat to public health or the environment. Illicit discharges that pose a serious threat to the public's health or the environment must be eliminated immediately.

g. Enforce Ordinances

Each Copermittee must implement and enforce its ordinances, orders, or other legal authority to prevent illicit discharges and connections to its MS4 and to eliminate detected illicit discharges and connections to it's MS4.

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h. Prevent And Respond To Sewage Spills (Including From Private Laterals And Failing Septic Systems) And Other Spills

(1) Each Copermittee must implement management measures and procedures to prevent, respond to, contain and clean up all sewage (see below) and other spills that may discharge into its MS4 from any source (including private laterals and failing septic systems). Copermittees must coordinate with spill response teams to prevent entry of spills into the MS4 and contamination of surface water, ground water and soil. Each Copermittee must coordinate spill prevention, containment and response activities throughout all appropriate departments, programs and agencies so that maximum water quality protection is available at all times.

(2) Each Copermittee must develop and implement a mechanism whereby it is notified of all sewage spills from private laterals and failing septic systems into its MS4. Each Copermittee must implement management measures and procedures to prevent, respond to, and coordinate a response to contain and clean up sewage from any such notification.

i. Education And Training

Each Copermittee must implement educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials.

5. PUBLIC PARTICIPATION COMPONENT

Each Copermittee must incorporate a mechanism for public participation in the updating, development, and implementation of the Jurisdictional Runoff Management Program.

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G. WATERSHED RUNOFF MANAGEMENT PROGRAM

1. Lead Watershed Copermittee Identification

Watershed Copermittees shall identify the Lead Watershed Copermittee for their Watershed Management Area (WMA). The Lead Watershed Copermittees shall serve as liaisons between the Permittees and Regional Board, where appropriate.

2. Watershed Water Quality Workplan (Watershed Workplan)

The Watershed Workplan shall describe the Permittees' development and implementation of a collective watershed strategy to assess and prioritize the water quality problems within the watershed's receiving waters, identify and model sources of the highest priority water quality problem(s), develop a watershed-wide BMP implementation strategy to abate highest priority water quality problems, and a monitoring strategy to evaluate BMP effectiveness and changing water quality prioritization in the WMA.

The work plan shall, at a minimum:

a. Characterize the receiving water quality in the WMA. Characterization shall include use of regularly collected water quality data, reports, monitoring and analysis generated in accordance with the requirements of the Receiving Waters Monitoring and Reporting Program, as well as applicable information available from other public and private organizations.

b. Identify the highest priority water quality problem(s), in terms of constituents by location, in the WMA's receiving waters. Identified water quality problem(s) shall, at a minimum, give consideration to; TMDLs, receiving waters listed on the CWA section 303(d) list, waters with persistent violations of water quality standards, toxicity, or impacts to beneficial uses, and other pertinent conditions.

c. Identify the sources of the highest water quality problem(s) within the WMA. Efforts to determine such sources shall include, but not be limited to: use of information from the construction, industrial/commercial, municipal, and residential source identification programs required within the Jurisdictional Runoff Program (JRMP) of this Order; specific actions to model pollutant transport to receiving waters for the sake of identifying the source(s) point(s) of origin; water quality monitoring data collected as part of the Receiving Water Monitoring and Reporting Program required by this Order, and additional focused water quality monitoring to identify specific sources within the watershed.

d. Develop a watershed BMP implementation strategy to attain receiving water quality objectives in the identified highest priority water quality problem(s). The BMP implementation strategy shall include a schedule for implementation of the BMP projects to abate specific receiving water quality problems. BMPs not

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contributing to measured pollutant reductions or improvements to water quality must be removed and replaced with alternative BMPs. Identified watershed water quality problems may be the result of jurisdictional discharges that will need to be addressed with BMPs applied in a specific jurisdiction in order to generate a benefit to the watershed.

e. Develop a strategy to model and monitor improvements in receiving water quality directly resulting from implementation of the BMPs described in the Watershed Workplan. The modeling and monitoring strategy shall generate the necessary data to report on the measured pollutant reduction that results from proper BMP implementation. Monitoring shall, at a minimum, be conducted in the receiving water to demonstrate reduction in pollutant concentrations and progression towards attainment of receiving water quality objectives.

f. Establish a schedule for development and implementation of the Watershed strategy outlined in the Workplan. The schedule shall, at a minimum, include forecasted dates of planned actions to address Provisions E.2(a) through E.2(e) and dates for watershed review meetings through the remaining portion of this Permit cycle. Annual watershed workplan review meetings must be open to the public and appropriately publically noticed such that interested parties may come and provide comments on the watershed program.

3. **Watershed Workplan Implementation** □Watershed Copermittee's shall begin implementing the Watershed Workplan within 60-days of acceptance by the Regional Board Executive Officer. If within 30 days of submittal, the Regional Board has not taken an action, the Workplan shall be deemed acceptable.

4. **Copermittee Collaboration** – Watershed Copermittees shall collaborate to develop and implement the Watershed Workplan. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

5. **Public Participation** □Watershed Copermittees shall implement a watershed-specific public participation mechanism within each watershed. A required component of the watershed-specific public participation shall be a minimum 30-day public review of the Watershed Workplan prior to submittal for acceptance by the Regional Board Execuive Officer. Opportunity for the public to review and comment on the Watershed Workplan must occur before the workplan is implemented.

6. **Watershed Workplan Review and Updates** □Watershed Copermittees shall review and update the Watershed Workplan annually to identify needed changes to the prioritized water quality problem(s) listed in the workplan. All updates to the Watershed Workplan shall be presented during an Annual Watershed Review Meeting. Annual Watershed Review Meetings shall occur once every calendar year and be conducted by the Watershed Copermittees. Annual Watershed Review Meetings shall be open to the public and adequately noticed. Individual Watershed Copermittees shall also review and modify their jurisdictional programs and JRMP

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Annual Reports, as necessary, so that they are consistent with the updated Watershed Workplan.

7. Aliso Creek Watershed Runoff Management Plan (WRMP) Provisions

The following provisions apply to the Aliso Creek WRMP. Requirements in this subsection must supersede requirements prescribed by the Regional Board on October 18, 2005.[20]

a. Each Copermittee within the Aliso Creek Watershed must implement the monitoring and reporting program described in *Aliso Creek 13325 Directive, Revised Monitoring Program Design – Integration with NPDES Program*, December 2004 (Revised Aliso Creek Program).

b. Each Copermittee must provide annual reports by March 1 of each year beginning in 2011 for the preceding annual period of January through December. The annual reports must contain the following information:

(1) Water quality data and assessment from the Revised Aliso Creek Program. Each municipality must implement the monitoring and reporting program described in the Revised Aliso Creek Program. All information submitted in the report must conform to a SWAMP-Compatible Quality Assurance Project Plan[21]. The report must contain an assessment of compliance with applicable water quality standards for each monitoring station. The report must include data in tabular and graphical form, and electronic data must be submitted to the Regional Board.

(2) Program Assessment. A description and assessment of each municipality's program implemented within the high-priority storm drain locations (as identified Revised Aliso Creek Program) to reduce discharges of indicator fecal bacteria/pathogens. Monitoring alone is not sufficient to assess progress of the municipal programs. Municipalities must demonstrate each year that their programs are effective and resulting in a reduction of bacteria sources.

(i) For structural and nonstructural management practices implemented, the assessment must contain a description of the

[20] On October 12, 2005, the Regional Board accepted proposed changes to the bacteria monitoring program that had been conducted since spring 2001 pursuant to an Investigative Order from the Regional Board's executive officer. The October 18, 2005, letter from the Regional Board's executive officer revised the Investigative Order and instituted the new monitoring and reporting requirements.

[21] The State Water Resource Control Board (State Board) has prepared an electronic template for Quality Assurance Project Plans (QAPP) to assist in QAPP development, to provide a common format that will allow for review to be expedited, and to provide information on Surface Water Ambient Monitoring (SWAMP) consistency. Additional information and the template are available on-line at http://www.waterboards.ca.gov/swamp/qapp.html.

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practice, capital and maintenance costs, expectations for effectiveness, date implemented, and any observed results.

(ii) For structural and nonstructural management practices evaluated, the assessment must contain a description of the practice(s), conclusions from the evaluation, and whether and when the practice is planned for implementation by the municipality or group of municipalities.

(3) Status Reports. Updates on high-priority storm drain areas. Status reports must be provided by each municipality that discuss the causes of impairment and subsequent management activities implemented within the reporting period in the high priority areas and the planned activities for the next reporting period.

(4) Certification Statement. The technical reports submitted to the Regional Board must include the following certification statement signed by either the principal executive officer, ranking elected official, or duly authorized representative of that person:

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 gather and evaluate the information submitted. Based on my inquiry of the person(s) directly responsible for gathering the information, the information 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.

c. The annual reports must be submitted until the Regional Board determines they are no longer warranted. If requested by a municipality, the monitoring program may be modified or reduced by the Regional Board. The monitoring program and annual reporting may be modified in response to adopted TMDLs and additional Clean Water Act 303(d) listings for impairment.

d. Municipalities must continue meeting on a quarterly basis to discuss efforts to reduce bacteria in the Aliso Creek watershed.

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H. FISCAL ANALYSIS

1. Secure Resources: Each Copermittee must secure the resources necessary to meet all requirements of this Order.

2. Annual Analysis: Each Copermittee must conduct an annual fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs required by this Order. The analysis must include estimated expenditures for the reporting period, the preceding period, and the next reporting period.

   a. Each analysis must 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.
   b. Each analysis must include a narrative description of circumstances resulting in a 25 percent or greater annual change for any budget line items.

3. Annual Reporting: Each Copermittee must submit its annual fiscal analysis with the annual JRMP report.

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I. TOTAL MAXIMUM DAILY LOADS

The waste load allocations (WLAs) of fully approved and adopted TMDLs are incorporated as Water Quality Based Effluent Limitations on a pollutant by pollutant, watershed by watershed basis. Early TMDL requirements, including monitoring, may be required and inserted into this Order pursuant to Finding E.10

1. Baby Beach Bacterial Indicator TMDL Water Quality Based Effluent Limitations

a. The Copermittees in the Baby Beach watershed shall implement BMPs capable of achieving the interim and final Bacterial Indicator Waste Load Allocations (WLAs) in discharges to Baby Beach as described in Table 6.

Table 6: TMDL Waste Load Reduction Milestones

Action Date	
Meet 50% wasteload reductions	3 years after effective date for dry weather
	7 years after effective date for wet weather
Meet 100% wasteload reductions	5 years after effective date for dry weather
	10 years after effective date for wet weather

b. The Copermittees shall conduct necessary monitoring, as described in Attachment A to Resolution No. R9-2008-0027, and submit annual progress reports as part of their yearly reports.

c. The following WLAs (Table 7) are to be met in Baby Beach receiving water by the end of the year 2019 for wet weather and 2014 for dry weather:

Table 7: Final Bacterial Indicator Waste Load Allocations for Baby Beach

	Waste Load Allocation	
Bacterial Indicator	Dry Weather (Billion MPN / Day)	Wet Weather (Billion MPN / 30 Days)
Total Coliform	0.86	3,254
Fecal Coliform	0.17	112
Enterococcus	0.03 114	

MPN: Most Probable Number

d. The Copermittees must meet the following Numeric Targets (Table 8) in Baby Beach receiving waters in order to meet the underlying assumptions of the TMDL. The Numeric Targets are to be met once 100 percent of the WLA reductions have been achieved (see Table 7 above).

Table 8: Final Bacterial Indicator Numeric Targets for Baby Beach

Bacterial Indicator	30-day geo mean (MPN / 100mL)	Single Sample Max (MPN / 100mL)
	Dry Weather only	Dry and Wet Weather
Total Coliform	1,000	10,000
Fecal Coliform	200	400
Enterococcus	35 104	

MPN: Most Probable Number

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J. PROGRAM EFFECTIVENESS ASSESSMENT AND REPORTING

1. Jurisdictional Program Effectiveness Assessments

a. Objectives of Effectiveness Assessments

Beginning with the Annual Report due in 2011, each Copermittee must annually assess the effectiveness of its Jurisdictional Runoff Management Program (JRMP) implementation at meeting the following objectives:

(1) Objective for 303(d) Waterbodies: Reduce storm water pollutant loadings.

(a) Each Copermittee must establish annual assessment measures or methods specifically for reducing discharges of storm water pollutants from its MS4 into each downstream 303(d)-listed water body for which that waterbody is impaired. Assessment measures must be developed for each of the six outcome levels described by CASQA.[22]
(b) Each Copermittee must annually conduct each established assessment measure or method and evaluate the outcome. Each outcome must then be used to assess the effectiveness of implemented management measures toward reducing MS4 discharges of the specific pollutants causing or contributing to conditions of impairment.
(c) The assessment measures must target both water quality outcomes and the results of municipal enforcement activities.

(2) Objective for Environmentally-Sensitive Areas: Prevent storm water MS4 discharges from causing or contributing to conditions of pollution, nuisance, or contamination.

(a) Each Copermittee must establish annual measures or methods specifically for assessing the effectiveness of its management measures for protecting downstream ESAs from adverse effects caused by discharges from its MS4. Assessment measures must be developed for each of the six outcome levels described by CASQA.
(b) Each Copermittee must annually implement each established assessment measure or method and evaluate the outcome. Each outcome must be used to assess the effectiveness of implemented management measures toward reducing MS4 discharges of the specific pollutants causing or contributing to conditions of impairment.
(c) The assessment measures must target both water quality outcomes and the results of municipal enforcement activities.

(3) Objectives for major program component outcomes: Determined by Each

[22] Effectiveness assessment outcome levels as defined by CASQA are defined in Attachment C of this Order. See "*Municipal Stormwater Program Effectiveness Assessment Guidance*" (CASQA, May 2007) for guidance for assessing program activities at the various outcome levels.

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Copermittee.

(a) Each Copermittee must annually develop objectives for each program component in Section F and the overall JRMP. The objectives must be established as appropriate in response to program implementation and evaluation of water quality and management practices.
(b) Assessment approaches for program implementation must include a mix of specific activities, general program components, and water quality data.
(c) The assessment measures must target both water quality outcomes and the results of municipal enforcement activities.

(4) Objectives for actions taken to protect receiving water limitations in accordance with this Order.

(a) Each Copermittee must develop and implement an effectiveness assessment strategy for each measure conducted in response to a determination to implement the "iterative" approach to prevent or reduce any storm water pollutants that are causing or contributing to the exceedance of water quality standards as outlined in this Order

b. ASSESSMENT REVIEW

(1) Based on the results of the effectiveness assessments, each Copermittee must annually review its jurisdictional activities and BMPs to identify modifications and improvements needed to maximize JRMP effectiveness, as necessary to achieve compliance with this Order.

(2) Each Copermittee must develop and annually conduct an Integrated Assessment[23] of each effectiveness assessment objective above (Section J.1.a) and the overall JRMP using a combination of outcomes as appropriate to the objectives.[24]

2. Program Modifications

a. Each Copermittee must develop and implement a plan and schedule to address program modifications and improvements identified during annual effectiveness assessments.

b. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs must 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

[23] Integrated assessment is defined in Attachment C. It is the process of evaluating whether program implementation is resulting in the protection or improvement of water quality. Integrated assessment combines assessments of program implementation and water quality.
[24] Not all program components need be addressed at each of the six outcome levels.

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contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems must be modified and improved to correct the water quality problems.

3. Effectiveness Assessment and Program Response Reporting

a. Each Copermittee must include a description and summary of its annual and long-term effectiveness assessments within each Annual Report. Beginning with the Annual Report due in 2011, the Program Effectiveness reporting must include:

(1) 303(d) waterbodies: A description and results of the annual assessment measures or methods specifically for reducing discharges of storm water pollutants from its MS4 into each 303(d)-listed waterbody;
(2) ESAs: A description and results of the annual assessment measures or methods specifically for managing discharges of pollutants from its MS4 into each downstream ESA;
(3) Other Program Components: A description of the objectives and corresponding assessment measures and results used to evaluate the effectiveness of each general program component. The results must include findings from both program implementation and water quality assessment where applicable;
(4) Receiving water protection: A description and results of the annual assessment measures or methods employed specifically for actions taken to protect receiving water limitations in accordance with Section A.3 of this Order;
(5) A description of the steps taken to use dry-weather and wet-weather monitoring data to assess the effectiveness of the programs for 303(d) impairments, ESAs, and general program components;
(6) A description of activities conducted in response to investigations of illicit discharge and illicit connection activities, including how each investigation was resolved and the pollutant(s) involved;
(7) Responses to effectiveness assessments: A description of each program modification, made in response to the results of effectiveness assessments conducted pursuant to Section J.1.a, and the basis for determining (pursuant to Section J.2.b.) that each modified activity and/or BMP represents an improvement with respect to reducing the discharge of storm water pollutants from the MS4.
(8) A description of the steps that will be taken to improve the Copermittee's ability to assess program effectiveness using measurable targeted outcomes, assessment measures, assessment methods, and outcome levels 1-6. Include a time schedule for when improvement will occur; and

(9) A description of the steps that will be taken to identify aspects of the Copermittee's Jurisdictional Runoff Management Program that will be changed based on the results of the effectiveness assessment.

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4. Work Plan

Each Copermittee must develop a work plan to address their high priority water quality problems in an iterative manner over the life of the permit. The goal of the work plan is to demonstrate a responsive and adaptive approach for the judicious and effective use of available resources to attack the highest priority problems. The work plan shall include, at a minimum, the following:

a. The problems and priorities identified during the assessment;
b. A list of priority pollutants and known or suspected sources;
c. A brief description of the strategy employed to reduce, eliminate or mitigate the negative impacts;
d. A description and schedule for new and/or modified BMPs. The schedule is to include dates for significant milestones;
e. A description of how the selected activities will address an identified high priority problem. This will include a description of the expected effectiveness and benefits of the new and/or modified BMPs;
f. A description of implementation effectiveness metrics;
g. A description of how efficacy results will be used to modify priorities and implementation; and
h. A review of past activities implemented, progress in meeting water quality standards, and planned program adjustments.

The Copermittee shall submit the work plan to the Regional Board within 365 days of adoption of the Order. Annual updates are also required and shall be included with the annual JRMP report. The Regional Board will assess the work plan for compliance with the specific and overall requirements of the Order. To increase effectiveness and efficiencies, Copermittees may combine their implementation efforts and work plans within a hydrologic area or sub area. Each Copermittee, however, maintains individual responsibility for developing and implementing an acceptable work plan.

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K. REPORTI NG

The Copermittees may propose alternate reporting criteria and schedules, as part of their updated JRMP, for the Executive Officer's acceptance. The Copermittees shall submit the updated JRMP within 365 days after adoption of this Order.

1. Runoff Management Plans

a. J URISDICTIONAL RUNOFF MANAGEMENT PLANS

(1) Copermittees: The written account of the overall program to be conducted by each Copermittee to meet the jurisdictional requirements of section F of this Order is referred to as the Jurisdictional Runoff Management Plan (JRMP). Each Copermittee must revise and update its existing JRMP so that it describes all activities the Copermittee will undertake to implement the requirements of this Order. Each Copermittee must submit its updated and revised JRMP to the Regional Board 365 days after adoption of this Order.

(2) At a minimum, each Copermittee's JRMP must be updated and revised to demonstrate compliance with each applicable section of this Order.

b. W ATERSHED WORKPLANS

(1) Copermittees: The written account of the program conducted by each watershed group of Copermittees is referred to as the Watershed Workplan. Copermittees within each watershed shall be responsible for updating and revising each Watershed Workplan. Each Watershed Workplan shall be updated and revised to describe any changes in water quality problems or priorities in the WMAs, and any necessary change to actions Copermittees will take to implement jurisdictional or watershed BMPs to address those identified.

(2) Lead Watershed Copermittee: Each Lead Watershed Permittee shall be responsible for coordinating the production of the Watershed Workplan, as well as coordinating Annual Watershed Review Meetings and public participation/public noticing in accordance with the requirements of this Order. The Lead Watershed Permittee shall submit the Watershed Workplan to the Principal.

(3) Principal Copermittee: The Principal Permittee shall assemble and submit the Watershed Workplan to the Regional Board no later than 365 days after adoption of this Order, and shall be prepared to implement the workplan within 60 days of the Regional Board Executive Officer deeming the workplan acceptable.

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(4) Each Watershed Workplan shall, at a minimum, include:

(a) Identification of the Lead Watershed Permittee for the watershed.
(b) An updated watershed map.
(c) Identification and description of all applicable water quality data, reports, analyses, and other information to be used to assess receiving water quality.
(d) Assessment and analysis of the watershed's water quality data, reports, analyses, and other information, used during identification and prioritization of the watershed's water quality problems.
(e) A prioritized list of water quality problems within the WMA including rationale explaining the method/logic used to determine prioritization.
(f) Identification of the likely sources, pollutant discharges, and/or other factors causing the high priority water quality problems within the WMA.
(g) A description of the strategy to be used to guide Copermittee implementation of BMPs either jurisdictionally or on a watershed-wide basis to abate the highest water quality problems
(h) A list of criteria used to evaluate BMP effectiveness and how it was applied.
(i) A GIS map of BMPs implemented and BMPs scheduled for implementation.
(j) A description of the public participation mechanisms to be used and the parties anticipated to be involved during the development and implementation of the Watershed Workplan.
(k) A description of Copermittee collaboration to accomplish development of the Watershed Workplan, including a schedule for Watershed meetings.
(l) A description of how TMDLs and 303(d)-listed water bodies were considered during prioritization of watershed water quality problems
(m) A description of the strategy to model and monitor improvement in receiving water quality directly resulting from implementation of the BMPs described in the Watershed Workplan.
(n) A scheduled annual Watershed Workplan Review Meeting once every calendar year. This meeting shall be open to the public.

2. Other Required Reports and Plans

a. SSMP UPDATES

(1) Copermittees must submit their updated model SSMP in accordance with the applicable requirements of section F.1 with the JRMP two years after adoption of this Order.
(2) Within 180 days of determination that the Model SSMP is in compliance with this Permit's provisions, each Copermittee must update their own local SSMP, and amended ordinances consistent with the model SSMP, and shall submit both (local SSMP and amended ordinances) to the Regional Board.
(3) For SSMP-related requirements of Section F.1 with subsequent

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implementation due dates, updated SSMPs must be submitted with the JRMP annual report covering the applicable reporting period.

b. Report of Waste Discharge

The Principal Copermittee must submit to the Regional Board, no later than 210 days in advance of the expiration date of this Order, a Report of Waste Discharge (ROWD) as an application for issuance of new waste discharge requirements. The fourth annual report for this Order may serve as the ROWD, provided it contains the minimum information below.

At a minimum, the ROWD must include the following: (1) Proposed changes to the Copermittees' runoff management programs; (2) Proposed changes to monitoring programs; (3) Justification for proposed changes; (4) Name and mailing addresses of the Copermittees; (5) Names and titles of primary contacts of the Copermittees; and (6) Any other information necessary for the reissuance of this Order.

3. Annual Reports

a. Jurisdictional Runoff Management Program (JRMP) Annual Reports

(1) Copermittees: Each Copermittee must generate individual JRMP Annual Reports which cover implementation of its jurisdictional activities during the past annual reporting period. Each Annual Report must verify and document compliance with this Order as directed in this section. Each Copermittee must retain records through 2015, available for review, that document compliance with each requirement of this Order. Each Copermittee must submit to the Principal Copermittee its individual JRMP Annual Report by the date specified by the Principal Copermittee. The reporting period for these annual reports must be the previous fiscal year. For example, the report submitted September 30, 2010 must cover the reporting period July 1, 2009 to June 30, 2010.

(2) Principal Copermittee: The Principal Copermittee is responsible for collecting and assembling each Copermittee's individual JRMP Annual Report. The Principal Copermittee must submit Unified JRMP Annual Reports to the Regional Board by September 30 of each year, beginning on September 30, 2011. The Unified JRMP Annual Report must contain the 13 individual JRMP Annual Reports.

(3) Each JRMP Annual Report must contain, at a minimum, the following information:

(a) Information required to be reported annually in Section H (Fiscal Analysis) of this Order;

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(b) Information required to be reported annually in Section J (Program Effectiveness) of this Order;
(c) The completed Reporting Checklist found in Attachment D, and
(d) Information for each program component by watershed as described in the following Table 9:

Table 9. Annual Reporting Requirements

Program Component	Reporting Requirement
New Development	1. Updated relevant sections of the General Plan and environmental review process and a description of planned updates within the next annual reporting period, if applicable
	2. Revisions to the local SSMP, including where applicable: (a) Identification and summary of where the SSMP fails to meet the requirements of this Order; (b) Updated procedures for identifying pollutants of concern for each Priority Development Project; (c) Updated treatment BMP ranking matrix; and (d) Updated site design and treatment control BMP design standards;
	3. Verification that site design, source control, and treatment BMPs were required on all applicable Priority Development Projects;
	4. Description of the application of LID and site design BMPs in the planning and approval process;
	5. Description of projects subject to the local waiver provision for numeric sizing of treatment control BMP requirements;
	6. Description and summary of the LID site design BMP substitution program, if applicable;
	7. Description and summary of the process to verify compliance with SSMP requirements;
	8. Updates to the BMPs that are listed in the local SSMP as options for treatment control;
	9. Description of the treatment control maintenance tracking process and verification that the requirements of this Order were met during the reporting period; (a) Updated watershed-based database of approved treatment control BMPs and treatment control BMP maintenance within its jurisdiction, including updates to the list of high-priority treatment BMPs;
	10. Description of the process for identifying and evaluating hydrologic conditions of concern and requiring a suite of management measures within all Priority Development Projects to protect downstream beneficial uses and prevent adverse physical changes to downstream stream channels;
	11. Description of enforcement activities applicable to the new development and redevelopment component and a summary of the effectiveness of those activities;

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Program Component	Reporting Requirement
Construction	1. Updated relevant ordinances and description of planned ordinance updates within the next annual reporting period, if applicable;
	2. A description of procedures used 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;
	3. Designated minimum and enhanced BMPs;
	4. Summary of the inspection program, including the following information: (a) Number and date of inspections conducted at each facility, including the facility address; (b) Number of facilities lacking adequate BMPs; (c) The BMP violations identified during the inspection by facility; (d) Number, date, and types of enforcement actions by facility; (e) Narrative description of inspection findings and follow-up activities for each facility;
Municipal	1. Updated source inventory;
	2. Changes to the designated municipal BMPs;
	3. Descriptions of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies;
	4. Summary and assessment of BMPs implemented at retrofitted flood control structures, including: (a) List of projects with BMP retrofits; and (b) List and description of structures retrofitted without BMPs;
	5. Description and assessment of the municipal structural treatment control operations and maintenance activities, including: (a) Number of inspections and types of facilities; and (b) Summary of findings;
	6. Description of the municipal areas/facilities operations and maintenance activities, including: (a) Number and types of facilities maintained; (b) Amount of material removed and how that material was disposed; and (c) List of facilities planned for bi-annual inspections and the justification;
	7. Description of the municipal areas/programs inspection activities, including: (a) Number and date of inspections conducted at each facility; (b) Number of facilities lacking adequate BMPs; (c) The BMP violations identified during the inspection by facility; (d) Number, date and types of enforcement actions by facility; (e) Narrative description of inspection findings and follow-up activities for each facility;

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Program Component	Reporting Requirement
	8. Description of activities implemented to address sewage infiltration into the MS4;
Commercial / Industrial	1. Annual inventory of commercial / industrial sources;
	2. Summary of the inspection program, including the following information: (a) Number and date of inspections conducted at each facility including the facility address; (b) Number of facilities lacking adequate BMPs; (c) The BMP violations identified during the inspection by facility; (d) Number, date, and types of enforcement actions by facility; (e) Narrative description of inspection findings and follow-up activities for each facility;
	3. Changes to designated minimum and enhanced BMPs;
	4. A list of industrial sites, including each name, address, and SIC code, that the Copermittee suspects may require coverage under the General Industrial Permit, but has not submitted an NOI;
Residential	1. Updated minimum BMPs required for residential areas and activities;
	2. Quantification and summary of applicable runoff and storm water enforcement actions within residential areas and activities;
	3. Description of efforts to manage runoff and storm water pollution in common interest areas;
Illicit Discharge Detection and Elimination	1. Changes to the legal authority to implement Illicit Discharge Detection and Elimination activities;
	2. Changes to the established investigation procedures;
	3. Public reporting mechanisms, including phone numbers and web pages;
	4. All data and assessments from the Dry Weather Effluent Analytical Monitoring activities;
	5. Response criteria developed for water quality data and notifications;
	6. Summaries of illicit discharges (including spills and water quality data events) and how each significant case was resolved;
	7. A description of instances when field screening and analytical data exceeded action levels, but for which no investigation was conducted;
	8. A description of enforcement actions taken in response to investigations of illicit discharges and a description of the effectiveness of those enforcement measures;
	9. A description of controls to prevent infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems;
Work Plan	Priorities, strategy, implementation schedule and effectiveness evaluation;

(4) Each JRMP Annual Report must also include the following information

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regarding non-storm water discharges (see Section B.2. of this Order):

(a) Identification of non-storm water discharge categories identified as a source of pollutants to waters of the U.S;
(b) A description of ordinances, orders, or similar means to prohibit non-storm water discharge categories identified under section B.2 above ;
(c) Identification of any control measures to be required and implemented for non-storm water discharge categories identified as needing said controls by the Regional Board; and
(d) A description of a program to address pollutants from non-emergency fire fighting flows identified by the Copermittee to be significant sources of pollutants.

4. Interim Reporting Requirements

For the July 2009-June 2010 reporting period, the Jurisdictional RMP must be submitted on January 31, 2011. Each Jurisdictional RMP Annual Report submitted for this reporting period must, at a minimum, include comprehensive descriptions of all activities conducted to fully implement the Copermittees' Jurisdictional RMP documents, as those documents were developed to comply with the requirements of Order No. 2002-01. The Principal Copermittee must submit these documents in a unified manner, consistent with the unified reporting requirements of Order No. 2002-01.

5. Universal Reporting Requirements

All submittals must include an executive summary, introduction, conclusion, recommendations, and signed certified statement. Each Copermittee must submit a signed certified statement covering its responsibilities for each applicable submittal. The Principal Copermittee must submit a signed certified statement covering its responsibilities for each applicable submittal and the sections of the submittals for which it is responsible.

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L. MODIFICATION OF PROGRAMS

Modifications of Jurisdictional Runoff Management Programs and/or Watershed Runoff Management Programs may be initiated by the Executive Officer of the Regional Board or by the Copermittees. Requests by Copermittees must be made to the Executive Officer, and must be submitted during the annual review process. Requests for modifications should be incorporated, as appropriate, into the Annual Reports or other deliverables required or allowed under this Order.

1. Minor Modifications: Minor modifications to Jurisdictional Runoff Management Programs, and/or Watershed Runoff Management Programs, may be accepted by the Executive Officer where the Executive Officer finds the proposed modification complies with all discharge prohibitions, receiving water limitations, and other requirements of this Order.

2. Modifications Requiring an Amendment to this Order: Proposed modifications that are not minor require amendment of this Order in accordance with this Order's rules, policies, and procedures.

M. PRINCIPAL COPERMITTEE RESPONSIBILITIES

Within 180 days of adoption of this Order, the Copermittees must designate the Principal Copermittee and notify the Regional Board of the name of the Principal Copermittee. The Principal Copermittee must, at a minimum:

1. Serve as liaison between the Copermittees and the Regional Board on general permit issues, and when necessary and appropriate, represent the Copermittees before the Regional Board.
2. Coordinate permit activities among the Copermittees and facilitate collaboration on the development and implementation of programs required under this Order.
3. Integrate individual Copermittee documents and reports into single unified documents and reports for submittal to the Regional Board as required under this Order.
4. Produce and submit documents and reports as required by section K of this Order and Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2009-0002 in Attachment E of this Order.

N. RECEIVING WATERS AND MS4 DISCHARGE MONITORING AND REPORTING PROGRAM

Pursuant to CWC section 13267, the Copermittees must comply with all the requirements contained in Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2009-0002 in Attachment E of this Order.

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O. STANDARD PROVISIONS, REPORTING REQUIREMENTS, AND NOTIFICATIONS

1. Each Copermittee must comply with Standard Provisions, Reporting Requirements, and Notifications contained in Attachment B of this Order. This includes 24 hour/5 day reporting requirements for any instance of non-compliance with this Order as described in section 5.e of Attachment B.

2. All plans, reports and subsequent amendments submitted in compliance with this Order must be implemented immediately (or as otherwise specified). All submittals by Copermittees must be adequate to implement the requirements of this Order.

I, David W. Gibson, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Diego Region, on December 16, 2009.

David W. Gibson
Executive Officer

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2001- 15

In the Matter of the Petitions of

BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY
AND
WESTERN STATES PETROLEUM ASSOCIATION

For Review Of Waste Discharge Requirements Order No. 2001-01
for Urban Runoff from San Diego County
[NPDES No. CAS0108758]
Issued by the
California Water Quality Control Board,
San Diego Region

SWRCB/OCC FILES A-1362, A-1362(a)

BY THE BOARD:

On February 21, 2001, the San Diego Regional Water Quality Control Board (Regional Water Board) issued a revised national pollutant discharge elimination system (NPDES) permit in Order No. 2001-01 (permit) to the County of San Diego (County), the 18 incorporated cities within the County, and the San Diego Unified Port District. The permit covers storm water discharges from municipal separate storm sewer systems (MS4) throughout the County. The permit is the second MS4 permit issued for the County, although the first permit was issued more than ten years earlier.[1]

[1] NPDES permits generally expire after five years, but can be extended administratively where the Regional Water Board is unable to issue a new permit prior to the expiration date. As the record in this matter amply demonstrates, the Regional Water Board engaged in an extensive process of issuing draft permits, accepting comments, and holding workshops and hearings since at least 1995.

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The permit includes various programmatic and planning requirements for the permittees, including construction and development controls, controls on municipal activities, controls on runoff from industrial, commercial, and residential sources, and public education. The types of controls and requirements included in the permit are similar to those in other MS4 permits, but also reflect the expansion of the storm water program since the first MS4 permit was adopted for San Diego County 11 years ago.[2]

On March 23, 2001, the State Water Resources Control Board (State Water Board or Board) received petitions for review of the permit from the Building Industry Association of San Diego County (BIA) and from the Western States Petroleum Association (WSPA).[3] The petitions are legally and factually related, and have therefore been consolidated for purposes of review.[4] None of the municipal dischargers subject to the permit filed a petition, nor did they file responses to the petitions.

I. BACKGROUND

MS4 permits are adopted pursuant to Clean Water Act section 402(p). This federal law sets forth specific requirements for permits for discharges from municipal storm sewers. One of the requirements is that permits "shall require controls to reduce the discharge of

[2] For a discussion of the evolution of the storm water program, consistent with guidance from the United States Environmental Protection Agency (U.S. EPA), see Board Order WQ 2000-11.

[3] On March 23, the State Water Board also received brief letters from the Ramona Chamber of Commerce, the North San Diego County Association of Realtors, the San Diego County Apartment Association, the National Association of Industrial and Office Properties, and the California Building Industry Association. All of these letters state that they are "joining in" the petition filed by BIA. None of the letters contain any of the required information for petitions, which is listed at Cal. Code of Regs., tit. 23, section 2050. These letters will be treated as comments on the BIA petition. To the extent the authors intended the letters be considered petitions, they are dismissed.

[4] Cal. Code of Regs., tit. 23, section 2054.

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pollutants to the maximum extent practicable [MEP]." States establish appropriate requirements for the control of pollutants in the permits.

This Board very recently reviewed the need for controls on urban runoff in MS4 permits, the emphasis on best management practices (BMPs) in lieu of numeric effluent limitations, and the expectation that the level of effort to control urban runoff will increase over time.[5] We pointed out that urban runoff is a significant contributor of impairment to waters throughout the state, and that additional controls are needed. Specifically, in Board Order WQ 2000-11 (hereinafter, LA SUSMP order), we concluded that the Los Angeles Regional Water Board acted appropriately in determining that numeric standards for the design of BMPs to control runoff from new construction and redevelopment constituted controls to the MEP.[6]

The San Diego permit incorporates numeric design standards for runoff from new construction and redevelopment similar to those considered in the LA SUSMP order.[7] In addition, the permit addresses programmatic requirements in other areas. The LA SUSMP order was a precedential decision,[8] and we will not reiterate our findings and conclusions from that decision.[9]

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[5] Board Order WQ 2000-11.

[6] As explained in that Order, numeric design standards are not the same as numeric effluent limitations. While BIA contends that the permit under review includes numeric effluent limitations, it does not. A numeric design standard only tells the dischargers how much runoff must be treated or infiltrated; it does not establish numeric effluent limitations proscribing the quality of effluent that can be discharged following infiltration or treatment.

[7] The San Diego permit also includes provisions that are different from those approved in the LA SUSMP Order, but which were not the subject of either petition. Such provisions include the inclusion of non-discretionary projects. We do not make any ruling in this Order on matters that were not addressed in either petition.

[8] Government Code section 11425.60; State Board Order WR 96-1 (Lagunitas Creek), at footnote 11.

[9] BIA restates some of the issues this Board considered in the LA SUSMP order. For instance, BIA contends that it is inappropriate for the permit to regulate erosion control. While this argument was not specifically addressed in our prior Order, it is obvious that the most serious concern with runoff from construction is the potential for increased erosion. It is absurd to contend that the permit should have ignored this impact from urban runoff.

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The petitioners make numerous contentions, mostly concerning requirements that they claim the dischargers will not be able to, or should not be required to, comply with. We note that none of the dischargers has joined in these contentions. We further note that BIA raises contentions that were already addressed in the LA SUSMP order. In this Order, we have attempted to glean from the petition issues that are not already fully addressed in Board Order Board Order WQ 2000-11, and which may have some impact on BIA and its members. WSPA restated the contentions it made in the petition it filed challenging the LA SUSMP order. We will not address those contentions again.[10] But we will address whether the Regional Water Board followed the precedent established there as it relates to retail gasoline outlets.[11]

[10] On November 8, 2001, following the October 31 workshop meeting that was held to discuss the draft order, BIA submitted a "supplemental brief" that includes many new contentions raised for the first time. (Interested persons who were not petitioners filed comments on the draft order asking the State Water Board to address some of these.) The State Water Board will not address these contentions, as they were not timely raised. (Wat. Code § 13320; Cal. Code of Regs., tit. 23, § 2050(a).) Specific contentions that are not properly subject to review under Water Code section 13320 are objections to findings 16, 17, and 38 of the permit, the contention that permit provisions constitute illegal unfunded mandates, challenges to the permit's inspection and enforcement provisions, objections to permit provisions regarding construction sites, the contention that post-construction requirements should be limited to "discretionary" approvals, the challenge to the provisions regarding local government compliance with the California Environmental Quality Act, and contentions regarding the term "discharge" in the permit. BIA did not meet the legal requirements for seeking review of these portions of the permit.

[11] On November 8, 2001, the State Water Board received eight boxes of documents from BIA, along with a "Request for Entry of Documents into the Administrative Record." BIA failed to comply with Cal. Code of Regs., tit. 23, section 2066(b), which requires such requests be made "prior to or during the workshop meeting." The workshop meeting was held on October 31, 2001. The request will therefore not be considered. BIA also objected in this submittal that the Regional Water Board did not include these documents in its record. The Regional Water Board's record was created at the time the permit was adopted, and was submitted to the State Water Board on June 11, 2001. BIA's objection is not timely.

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II. CONTENTIONS AND FINDINGS[12]

Contention: BIA contends that the discharge prohibitions contained in the permit are "absolute" and "inflexible," are not consistent with the standard of "maximum extent practicable" (MEP), and financially cannot be met.

Finding: The gist of BIA's contention concerns Discharge Prohibition A.2, concerning exceedance of water quality objectives for receiving waters: "Discharges from MS4s which cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited." BIA generally contends that this prohibition amounts to an inflexible "zero contribution" requirement.

BIA advances numerous arguments regarding the alleged inability of the dischargers to comply with this prohibition and the impropriety of requiring compliance with water quality standards in municipal storm water permits. These arguments mirror arguments made in earlier petitions that required compliance with water quality objectives by municipal storm water permittees. (See, e.g., Board Orders WQ 91-03, WQ 98-01, and WQ 99-05.) This Board has already considered and upheld the requirement that municipal storm water discharges must not cause or contribute to exceedances of water quality objectives in the receiving water. We adopted an iterative procedure for complying with this requirement, wherein municipalities must report instances where they cause or contribute to exceedances, and then must review and improve BMPs so as to protect the receiving waters. The language in the permit in Receiving

[12] This Order does not address all of the issues raised by the petitioners. The Board finds that the issues that are not addressed are insubstantial and not appropriate for State Water Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349]; Cal. Code Regs., tit. 23, § 2052.) We make no determination as to whether we will address the same or similar issues when raised in future petitions.

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Water Limitation C.1 and 2 is consistent with the language required in Board Order WQ 99-05, our most recent direction on this issue.[13]

While the issue of the propriety of requiring compliance with water quality objectives has been addressed before in several orders, BIA does raise one new issue that was not addressed previously. In 1999, the Ninth Circuit Court of Appeals issued an opinion addressing whether municipal storm water permits must require "strict compliance" with water quality standards.[14] (*Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.) The court in *Browner* held that the Clean Water Act provisions regarding storm water permits do not require that municipal storm-sewer discharge permits ensure strict compliance with water quality standards, unlike other permits.[15] The court determined that: "Instead, [the provision for municipal storm water permits] *replaces* the requirements of [section 301] 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'." (191 F.3d at 1165.) The court further held that the Clean Water Act does grant the permitting agency discretion to determine what pollution controls are appropriate for municipal storm water discharges. (*Id.* at 1166.) Specifically, the court stated

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[13] In addition to Discharge Prohibition A.2, quoted above, the permit includes Receiving Water Limitation C.1, with almost identical language: "Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited." Receiving Water Limitation C.2 sets forth the iterative process for compliance with C.1, as required by Board Order WQ 99-05.

[14] "Water quality objectives" generally refers to criteria adopted by the state, while "water quality standards" generally refers to criteria adopted or approved for the state by the U.S. EPA. Those terms are used interchangeably for purposes of this Order.

[15] Clean Water Act § 301(b)(1)(C) requires that most NPDES permits require strict compliance with quality standards.

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that U.S. EPA had the authority either to require "strict compliance" with water quality standards through the imposition of numeric effluent limitations, or to employ an iterative approach toward compliance with water quality standards, by requiring improved BMPs over time. (*Id.*) The court in *Browner* upheld the EPA permit language, which included an iterative, BMP-based approach comparable to the language endorsed by this Board in Order WQ 99-05.

In reviewing the language in this permit, and that in Board Order WQ 99-05, we point out that our language, similar to U.S. EPA's permit language discussed in the *Browner* case, does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs. As pointed out by the *Browner* court, there is nothing inconsistent between this approach and the determination that the Clean Water Act does not mandate strict compliance with water quality standards. Instead, the iterative approach is consistent with U.S. EPA's general approach to storm water regulation, which relies on BMPs instead of numeric effluent limitations.

It is true that the holding in *Browner* allows the issuance of municipal storm water permits that limit their provisions to BMPs that control pollutants to the maximum extent practicable (MEP), and which do not require compliance with water quality standards. For the reasons discussed below, we decline to adopt that approach. The evidence in the record before us is consistent with records in previous municipal permits we have considered, and with the data we have in our records, including data supporting our list prepared pursuant to Clean Water Act section 303(d). Urban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses. In order to protect beneficial uses and to achieve compliance with water quality objectives in our streams, rivers, lakes, and the ocean, we

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must look to controls on urban runoff. It is not enough simply to apply the technology-based standards of controlling discharges of pollutants to the MEP; where urban runoff is causing or contributing to exceedances of water quality standards, it is appropriate to require improvements to BMPs that address those exceedances.

While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvement of BMPs, is appropriate. We will generally not require "strict compliance" with water quality standards through numeric effluent limitations and we will continue to follow an iterative approach, which seeks compliance over time.[16] The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced throughout large and medium municipal storm sewer systems.[17]

We have reviewed the language in the permit, and compared it to the model language in Board Order WQ 99-05. The language in the Receiving Water Limitations is virtually identical to the language in Board Order WQ 99-05. It sets a limitation on discharges that cause or contribute to violation of water quality standards, and then it establishes an iterative approach to complying with the limitation. We are concerned, however, with the language in Discharge Prohibition A.2, which is challenged by BIA. This discharge prohibition is similar to the Receiving Water Limitation, prohibiting discharges that cause or contribute to exceedance of

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[16] Exceptions to this general rule are appropriate where site-specific conditions warrant. For example, the Basin Plan for the Lake Tahoe basin, which protects an outstanding national resource water, includes numeric effluent limitations for storm water discharges.

[17] While BIA argues that the permit requires "zero contribution" of pollutants in runoff, and "in effect" contains numeric effluent limitations, this is simply not true. The permit is clearly BMP-based, and there are no numeric effluent limitations. BIA also claims that the permit will require the construction of treatment plants for storm water similar to the publicly-owned treatment works for sanitary sewage. There is no basis for this contention; there is no requirement in the permit to treat all storm water. The emphasis is on BMPs.

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water quality objectives. The difficulty with this language, however, is that it is not modified by the iterative process. To clarify that this prohibition also must be complied with through the iterative process, Receiving Water Limitation C.2 must state that it is also applicable to Discharge Prohibition A.2. The permit, in Discharge Prohibition A.5, also incorporates a list of Basin Plan prohibitions, one of which also prohibits discharges that are not in compliance with water quality objectives. (See, Attachment A, prohibition 5.) Language clarifying that the iterative approach applies to that prohibition is also necessary.[18]

BIA also objects to Discharge Prohibition A.3, which appears to require that treatment and control of discharges must always occur prior to entry into the MS4: "Discharges into and from MS4s containing pollutants which have not been reduced to the [MEP] are prohibited."[19] An NPDES permit is properly issued for "discharge of a pollutant" to waters of the United States.[20] (Clean Water Act § 402(a).) The Clean Water Act defines "discharge of a pollutant" as an "addition" of a pollutant to waters of the United States from a point source. (Clean Water Act section 502(12).) Section 402(p)(3)(B) authorizes the issuance of permits for discharges "from municipal storm sewers."

We find that the permit language is overly broad because it applies the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s. It is certainly

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[18] The iterative approach is not necessary for all Discharge Prohibitions. For example, a prohibition against pollution, contamination or nuisance should generally be complied with at all times. (See, Discharge Prohibition A.1.) Also, there may be discharge prohibitions for particularly sensitive water bodies, such as the prohibition in the Ocean Plan applicable to Areas of Special Biological Significance.

[19] Discharge Prohibition A.1 also refers to discharges into the MS4, but it only prohibits pollution, contamination, or nuisance that occurs "in waters of the state." Therefore, it is interpreted to apply only to discharges to receiving waters.

[20] Since NPDES permits are adopted as waste discharge requirements in California, they can more broadly protect "waters of the state," rather than being limited to "waters of the United States." In general, the inclusion of "waters (footnote continued)

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true that in most instances it is more practical and effective to prevent and control pollution at its source. We also agree with the Regional Water Board's concern, stated in its response, that there may be instances where MS4s use "waters of the United States" as part of their sewer system, and that the Board is charged with protecting all such waters. Nonetheless, the specific language in this prohibition too broadly restricts all discharges "into" an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters.[21] It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control. In particular, dischargers subject to industrial and construction permits must comply with all conditions in those permits prior to discharging storm water into MS4s.

Contention: State law requires the adoption of wet weather water quality standards, and the permit improperly enforces water quality standards that were not specifically adopted for wet weather discharges.

Finding: This contention is clearly without merit. There is no provision in state or federal law that mandates adoption of separate water quality standards for wet weather conditions. In arguing that the permit violates state law, BIA states that because the permit applies the water quality objectives that were adopted in its Basin Plan, and those objectives were not specifically adopted for wet weather conditions only, the Regional Water Board violated

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of the state" allows the protection of groundwater, which is generally not considered to be "waters of the United States."

[21] There are other provisions in the permit that refer to restrictions "into" the MS4. (See, e.g., Legal Authority D.1.) Those provisions are appropriate because they do not apply the MEP standard to the permittees, but instead require the permittees to demand appropriate controls for discharges into their system. For example, the federal regulations require that MS4s have a program "to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system . . . ." (40 C.F.R. § 122.26(d)(2)(iv)(D).)

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Water Code section 13241. These allegations appear to challenge water quality objectives that were adopted years ago. Such a challenge is clearly inappropriate as both untimely, and because Basin Plan provisions cannot be challenged through the water quality petition process. (See Wat. Code § 13320.) Moreover, there is nothing in section 13241 that supports the claim that Regional Water Boards must adopt separate wet weather water quality objectives. Instead, the Regional Water Board's response indicates that the water quality objectives were based on all water conditions in the area. There is nothing in the record to support the claim that the Regional Water Board did not in fact consider wet weather conditions when it adopted its Basin Plan. Finally, Water Code section 13263 mandates the Regional Water Board to implement its Basin Plan when adopting waste discharge requirements. The Regional Water Board acted properly in doing so.

BIA points to certain federal policy documents that authorize states to promulgate water quality standards specific to wet-weather conditions.[22] Each Regional Water Board considers revisions to its Basin Plan in a triennial review. That would be the appropriate forum for BIA to make these comments.

Contention: BIA contends that the permit improperly classifies urban runoff as "waste" within the meaning of the Water Code.

Finding: BIA challenges Finding 2, which states that urban runoff is a waste, as defined in the Water Code, and that it is a "discharge of pollutants from a point source" under the federal Clean Water Act. BIA contends that the legislative history of section 13050(d) supports

[22] These documents do not support the claim that U.S. EPA and the Clinton Administration indicated that the absence of such regulations "is a major problem that needs to be addressed," as claimed in BIA's Points and Authorities, at page 18.

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its position that "waste" should be interpreted to exclude urban runoff. The Final Report of the Study Panel to the California State Water Resources Control Board (March, 1969) is the definitive document describing the legislative intent of the Porter-Cologne Water Quality Control Act. In discussing the definition of "waste," this document discusses its broad application to "current drainage, flow, or seepage into waters of the state of harmful concentrations" of materials, including eroded earth and garbage.

As we stated in Board Order WQ 95-2, the requirement to adopt permits for urban runoff is undisputed, and Regional Water Boards are not required to obtain any information on the impacts of runoff prior to issuing a permit. (At page 3.) It is also undisputed that urban runoff contains "waste" within the meaning of Water Code section 13050(d), and that the federal regulations define "discharge of a pollutant" to include "additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man." (40 C.F.R. § 122.2.) But it is the waste or pollutants in the runoff that meet these definitions of "waste" and "pollutant," and not the runoff itself.[23] The finding does create some confusion, since there are discharge prohibitions that have been incorporated into the permit that broadly prohibit the discharge of "waste" in certain circumstances. (See Attachment A to the permit.) The finding will therefore be amended to state that urban runoff contains waste and pollutants.

Contention: BIA contends that the Regional Water Board violated California Environmental Quality Act (CEQA).

[23] The Regional Water Board is appropriately concerned not only with pollutants in runoff but also the volume of runoff, since the volume of runoff can affect the discharge of pollutants in the runoff. (See Board Order WQ 2000-11, at page 5.)

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Finding: As we have stated in several prior orders, the provisions of CEQA requiring adoption of environmental documents do not apply to NPDES permits.[24] BIA contends that the exemption from CEQA contained in section 13389 applies only to the extent that the specific provisions of the permit are required by the federal Clean Water Act. This contention is easily rejected without addressing whether federal law mandated all of the permit provisions. The plain language of section 13389 broadly exempts the Regional Water Board from the requirements of CEQA to prepare environmental documents when adopting "any waste discharge requirement" pursuant to Chapter 5.5 (§§ 13370 et seq., which applies to NPDES permits).[25] BIA cites the decision in *Committee for a Progressive Gilroy v. State Water Resources Control Board* (1987) 192 Cal.App.3d 847. That case upheld the State Water Board's view that section 13389 applies only to NPDES permits, and not to waste discharge requirements that are adopted pursuant only to state law. The case did not concern an NPDES permit, and does not support BIA's argument.

Contention: WSPA contends that the Regional Water Board did not follow this Board's precedent for retail gasoline outlets (RGOs) established in the LA SUSMP order.

Finding: In the LA SUSMP order, this Board concluded that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. We also noted that, in light of the small size of many RGOs and the proximity to underground tanks, it might not always be feasible or safe to employ treatment methodologies. We directed the Los Angeles Regional Water Board to mandate that RGOs

[24] Water Code section 13389; see, e.g., Board Order WQ 2000-11.

[25] The exemption does have an exception for permits for "new sources" as defined in the Clean Water Act, which is not applicable here.

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employ the BMPs listed in a publication of the California Storm Water Quality Task Force. (*Best Management Practice Guide – Retail Gasoline Outlets* (March 1997).) We also concluded that RGOs should not be subject to the BMP design standards at this time. Instead, we recommended that the Regional Water Board undertake further consideration of a threshold relative to size of the RGO, number of fueling nozzles, or some other relevant factor. The LA SUSMP order did not preclude inclusion of RGOs in the SUSMP design standards, with proper justification, when the permit is reissued.

The permit adopted by the Regional Water Board did not comply with the directions we set forth in the LA SUSMP order for the regulation of RGOs. The permit contains no findings specific to the issues discussed in our prior order regarding RGOs, and includes no threshold for inclusion of RGOs in SUSMPs. Instead, the permit requires the dischargers to develop and implement SUSMPs within one year that include requirements for "Priority Development Project Categories," including "retail gasoline outlets." While other priority categories have thresholds for their inclusion in SUSMPs, the permit states: "Retail Gasoline Outlet is defined as any facility engaged in selling gasoline."[26]

The Regional Water Board responded that it did follow the directions in the LA SUSMP order. First, it points to findings that vehicles and pollutants they generate impact receiving water quality. But the only finding that even mentions RGOs is finding 4, which simply lists RGOs among the other priority development project categories as land uses that generate more pollutants. The Regional Water Board staff also did state some justifications for the inclusion of RGOs in two documents. The Draft Fact Sheet explains that RGOs contribute

[26] Permit at F.1.b(2)(a)(x).

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pollutants to runoff, and opines that there are appropriate BMPs for RGOs. The staff also prepared another document after the public hearing, which was distributed to Board Members prior to their vote on the permit, and which includes similar justifications and references to studies.[27] The LA SUSMP order called for some type of threshold for inclusion of RGOs in SUSMPs. The permit does not do so. Also, justifications for permit provisions should be stated in the permit findings or the final fact sheet, and should be subject to public review and debate.[28] The discussion in the document submitted after the hearing did not meet these criteria. There was some justification in the "Draft Fact Sheet," but the fact sheet has not been finalized.[29] In light of our concerns over whether SUSMP sizing criteria should apply to RGOs, it was incumbent on the Regional Water Board to justify the inclusion of RGOs in the permit findings or in a final fact sheet, and to consider an appropriate threshold, addressing the concerns we stated. The Regional Water Board also responded that when the dischargers develop the SUSMPs, the dischargers might add specific BMPs and a threshold as directed in the LA SUSMP order. But the order specifically directed that any threshold, and the justification therefore, should be included in the permit. The Regional Water Board did not comply with these directions.

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[27] See "Comparison Between Tentative Order No. 2001-01 SUSMP Requirements and LARWQCB SUSMP Requirements (as Supported by SWRCB Order WQ 2000-11)."

[28] See 40 C.F.R. sections 124.6(e) and 124.8.

[29] U.S. EPA regulations require that there be a fact sheet accompanying the permit. (40 C.F.R. § 124.8.) The record contains only a draft fact sheet, which was never published or distributed in final form. The Regional Water Board should finalize the fact sheet, accounting for any revisions made in the final permit, and publish it on its web site as a final document.

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III. CONCLUSIONS

Based on the discussion above, the Board concludes that:

1. The Regional Water Board appropriately required compliance with water quality standards and included requirements to achieve reduction of pollutants to the maximum extent practicable. The permit must be clarified so that the reference to the iterative process for achieving compliance applies not only to the receiving water limitation, but also to the discharge prohibitions that require compliance with water quality standards. The permit should also be revised so that it requires that MEP be achieved for discharges "from" the municipal sewer system, and for discharges "to" waters of the United States, but not for discharges "into" the sewer system.

2. The Regional Water Board was not required to adopt wet-weather specific water quality objectives.

3. The Regional Water Board inappropriately defined urban runoff as "waste."

4. The Regional Water Board did not violate the California Environmental Quality Act.

5. The permit will be revised to delete retail gasoline outlets from the Priority Development Project Categories for Standard Urban Storm Water Mitigation Plans. The Regional Water Board may consider adding retail gasoline outlets, upon inclusion of appropriate findings and a threshold describing which outlets are included in the requirements.

IV. ORDER

IT IS HEREBY ORDERED that the Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems in San Diego County (Order No. 2001-01) are revised as follows:

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1. Part A.3: The words "into and" are deleted.

2. Part C.2: Throughout the first paragraph, the words ", Part A.2, and Part A.5 as it applies to Prohibition 5 in Attachment A" shall be inserted following "Part C.1."

3. Finding 2: Revise the finding to read: **URBAN RUNOFF CONTAINS "WASTE" AND "POLLUTANTS"**: Urban runoff contains waste, as defined in the California Water Code, and pollutants, as defined in the federal Clean Water Act, and adversely affects the quality of the waters of the State.

4. Part F.1.b(2)(a): Delete section "x."

In all other respects the petitions are dismissed.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 15, 2001.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marché
Clerk to the Board

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TAB "4"

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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:

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- 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.

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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.

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> 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

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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).

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> 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).

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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).

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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.

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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)."

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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]."

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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

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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."

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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."

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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;

[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.

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(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,

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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."

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(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.

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[46] See footnote 50, page 21.

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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.

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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."

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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

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(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."

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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."

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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.

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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."

(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: [¶]...[¶]

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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.

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.

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.

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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

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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.

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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.

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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.

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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.)

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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.

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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.

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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.

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> 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.

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> 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;
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> (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.)

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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

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> [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.

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(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.)

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> (*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.

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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.

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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

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.

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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

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[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."

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.

(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

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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

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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.

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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

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.

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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).

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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.

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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

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."

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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.

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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.

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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).)

- 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.

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

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[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,

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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.

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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;

[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.
>
> [¶]…[¶]

> The 2007 Permit imposes standards far beyond those listed in ... the 2001 Permit .... The 2007 Permit now requires the copermittees to engage in specific programmatic activities that are duplicative of the activities that were not required under the 2001 Permit and that are already required of them on a jurisdictional basis within the boundaries of the same watershed. These new requirements include no less than two watershed water quality activities and two watershed education activities per year. The two-activity watershed requirement is a condition of all copermittees regardless of whether the activity is within their jurisdictional authority or not.
>
> In addition, while the 2007 Permit states that activities can be implemented at a regional, watershed or jurisdictional level, it mandates that watershed quality activities implemented on a jurisdictional basis must exceed the baseline jurisdictional requirements under Section D of the Order. By reason of the dual baseline standards, jurisdictional and watershed, the copermittees are required to perform more and duplicative work.

The Commission finds that E.2.f. and E.2.g of the permit are a new program or higher level of service.

As to watershed education in part E.2.f, the 2001 permit (in part J.2.g.) stated that the WURMP shall contain "A watershed based education program." The 2007 permit states that the WURMP shall include "watershed education activities" defined as "outreach and training activities that address high priority water quality problems in the WMA [Watershed Management Area(s)]." Moreover, in part E.f.(4), the 2007 permit states: "A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences." Because of this increased requirement for implementation of watershed education, the Commission finds that watershed education activities, as defined in part E.2.f, is a new program or higher level of service.

Additionally, the Commission finds that the rest of part E.2.f. is a new program or higher level of service because it includes elements not in the 2001 permit, such as:

- A definition of watershed water quality activities (part E.2.f.(1)(a)).
- Submission of a watershed activities list, with specified contents (part E.2.f.(2)).
- A detailed description of each activity on the watershed activities list, with seven specific components (part E.2.f.(3)).
- Implementation of watershed activities pursuant to established schedules, including definitions of when activities are in an active implementation phase (part E.2.f.(4)).

As to part E.2.g., although the 2001 (in parts J.1. & J.2.) and 2007 permits both require copermittee collaboration in developing and implementing the Watershed Urban Runoff Management Plan, copermittee collaboration is a new program or higher level of service because the WURMP is greatly expanded over the 2001 permit in part E.2.f as discussed above. This means that new collaboration is required to develop and implement the watershed activities in part E.2.f.

The 2007 permit (in part E.2.g) also states that "Watershed Copermittee collaboration shall include frequent regularly scheduled meetings." This requirement for meetings was not in the 2001 permit. The Fact Sheet/Technical Report states:

> The requirement for regularly scheduled meetings has been added based on Regional Board findings that watershed groups which hold regularly scheduled meetings (such as for San Diego Bay) typically produced better programs and work products than watershed groups that went for extended periods of time without scheduled meetings.[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."

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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).

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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.

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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).]

> 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.

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- 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

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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.

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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.

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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."

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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.

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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.

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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

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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.

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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

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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.

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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

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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)).

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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.

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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.

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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.

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> 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.

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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.

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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.

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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.

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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.

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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).

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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.

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The priority development project categories listed in part D.1.d.(2) are:

(a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments.

(b) Commercial developments greater than one acre. [as specified]

(c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.).

(d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.

(e) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except ... hydromodification requirement D.1.g.

(f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater.

(g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands.

(h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce.

(i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles.

(j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

The Commission finds that claimants have authority to impose fees for complying with the HMP activities in permit part D.1.g. for priority development projects, and their authority is sufficient within the meaning of Government Code section 17556, subdivision (d), in that the fee would not be subject to Proposition 218 voter approval. These activities involve collaborating with other copermittees to develop and implement a hydromodification management plan, and reporting on it. Because regulatory fees, pursuant to article XI, section 7 of the California Constitution, could be imposed on these priority development projects to pay for the costs of HMP, the Commission finds that permit part D.1.g. does not impose costs mandated by the state.

Low impact development: Low impact development is defined in Attachment C of the permit as a "storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions." The purpose of LID is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects." LID best management practices include draining a portion of impervious areas into pervious areas prior to discharge into the storm drain, and constructing portions of priority development projects with permeable surfaces.

Part D.1.d.(7) requires updating the Standard Urban Storm Water Mitigation Plans (SUSMP) to include low impact development requirements, as specified, including BMP requirements that meet or exceed the requirements of sections D.1.d.(4)[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.

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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

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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).

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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.

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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.

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> 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.

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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.'

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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).

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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.

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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.

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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."

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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.

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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.

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(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

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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.

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(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.

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(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."

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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.

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State Board Order No. 91-04	3
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State Board Order No. 98-01	5
State Board Order No. 2000-11	6
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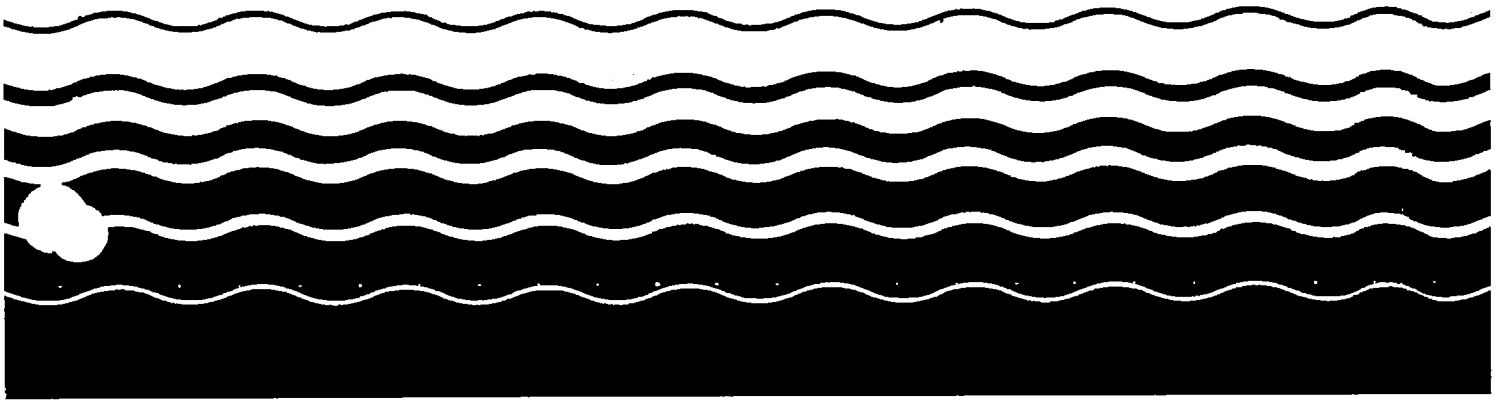
United States
Environmental Protection
Agency

Office Of Water
(EN-336)

EPA 833-B-92-001
November 1992

EPA

Guidance Manual For The Preparation Of Part 2 Of The NPDES Permit Applications For Discharges From Municipal Separate Storm Sewer Systems



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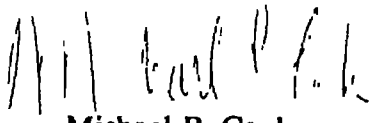
FOREWORD

This manual provides detailed guidance on the development of Part 2 permit applications for municipal separate storm sewer systems. It provides technical assistance and support for all municipal separate storm sewer systems subject to regulatory requirements under the National Pollutant Discharge Elimination System (NPDES) program for storm water point source discharges. This manual also emphasizes the application of pollution prevention measures and implementation of Best Management Practices (BMPs) to reduce pollutant loadings and improve water quality.

The control of pollution from urban and industrial storm water discharges is critical in maintaining and improving the quality of the Nation's waters. Pollutants in storm water discharges from many sources are largely uncontrolled. The *National Water Quality Inventory, 1990 Report to Congress*, provides a general assessment of water quality based on biennial reports submitted by the States under Section 305(b) of the Clean Water Act (CWA). The report indicates that roughly one third of the impairment in assessed waters is due to storm water runoff.

This document was issued in support of Environmental Protection Agency (EPA) regulations and policy initiatives involving the development and implementation of a national storm water program. This document is Agency guidance only. It does not establish or affect legal rights or obligations. Agency decisions in any particular case will be made applying the laws and regulations on the basis of specific facts when permits are issued or regulations promulgated.

This document will be revised and expanded periodically to reflect additional guidance. Comments from users are welcomed. Send comments to U.S. EPA, Office of Wastewater Enforcement and Compliance, 401 M Street, SW, Mail Code EN-336, Washington, D.C. 20460.



Michael B. Cook,
Director
Office of Wastewater Enforcement
and Compliance

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CHAPTER 1
INTRODUCTION

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1.0 INTRODUCTION

1.1 OVERVIEW

Control of pollution from urban and industrial storm water discharges is an important factor in maintaining and improving the quality of the Nation's waters. To help improve the quality of storm water discharges, Congress passed the Water Quality Act (WQA) in 1987. The WQA added to the Clean Water Act (CWA) a provision [Section 402(p)] that directed the U.S. Environmental Protection Agency (EPA) to establish final regulations governing storm water discharges under the National Pollutant Discharge Elimination System (NPDES) program.

In response, EPA published regulations in the November 16, 1990, Federal Register (55 FR 47990) that established NPDES permit application requirements for storm water point source discharges As part of these regulations, municipal separate storm sewer systems (MS4s) that serve populations greater than 250,000 ("large MS4s"), MS4s that serve populations between 100,000 and 250,000 ("medium MS4s"), and other MS4s identified by the permitting authority must be covered by NPDES permits. The regulations establish a two-part application process for these MS4s In April 1991, EPA issued guidance on the preparation of Part 1 of the NPDES permit application for discharges from MS4s (EPA, 1991b). The present manual provides guidance on the preparation of Part 2 applications. The information in this manual should help municipalities focus their efforts on activities that meet the application requirements.

1.2 SUMMARY OF THE CLEAN WATER ACT REQUIREMENTS

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. Efforts to improve water quality under the NPDES program have traditionally focused on reducing pollutants in discharges of industrial process wastewater and municipal sewage. As pollution control measures have been implemented for these discharges, it has become evident that diffuse sources of water pollution (those occurring over a wide area) are also major contributors to water quality degradation. Recent studies, including the Nationwide Urban Runoff Program (NURP) study (EPA, 1983), have shown that storm water runoff from urban and industrial areas typically contains the same general types of pollutants that are often found in wastewater in industrial discharges. Pollutants commonly found in storm water runoff include heavy metals, pesticides, herbicides, and synthetic organic compounds such as fuels, waste oils, solvents, lubricants, and grease. These compounds can have damaging effect on both human health and aquatic ecosystems. In addition to pollutants, the high volumes of storm water discharged from MS4s in areas of rapid urbanization have had significant impacts on aquatic ecosystems due to physical modifications such as bank erosion and widening of channels.

The statutory provisions governing discharges from MS4s are contained in CWA Section 402(p)(3)(B). In general, Congress provided that permits for discharges from MS4s:

- May be issued on either a system- or jurisdiction-wide basis;
- Shall effectively prohibit non-storm water discharges into the MS4, and
- Shall require controls to reduce the discharge of pollutants to the maximum extent practicable (MEP).

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Under the storm water program, the initial round of NPDES permits will emphasize the use of Best Management Practices (BMPs) to reduce pollutant loadings from MS4s. These BMPs include pollution prevention measures, management practices, control techniques, and design and engineering practices. As with any discharger subject to the NPDES program, MS4s must meet technology-based requirements [in this case, the "maximum extent practicable" standard of Section 402(p)] as well as applicable water quality standards.

1.3 THE PERMIT APPLICATION PROCESS

The goal of the NPDES program for municipal storm water is the reduction and elimination of pollutants in storm water discharges from large and medium MS4s. The permit application process in 40 CFR 122.26(d) is designed to meet this goal by developing site-specific NPDES permits containing storm water management programs for individual MS4s. Site-specific permitting is crucial given the differing nature of discharges from MS4s in different parts of the country and the varying impacts of these discharges on receiving waters. To facilitate this process, the regulations specify a two-part permit application.

Part 1 of the permit application initiates the process through which municipalities began to identify sources of pollutants to the municipal storm sewer system. Part 1 also requires municipalities to propose strategies to characterize storm water discharges from their municipal separate storm sewer systems. *Guidance for the Preparation of Part 1 of The NPDES Permit Applications for Discharges From Municipal Separate Storm Sewer Systems* was issued in April 1991, and is available through EPA's Storm Water Hotline [(703) 821-4823].

The present manual describes how to meet the Part 2 permit application requirements for storm water discharges from large and medium MS4s. Part 2 of the permit application builds upon the foundation established in Part 1 and provides for the development of comprehensive storm water management programs. Part 2 requires particular information that MS4s must have developed to have an effective storm water control plan. However, each applicant is given flexibility on how to present and organize this information in a way which best suits the MS4's needs and is most consistent with its overall storm water management strategy. This guidance presents examples which illustrate some alternative ways to present information that will fulfill the Part 2 permit application requirements.

1.4 WHO MUST SUBMIT A PART 2 APPLICATION

Municipalities, incorporated places, and counties with unincorporated urban areas that own or operate a large or medium MS4 that discharges to waters of the United States are required to obtain a NPDES storm water permit. In addition, small MS4s (less than 100,000) that are owned or operated by a municipality other than those identified in the NPDES regulation can be designated by the permitting authority 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.

Under EPA's definition of MS4, "large" MS4s serve populations greater than 250,000, and "medium" MS4s serve populations of at least 100,000, but less than 250,000. Population is determined by the most recent Decennial Census by the Bureau of the Census. A list of large and medium municipalities identified in the November 16, 1990, rule is contained in Exhibit 1-1, in which population was based on the 1980 Census. **After the publication of the November 16, 1990, rule, the Bureau of the Census released data for 1990, and, as a result, some additional municipalities may be required to submit applications, while others may fall below 100,000. These changes are not reflected in Exhibit 1-1.**

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Exhibit 1-1: Large and Medium MS4s (Based on 1980 Census Data)

Municipalities, Counties, and Incorporated Areas With Populations greater than 250,000 which Must Submit NPDES Storm Water Applications

State	Entity
Alabama	Birmingham
Arizona	Phoenix
	Tucson
California	Long Beach
	Los Angeles
	Los Angeles County
	Oakland
	Sacramento
	Sacramento County
	San Diego
	San Diego County
	San Francisco
	San Jose
Colorado	Denver
Delaware	New Castle County
District of Columbia	
Florida	Dade County
	Jacksonville
	Miami
	Tampa
Georgia	Atlanta
	DeKalb County
Hawaii	Honolulu County
Illinois	Chicago
Indiana	Indianapolis
Kansas	Wichita
Kentucky	Louisville
Louisiana	New Orleans
Maryland	Anne Arundel County
	Baltimore County
	Baltimore
	Montgomery County
	Prince George's County
Massachusetts	Boston
Michigan	Detroit
Minnesota	Minneapolis
	St Paul
Missouri	Kansas City
	St. Louis
Nebraska	Omaha
New Jersey	Newark
New Mexico	Albuquerque
New York	Buffalo
	Bronx Borough
	Brooklyn Borough
	Manhattan Borough
	Queens Borough
	Staten Island Borough
North Carolina	Charlotte
Ohio	Cincinnati
	Cleveland
	Columbus
	Toledo
Oklahoma	Oklahoma City
	Tulsa
Oregon	Portland
Pennsylvania	Philadelphia
	Pittsburgh
Tennessee	Memphis
	Nashville/Davidson
Texas	Austin
	Dallas
	El Paso
	Fort Worth
	Harris County
	Houston
	San Antonio
Utah	Salt Lake County
Virginia	Fairfax County
	Norfolk
	Virginia Beach
Washington	King County
	Seattle
Wisconsin	Milwaukee

Municipalities, Counties, and Incorporated Areas with Populations between 100,000 and 250,000 which Must Submit NPDES Storm Water Applications.

State	Entity
Alabama	Huntsville
	Jefferson County
	Mobile
	Montgomery
Alaska	Anchorage
Arizona	Mesa
	Pima County
	Tempe
Arkansas	Little Rock
California	Alameda County
	Anaheim
	Bakersfield
	Berkeley
	Concord
	Contra Costa County
	Fremont
	Fresno
	Fullerton
	Garden Grove
	Glendale
	Huntington Beach
	Kern County
	Modesto
California, cont	Orange County
	Oxnard
	Pasadena
	Riverside
	Riverside County
	San Bernardino
	San Bernardino County
	Santa Ana
	Stockton
	Sunnyvale
	Torrance
Colorado	Aurora
	Colorado Springs
	Lakewood
	Pueblo
Connecticut	Bridgeport
	Hartford
	New Haven
	Stamford
	Waterbury
Florida	Broward County
	Escambia County
	Fort Lauderdale
	Hileah
	Hillsborough County
	Hollywood
	Orange County
	Orlando
	Palm Beach County
	Pinellas County
	Polk County
	Sarasota County
	St Petersburg
Georgia	Clayton County
	Cobb County
	Columbus
	Macon
	Richmond County
	Savannah
Idaho	Boise City
Illinois	Peoria
	Rockford
Indiana	Evansville
	Fort Wayne
	Gary
	South Bend
Iowa	Cedar Rapids
	Davenport
	Des Moines
Kansas	Kansas City
	Topeka
Kentucky	Jefferson County
	Lexington-Fayette
Louisiana	Baton Rouge
	Jefferson Parish
	Shreveport

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Exhibit 1-1: Large and Medium MS4s (cont.)
(Based on 1980 Census Data)

Massachusetts	Springfield	North Carolina	Durham	Texas, cont'd	Corpus Christi
	Worcester		Greensboro		Garland
Michigan	Ann Arbor		Raleigh		Irving
	Flint		Winston-Salem		Lubbock
	Grand Rapids		Cumberland County		Pasadena
	Lansing	Ohio	Akron		Waco
	Livonia		Dayton	Utah	Salt Lake City
	Sterling Heights		Youngstown	Virginia	Alexandria
	Warren	Oregon	Eugene		Arlington County
Mississippi	Jackson		Multnomah County		Chesapeake
Missouri	Independence		Washington County		Chesterfield County
	Springfield	Pennsylvania	Allentown		Hampton
Nebraska	Lincoln		Erie		Henrico County
Nevada	Clark County	Rhode Island	Providence		Newport News
	Las Vegas	South Carolina	Columbia		Portsmouth
	Reno		Greenville County		Richmond
New Jersey	Elizabeth		Richland County		Roanoke
	Jersey City	Tennessee	Chattanooga	Washington	Snohomish County
	Paterson		Knoxville		Spokane
New York	Albany	Texas	Amarillo		Pierce County
	Rochester		Arlington		Tacoma
	Syracuse		Beaumont	Wisconsin	Madison
	Yonkers				

Source. 55 FR 48073, November 16, 1990.

The definition of MS4 excludes those conveyances that are designed to discharge storm water runoff combined with municipal sanitary sewers ("combined sewer systems"). Therefore, municipalities that own or operate combined sewer systems may petition to have their population, based on Bureau of the Census figures, reduced by the number of people served by the combined sewer system. If the total population served by the separate storm sewer system alone is less than 100,000, the municipality may be eligible for an exemption from NPDES storm water permit requirements. Municipalities should contact their permitting authority for additional information. **Exhibit 1-1 does not reflect any modifications in the application requirements for cities with combined sewer systems.**

1.5 SUBMITTING THE PART 2 APPLICATION

Completed Part 2 applications should be submitted to the appropriate permitting authority listed in Exhibit 1-2. For municipalities in States with authorized NPDES programs, the permitting authority is the State office listed in Exhibit 1-2. Because some of these States may have application requirements in addition to EPA's, municipalities in States with authorized NPDES programs should contact their States for guidance. For municipalities in States without approved NPDES programs, the permitting authority is the EPA Regional Office listed in Exhibit 1-2.

Municipalities with populations greater than 250,000 (large MS4s) were to submit their Part 2 applications by November 16, 1992. Municipalities with populations greater than 100,000, but less than 250,000 (medium MS4s), must submit Part 2 applications by May 17, 1993. Inquiries regarding Part 2 applications or the permitting process should be directed to the appropriate permitting authority.

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Exhibit 1-2: NPDES Storm Water Program Permitting Authorities

State	Permit Auth	Contact
Alabama	State	Aubrey White Water Division 1751 Dickinson Dr Montgomery, AL 36130 (205) 271-7811
Alaska	EPA	Steve Bubnick U S EPA Region 10 WD-134 1200 6th Ave. Seattle, WA 98101 (206) 553-8399
Arizona	EPA	Eugene Bromley U S EPA Region 9 W-5-1 75 Hawthorne St. San Francisco, CA 94105 (415) 744-1906
Arkansas	State	Mark Bradley Permitting Section Chief 8001 National Dr. P O Box 8913 Little Rock, AR 72219-8913
California	State	Archie Matthews Div of Water Qual Control Dept. of State Water Res Bd. Mail Code G8 901 P Street Sacramento, CA 95814 (916) 657-0525
Colorado	State	Patricia Nelson Dept. of Health Water Quality Control Div WPCD-PE-B2 4300 Cherry Drive South Denver, CO 80222-1530 (303) 692-3590
Connect-icut	State	Permit Coordinator Dept of Envir Protection Water Management Bureau 165 Capitol Ave. Hartford, CT 06106 (203) 566-7167
Delaware	State	Chuck Schadel Dept of Natural Resources Surface Water Management 89 Kings Hwy, P O Box 1401 Dover, DE 19903 (302) 739-5731
District of Columbia	EPA	Kevin Magerr U S EPA Region 3 3WM53 841 Chestnut Bldg Philadelphia, PA 19107 (215) 597-1651
Florida	EPA	Chris Thomas U.S. EPA Region 4 4WM-FP 345 Courtland St. N E. Atlanta, GA 30365 (404) 347-2391
Georgia	State	Allen Hallum Municipal Permitting Prog Ga. Env Protection Div 4244 International Pkwy Suite 110 Atlanta, GA 30354 (404) 362-2680
Hawaii	State	Steve Chang Dept of Health Clean Water Branch Five Water Front Plaza #500 Ala Moana Blvd. Honolulu, HI 96813 (808) 586-4309
Idaho	EPA	Steve Bubnick U S EPA Region 10 WD-134 1200 6th Avenue Seattle, WA 98101 (206) 553-8399
Illinois	State	Sue Epperson EPA Water Poll. Control Permits Section #15 P O Box 19276 Springfield, IL 62794-9276 (217) 782-0610
Indiana	State	Catherine Hess Dept. of Env Mgmt. NPDES Permits Group Room #718 105 S Meridian St. P O Box 6015 Indianapolis, IN 46206-6015 (317) 232-8704

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Exhibit 1-2: NPDES Storm Water Program Permitting Authorities (cont.)

State	Permit Auth	Contact
Iowa	State	Monica Wnuck Dept of Natural Resources Wallace State Building 900 E Grand Street Des Moines, IA 50319-0034 (515) 281-7017
Kansas	State	Don Carlson Dept. of Health and Env Bureau of Water Ind. or Mun. Progs. Section Forbes Field, Building 740 Topeka, KS 66620 (913) 296-5555
Kentucky	State	Douglas Allgeier Dept. of Env Protection Water Division 14 Reilly Road Frankfort, KY 40601 (502) 564-3410
Louisiana	EPA	Brent Larsen U S EPA Region 6 6W-PM 1455 Ross Ave Dallas, TX 75202 (214) 655-7175
Maine	EPA	Shelley Puleo U S EPA Region 1 JFK Building/WCP Boston, MA 02203 (617) 565-3525
Maryland	State	Brian Clevenger MD Dept. of Environment Sed. & Storm Water Admin. 2500 Broening Hwy Baltimore, MD 21224 (410) 631-3545
Mass-achusetts	EPA	Shelley Puleo U S EPA Region 1 WCP JFK Building Boston, MA 02203 (617) 565-3525
Michigan	State	Gary Boersen Dept of Natural Resources Surf Wtr Qual Div -Permits P O Box 30028 Lansing, MI 48909 (517) 373-1982
Minnesota	State	Scott Thompson Pollution Control Agency 520 Lafayette Rd St. Paul, MN 55155-3898 (612) 296-7203
Miss-issippi	State	Louis Lavalee Dept. of Env Quality Office of Pollution Control Ind. Wastewater Branch P O Box 10385 Jackson, MS 39289-0385 (601) 961-5074
Missouri	State	Karl Fett Dept. of Natural Resources Water Poll Control Program 205 Jefferson St P O Box 176 Jefferson City, MO 65102 (314) 526-2928
Montana	State	Fred Shewman Water Quality Bureau Cogswell Building Helena, MT 59620 (406) 444-2406
Nebraska	State	Clark Smith Environmental Quality P O Box 98922 Lincoln, NE 68509 (402) 471-4239
Nevada	State	Rob Saunders Conserv & Natural Res Environmental Protection 333 W Nye Lane Carson City, NV 89710 (702) 687-5870
New Hampshire	EPA	Shelley Puleo U S EPA Region 1 WCP JFK Building Boston, MA 02203 (617) 565-3525
New Jersey	State	Barry Chalofsky NJ DEPE Office of Regulatory Policy CN423 Trenton, NJ 08625-0423 (609) 633-7021

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Exhibit 1-2: NPDES Storm Water Program Permitting Authorities (cont.)

State	Permit Auth	Contact
New Mexico	EPA	Brent Larsen U S EPA Region 6 6W-PM 1445 Ross Ave Dallas, TX 75202 (214) 655-7175
New York	State	Ken Stevens Wastewater Facilities Design NY State Dept. of Env Cons 50 Wolf Road Albany, NY 12233 (518) 457-1157
North Carolina	State	Colleen Sullins Environmental Management Water Permits & Eng P O Box 29535 Raleigh, NC 27626-0535 (919) 733-5083
North Dakota	State	Shelia McClenathan Dept of Health Water Quality Div 1200 Missouri Ave. P O Box 5520 Bismarck ND 585202-5520 (701) 221-5210
Ohio	State	John Morrison OEPA Water Pollution Control 1800 Watermark P O Box 1049 Columbus, OH 43266 (614) 644-2017
Oklahoma	EPA	Brent Larsen U S EPA Region 6 6W-PM 1445 Ross Avenue Dallas, TX 75202 (214) 655-7175 Ted Williamson Discharge Permits Division Oklahoma Dept of Health 1000 N E. 10th Oklahoma City, OK 73117
Oregon	State	Ranei Nomura DEQ-Water Quality 811 SW 6th Ave Portland, OR 97204 (503) 229 5256
Pennsylvania	State	R B Patel Environmental Resources Water Quality Management P O Box 2063 Harrisburg, PA 17120 (717) 787-8184
Puerto Rico	EPA	Jose Rivera U S EPA Region 2 Wtr Permits & Compl. Br 26 Federal Plaza, Room 845 New York, NY 10278 (212) 264-2911
Rhode Island	State	Peter Duhamel Division of Water Resources 291 Promenade St Providence, RI 02908 (401) 277-6519
South Carolina	State	Arturo Ovalles DHEC Industry and Agriculture Wastewater Division 2600 Bull St Columbia, SC 29201 (803) 734-5241
South Dakota	EPA	Vern Berry U S EPA Region 8 8-WM-C Suite 500 999 18th St Denver, CO 80202 2466 (303) 293-1630
Tennessee	State	Robert Haley Dept of Env Wtr Poll Ctrl 401 Church St 6th Floor L & C Annex Nashville, TN 37243-1534 (615) 532 0625
Texas	EPA	Brent Larsen U S EPA Region 6 6W-PM 1445 Ross Ave. Dallas, TX 37243-1534
Utah	State	Harry Campbell Div of Water Qual P O Box 144870 Salt Lake City, UT 84114-4870 (801) 538-6146

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Exhibit 1-2: NPDES Storm Water Program Permitting Authorities (cont.)

State	Permit Auth	Contact
Vermont	State	Brian Kooker Env Conserv Permits Compliance & Protection 103 S Main St. Annex Building Waterbury, VT 05671-0405 (802) 244-5674
Virgin Islands	State	Marc Pacifico Dept. of Planning & Nat Resources Div of Env Protection 1118 Watergut Project Box 1118 Christiansted St. Croix, VI 00820-5065 (809) 773-0565
Virginia	State	Burton Tuxford VA Water Control Board 4900 Cox Road Glen Allen, VA 23060 (804) 527-5000
Wash-ington	State	Ed O'Brien Dept. of Ecology Industrial Storm Water Unit Water Quality Div P O. Box 47696 Olympia, WA 98504-7696 (206) 438-7614
West Virginia	State	Jerry Ray Office of Water Resources 1201 Greenbriar St. Charleston, WV 25311 1088 (304) 558-0375
Wisconsin	State	Anne Manuel Dept. of Natural Resources Wastewater Management P.O Box 7921 Madison, WI 53707 (608) 267-7694
Wyoming	State	John Wagner Dept. of Envir Quality Herschler Building 4th Floor Cheyenne, WY 82002 (307) 777-7082

Source Poll of Regional and State offices

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1.6 USE OF INFORMATION IN PART 1 AND PART 2 APPLICATIONS

The information submitted in the Part 1 and Part 2 permit applications provides applicants with a starting point for developing comprehensive storm water management programs. For example, the field screening data submitted with the Part 1 application provides a basis for a program to control illicit discharges. Also, the application information may assist in prioritizing controls and in long-term tracking of program effectiveness.

Permitting authorities will use the information from each municipality's Part 1 and 2 applications as the basis for establishing conditions in that municipality's NPDES storm water permit. For example, if a municipality submits a satisfactory application, all or part of its proposed storm water management program is likely to become an integral part of its permit

1.7 ORGANIZATION OF THIS MANUAL

Chapter 1, *Introduction*, provides a brief overview of the Part 2 permit application process It discusses who must submit a Part 2 application and how the information in the applications will be used It also contains a summary of the statutory and regulatory basis for the NPDES storm water program.

Chapter 2, *The Part 2 Application*, describes the statutory and regulatory requirements of municipal NPDES storm water permit applications in more detail. Chapter 2 outlines the specific requirements of the Part 1 and Part 2 applications, explains how Part 2 builds on the Part 1 application, and describes the interconnection among the various components of the Part 2 application.

Chapter 3, *Adequate Legal Authority*, describes how municipalities must demonstrate that they have adequate legal authority to carry out the program requirements [§122.26(d)(2)(i)]

Chapter 4, *Source Identification*, provides guidance on identifying major outfalls and inventorying dischargers to the MS4 [§122 26(d)(2)(ii)]

Chapter 5, *Discharge Characterization*, provides guidance for submitting quantitative data on the MS4 and developing a proposed monitoring program [§122 26(d)(2)(iii)].

Chapter 6, *Proposed Management Program*, describes the steps municipalities must take when they develop site-specific storm water management programs [§122.26(d)(2)(iv)]. These plans are the heart of the municipal permit application, and the permitting authority will probably incorporate all or part of the municipality's proposed management program into their NPDES storm water permit. In their proposed management programs, municipalities must describe management practices, control techniques and systems, design and engineering methods, and other provisions that are aimed at reducing the discharge of pollutants to the "maximum extent practicable "

Chapter 7, *Assessment of Controls*, explains how a municipality can assess the effectiveness of its storm water management program and target priorities through the use of direct and indirect measures [§122 26(d)(2)(v)]

Chapter 8, *Fiscal Analysis*, provides guidance on estimating necessary capital and operation and maintenance expenditures, and financing these expenditures [§122 26(d)(2)(vi)].

1.8 OTHER GUIDANCE AVAILABLE

Municipalities should use this guidance document together with the Part 1 guidance (EPA, 1991b). Exhibit 1-3 lists other sources of guidance available from EPA's Storm Water Hotline [(703) 821-4823] In addition, applicants may wish to obtain further information from the documents identified in the bibliography at the end of this guidance (Appendix A).

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Exhibit 1-3
Documents Available from the EPA Storm Water Hotline•
[(703) 821-4823]

November 16, 1990, Federal Register - 55 FR 47990 National Pollutant Discharge Elimination System (NPDES) Permit Application Requirements for Storm Water Discharges - Final Rule

March 21, 1991, Federal Register - 56 FR 12098 Application Deadline for Group Applications Final Rule; Application Deadline for Individual Applications - Proposed Rule

August 16, 1991, Federal Register - 56 FR 40948 NPDES General Permits and Reporting Requirements for Storm Water Discharges Associated with Industrial Activity - Proposed Rule

November 5, 1991, Federal Register - 56 FR 50548 Application Deadlines, Final Rule and Proposed Rule

April 2, 1992, Federal Register - 57 FR 11394 Application Deadlines, General Permit Requirements and Reporting Requirements, Final Rule

Summary of November 16, 1990, Storm Water Application Rule

Summary of August 16, 1991, Proposed Storm Water Implementation Rule

August 16, 1991, Proposed Storm Water Implementation Rule Package Fact Sheet

April 2, 1992, Storm Water Program Rule Fact Sheet

Guidance Manual for the Preparation of NPDES Permit Applications for Storm Water Discharges Associated with Industrial Activity (EPA 505/8-91-002, April 1991)

Guidance Manual for the Preparation of Part 1 of the NPDES Permit Applications for Discharges From Municipal Separate Storm Water Systems (EPA 505/8-91-003A, April 1991)

Typical Values of Annual Storm Events Statistics for Rain Zones of the United States ("Urban Targeting and BMP Selection", EPA Region V, November 1990)

List of EPCRA (SARA Title III) Section 313 Water Priority Chemicals (Draft)

List of State and EPA Regional Storm Water Contacts

State NPDES Program Status

Question and Answer Document

List of Reportable Quantities for Hazardous Substances Under CERCLA

NPDES Storm Water Sampling Guidance Document (EPA 833-B-92-001, July 1992)

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Exhibit 1-3
Documents Available from the Storm Water Hotline (cont.)

September 9, 1992, Federal Register - 57 FR 41176 Final NPDES General Permits for Storm Water Discharges from Construction Sites - Notice

September 9, 1992, Federal Register - 57 FR 41236 Final NPDES General Permits for Storm Water Discharges Associated with Industrial Activity - Notice

September 9, 1992 Federal Register - 57 FR 41344 National Pollutant Discharge Elimination System, Request for Comment on Alternative Approaches for Phase II Storm Water Program - Proposed Rule

* The following documents are available from the National Technical Information Service (NTIS) (1) *Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices* (EPA 832-R-92-006, September 1992), (2) *Storm Water Management for Construction Activities, Developing Pollution Prevention Plans and Best Management Practices* (EPA 832-R-92-005, September 1992)

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CHAPTER 2
THE PART 2 APPLICATION

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2.0 THE PART 2 APPLICATION

2.1 BACKGROUND

The NPDES permit application requirements for MS4s [40 CFR 122.26(d)] establish a two-part application designed to meet the goal of developing comprehensive site-specific storm water quality management programs for MS4s.

The purpose of the two-part application process is to develop information, in a reasonable time frame, that will build successful storm water management programs and allow permitting authorities to make informed decisions about permit conditions. The application process is designed to focus the efforts of municipalities in two areas: prohibiting non-storm water discharges into storm sewers, and implementing controls that reduce the discharge of pollutants from MS4s to the maximum extent practicable.

Part 1 of the application requires information on existing programs and legal authority. In addition, Part 1 requires the results from field screening of major outfalls to detect illicit connections. The Part 2 application requirements are intended to build upon the information submitted with the Part 1 application. Each part has virtually the same major areas of concern, but the Part 2 application requires a greater level of detail. Part 2 of the permit application requires a demonstration of adequate legal authority, additional information on pollutant sources and outfalls, a limited amount of representative quantitative sampling data, a proposed monitoring program, a proposed storm water management program, an estimate of the effectiveness of storm water controls, and a fiscal analysis. The requirements for the Part 1 and Part 2 applications are summarized briefly in Exhibit 2-1, and described in more detail in Section 2.2. The storm water regulations underlying this guidance can be found in Appendix B.

Before applicants proceed with the detailed development of their permit applications; they should recognize the fundamental requirements:

- Who or what are the primary contributors of pollutants in storm water discharges from MS4s?
- Where are these sources of pollutants located in relation to receiving water resources?
- What is the magnitude of these pollutant sources and their potential impact on receiving waters?
- How does the municipality plan to reduce or eliminate the contribution of pollutants in storm water discharges or prevent the damaging influences of these discharges?
- Why did the municipality select the activities or best management practices (BMPs) it proposes?
- When will the municipality implement its proposed program?
- How will the applicant assess the effectiveness of the program? What criteria or measures will apply?
- How will the municipality fund proposed program activities?

Wherever appropriate, the applicant must also show that it has adequate legal authority to implement, enforce, or mandate compliance with applicable ordinances, statutes, contracts, or other similar vehicles as required by the storm water regulation.

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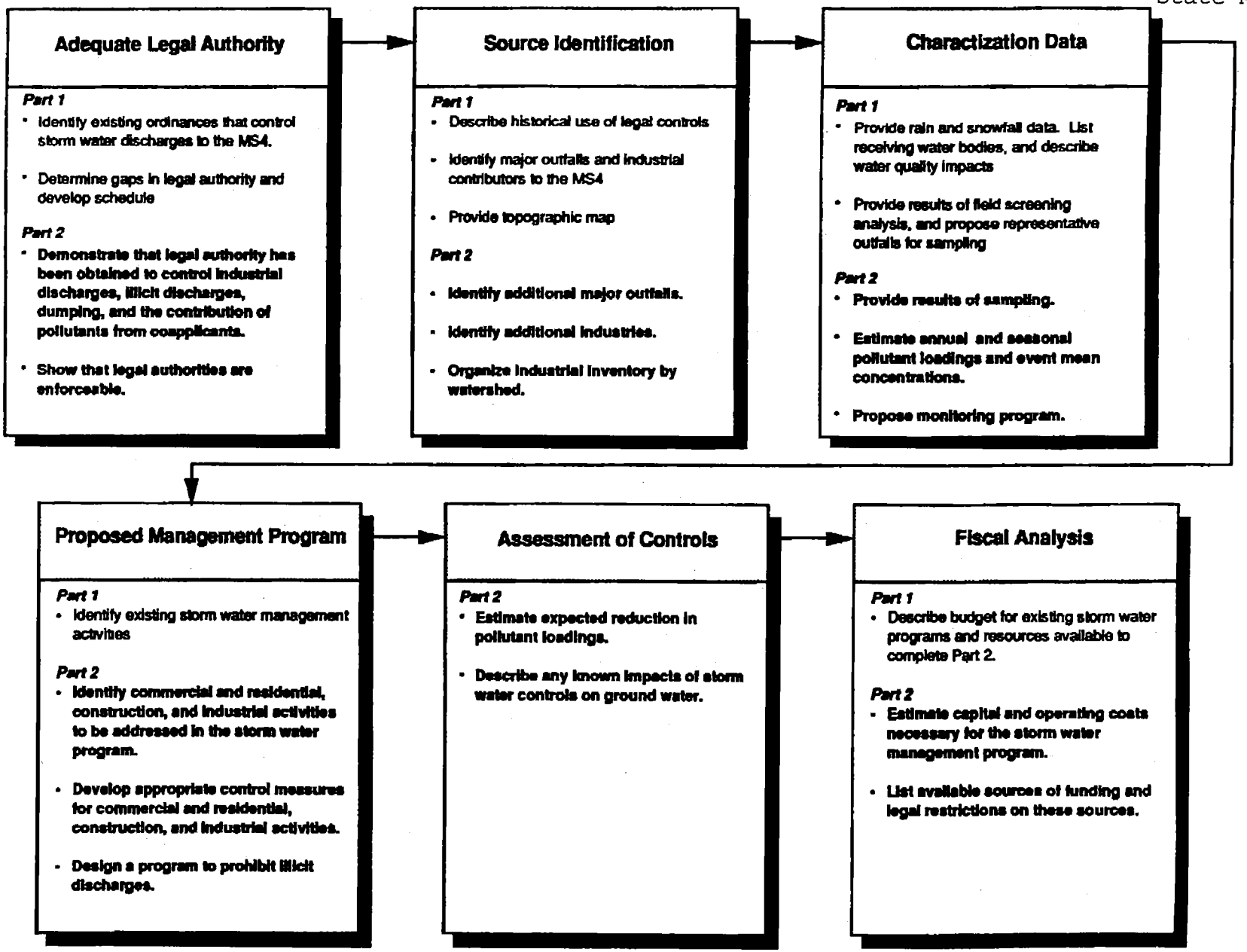
Exhibit 2-1: Part 1 and Part 2 Storm Water Application Requirements.



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These questions (described above) that an applicant must address follow a natural progression or development. For example, before applicants can identify how they will reduce the contribution of pollutants in storm water discharges (the fourth bullet point above), they must identify pollutant sources and estimate the magnitude of pollutant loads (bullet points 1-3 above).

2.2 PART 1 APPLICATIONS

Sections 2.2.1 and 2 2 2 provide overviews of the regulatory requirements of §122 26(d). Section 2 2 3 describes the relationship among the various application provisions.

2.2.1 Overview of the Part 1 Application

Part 1 applications consist of the following six elements

- **General information.** The applicant's name, address, telephone number of contact person, ownership status and status as a State or local government entity

- **Legal authority.** A description of existing legal authority to control discharges to the MS4, and if this authority does not meet the required criteria, a list of additional authority needed and a schedule and commitment to seek such authority.

- **Source identification.** A description of the historic use of ordinances, guidance, or other controls that limit non-storm water discharges to any publicly owned treatment works (POTW), and a topographic map covering an area one mile beyond the service boundaries of the MS4 showing:

  - the location of known municipal sewer system outfalls;

  - a description of all land use activities;

  - the location and activities of landfills;

  - the location and permit number of any known discharge to the MS4;

  - the location of major structural controls for storm water discharges (such as retention basins, or major infiltration devices); and

  - identification of publicly owned parks, recreational areas, and other open lands.

- **Discharge characterization.** A summary of the types and characteristics of storm water discharges, including:

  - monthly mean rain and snowfall estimates and the average number of storm events per month;

  - existing quantitative data describing the volume and quality of discharges from the MS4, including a description of the outfalls and sampling methods used;

  - a list of "downstream" water bodies receiving discharge from the MS4, and a description of the impact of outfall upon them;

  - the results of field screening analysis for illicit discharges at either selected field screening points or major outfalls covered in the permit application; and

  - a proposed characterization plan for conducting sampling and obtaining the quantitative data necessary to complete Part 2 of the application.

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- **Management programs.** A description of existing management programs to control pollutants from the municipal separate storm sewer system. For example, what procedures are in place to control pollution from construction activities, and how do they work? What is the program (such as investigation procedures and how they operate) for identifying illicit connections to the municipal storm sewer system?

- **Fiscal resources** A presentation of the municipality's budget for existing storm water programs and for completing Part 2 of the permit application.

2.2.2 Overview of the Part 2 Application

The Part 2 application must include the following elements:

- **Adequate legal authority.** A demonstration that the municipality can operate according to the legal authority established by ordinance, statute, or series of contracts. The municipality also must demonstrate that its authority is enforceable. A discussion of how adequate legal authority may be demonstrated appears in Chapter 3 of this guidance.

- **Source identification.** An inventory, organized by watershed, of the facilities that may discharge storm water associated with industrial activity to the MS4. The applicant also must identify the location of any major outfall that discharges to waters of the United States that was not reported in Part 1. A discussion of the information to be submitted for each such facility in the inventory appears in Chapter 4 of this guidance.

- **Characterization data.** Sampling results for 5-10 outfalls designated by the permitting authority, estimates of cumulative annual pollutant loadings and event mean concentrations, and a proposed schedule to submit estimates of seasonal pollutant loadings and event mean concentrations for each major outfall identified in the source identification sections of Part 1 and 2. The *Characterization Data* provision of the Part 2 application also requires the development of an on-going monitoring program covering the term of the permit. Procedures for meeting the requirements of this section appear in Chapter 5.

- **Proposed management program.** A program that shows the municipality's comprehensive planning process for the reduction and control of pollutants, the staff and equipment available to implement the program, and a full description of how controls will be implemented to reduce pollutants from all sources of storm water. Municipalities must also describe how the program will be implemented and maintained. The Part 2 requirements for a proposed management program are described in Chapter 6.

- **Assessment of controls.** An estimate of the projected effectiveness of the municipal storm water management program, and an identification of the known impacts of storm water controls on ground water. The assessment of controls is discussed in Chapter 7.

- **Fiscal analysis.** A fiscal analysis of the capital and operation and maintenance expenditures needed to accomplish the activities (including implementation) required by the characterization data and proposed management program sections of the Part 2 application. This fiscal analysis must include projected expenses for each fiscal year of the permit term. A discussion of the fiscal analysis is included in Chapter 8.

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2.2.3 Relationship Among Application Requirements

The required elements of the Part 2 application are related to each other. As a result, this guidance addresses how the application elements are related, and how information gathered for one requirement will assist the applicant in meeting other requirements. For example, the information gathered for the *Industrial Source Identification* provision of the Part 2 application will assist the municipality in.

- Targeting monitoring goals to potential pollutant sources, which may include selecting monitoring locations and chemical specific sampling frequencies (a requirement of the *Characterization Data* provision);

- Identifying illicit discharges (a requirement of the *Proposed Management Program's* illicit connection provision);

- Identifying facilities with the greatest potential for degrading receiving water quality (a requirement of the *Proposed Management Program's* industrial program provision), and

- Targeting sites that handle, store, or transport toxic or hazardous materials for on-site inspections (another requirement of the *Proposed Management Program's* industrial program provision).

As another example, the information that the applicant must prepare for the *Characterization Data* provision (e.g., the results of the sampling requirement and the estimated event mean concentrations and annual pollutant loads) may help the municipality:

- Evaluate the contribution of pollutants in storm water discharges from individual sources and determine which sources may require inspections or controls (a requirement of the *Proposed Management Program's* industrial program provision);

- Predict the impact of storm water discharges on receiving waters known to be impacted. (In the *Proposed Management Program*, additional controls may be warranted for construction sites or other industrial activities that discharge to these waters); and

- Determine what BMPs may be appropriate for given areas (another requirement of the *Proposed Management Program*)

Exhibit 2-2 summarizes some of these key interrelationships, although many other interrelationships exist. A more detailed discussion of specific information requirements and interrelationships among provisions is provided in subsequent chapters As municipalities prepare their permit applications, they should coordinate all program requirements.

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Exhibit 2-2
Examples of Relationship Among Part 2 Requirements

					Fiscal Analysis
				Assessment of Controls	Cost/benefit analysis identifies the most cost-effective BMPs
			Proposed Management Program	Estimates of reductions in pollutant loadings predicts impact of storm water management activities	Fiscal analysis considers costs of controls, maintenance, and capital improvements Management program may include feasibility analyses that consider cost.
		Characterization Data	Annual pollutant loads help prioritize areas for BMPS On-going monitoring indicates success of BMPs and need to re-prioritize	On-going monitoring program verifies program effectiveness. Instream monitoring verifies biological recovery.	Fiscal analysis considers cost of on-going monitoring
	Source Identification	Land use information and organization of industry by watershed defines representative sampling points	Inventory of industrial users helps the city target facilities for inspections and control measures	Estimates of pollutant load reductions depend on land use	Industrial inventory identifies potential sources of storm water utility fees
Adequate Legal Authority	Some sources or outfalls may be outside a city's jurisdiction. Interjurisdictional agreements may be necessary.	Authority to require sampling and obtain information for industries and dischargers outside of the MS4's jurisdiction at sampling points	Legal authority needed to implement BMPS, control and inspect industry, and prohibit dumping and illicit discharge	Need information gathering and inspection authority where it is necessary to inspect, monitor, and enter the facility or the site	Legal authority is required for some financing plans, such as a storm water utility

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2.3 ADDITIONAL FACTORS TO BE CONSIDERED IN DEVELOPING THE PART 2 APPLICATION

As discussed in the previous section, the various provisions of the Part 2 application process are interconnected

All municipalities covered by §122 26(d) must submit a Part 2 permit application that meets the requirements of the storm water permit application regulations. However, each MS4 is unique, and each Part 2 submission will be different. Municipal separate storm sewer systems differ in many ways, including population served, geologic and climatologic settings, density of development, and form of government These underlying factors make each applicant unique

The major factors that applicants should consider are

- Population and projected growth rate;
- Zoning and existing land use patterns;
- Nature of watershed and receiving waters;
- Climatic conditions, soil types, and watershed delineations,
- Existing municipal functions and municipal lands,
- Other environmental impacts;
- Public involvement; and
- Intergovernmental coordination.

In addition, municipalities must implement their storm water management programs in a manner that is consistent with other applicable Federal, State, and local environmental laws.

Population and Projected Growth Rates

Some storm water BMPs are more appropriate for densely developed areas, while other methods may be more useful in developing areas Consequently, defining current population densities and projecting future areas of population growth provides the basic information that can assist in the evaluation and prioritization of appropriate storm water control strategies

Zoning and Existing Land Use Patterns

Through ordinances, permits, or contracts, municipalities may mandate storm water controls for new residential, commercial, or industrial developments in order to improve or assure maintenance of the quality of receiving waters at or near pre-development levels. The Nationwide Urban Runoff Program (NURP) study (EPA, 1983), pointed out that some of the best opportunities for implementing cost effective measures to prevent or reduce pollutants in storm water occur during new development. These measures may include structural controls, such as storm water detention basins or constructed storm water wetlands, or nonstructural alternatives such as cluster development and buffer zones Sections 122.26(d)(1)(iii)(B)(2) and 122 26(d)(2)(ii) require the municipality to establish comprehensive management plans for new development (see Chapter 6)

Nature of Watershed and Receiving Waters

The types of storm water controls appropriate for a MS4 depend on the nature of the watershed and the receiving waters. This includes geologic and hydrologic features such as slope drainage patterns and stream size For example, roadside swales may not be practical in areas with steep terrain, but can be very useful in flat areas In addition, structural BMPs or other management measures that control the volume and timing of release are appropriate where uncontrolled storm water may cause physical impacts to receiving waters (especially small streams, rivers, and wetlands).

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Information on the watershed and the receiving waters is required in the Part 1 permit application [§122 26(d)(1)(iv)(C)]. In Part 1, applicants are required to list water bodies that receive discharges from the MS4. The list of water bodies includes downstream segments, lakes, and estuaries where pollutants from the system discharges may accumulate and result in non-attainment of State water quality standards Part 1 also requires a description of known water quality impacts. Applicants must include a discussion of water bodies that were cited in:

- State reports required by CWA Sections 305(b), 304(l), and 314(a);
- The State Nonpoint Source Report; and
- Other reports identifying sensitive watersheds

Part 1 applicants should also include in this discussion a description of impacts caused by dissolved oxygen depression, bioaccumulation of toxics, excessive sedimentation, hydrologic modification, habitat destruction, etc.

Municipalities are expected to give priority consideration to those classes of pollutant sources that contribute significant loadings or pose a significant impact on receiving waters. Applicants must consider control methods that address storm water discharges from commercial and residential areas; illicit discharges and illegal disposal, storm water discharges from industrial areas; and storm water runoff from construction sites. Municipalities' permits will differ substantially in the emphasis placed on controlling various sources of pollutants in discharges from the MS4. Permits for older municipalities may emphasize control of cross-connections, while permits for municipalities with large areas of new development may emphasize the installation of permanent structural controls during construction

The Part 2 storm water permit application requires descriptions of management programs to address sources of pollutants discharged to separate storm sewer systems. For management strategies to be effective, municipalities must give prior consideration to the nature (e g., physical and biological parameters) and the designated uses of receiving waters such as streams, tributaries, and natural wetlands For example, a storm water management program for a newly developing area with an existing shallow, slow-moving stream could include provisions to ensure that the post-development peak discharge flow rate for the stream is held to a certain percentage of its historical or pre-development peak discharge flow rate

Climatic Conditions, Soil Types, and Watershed Delineations

Seasonal variations in precipitation can have a significant impact on storm water quality For example, extended dry seasons in areas such as the southwestern United States result in pollutant loads distinctly higher than in other parts of the country during the first several storms of the wet season. Areas with more frequent rain and snowfall throughout the year may have more storm water discharges, but the discharges may have consistently lower pollutant concentrations than those in the Southwest. In addition, areas with significant snowfall may experience a peak in storm water discharge volume and pollutant concentration during the spring thaw.

Natural soil conditions affect the potential for storm water to recharge ground water. Porosity and permeability are properties of the soil that govern the size and number of the interstitial spaces through which water may flow. Compaction (e.g , compression of the soil by heavy machinery) will reduce the amount of void space in the soil and thereby reduce the amount of rainfall that infiltrates through the soil to ground water. Natural soil conditions are very important when siting structures designed for storm water infiltration. In addition, identifying such sites must take into consideration potential ground water impacts

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that may result whenever infiltration is part of the storm water management program

Existing Municipal Functions and Municipal Lands

The Part 2 application affords municipalities the opportunity to discuss alternatives in the *Proposed Storm Water Management Program*. When considering the wide range of municipal functions, applicants need to establish which agencies will be responsible for implementing each portion of a storm water management program. (This could be outlined in the *Adequate Legal Authority* chapter of the Part 2 application, as discussed in Chapter 3 of this guidance.) Many of these agencies, will have primary missions other than dealing with storm water or water quality. Expansion of the established charter of an agency to include an element of storm water control may require legislative action, moderately expanding the scope of other municipal agencies' missions to include storm water concerns can be much more cost effective than the initiation of entirely new programs.

Applicants should identify existing municipal functions that impact the quality of storm water discharges. These functions may include snow removal activities such as road deicing, vehicle maintenance operations, and herbicide, pesticide, and fertilizer application to public lands. Municipalities can modify these activities to improve storm water quality through oversight of future land development, modifications to flood management structures, changes in materials used or in material handling or application practices, maintenance of roads, and installation of structures such as retention basins

The municipal agency (or agencies) responsible for storm water runoff control should also consider the extent to which municipal lands and activities contribute pollutants to runoff. The same BMPs recommended for private lands may also be incorporated into the development and maintenance of a municipality's own lands and activities. For example, reduced use of pesticides and fertilizers on park land and open spaces usually decreases the contribution of these contaminants to storm water runoff. Implementing BMPs on municipal lands also shows the municipality's commitment to an effective storm water management program BMPs are discussed in greater detail in Section 6.4 of this guidance.

Other Environmental Impacts

Municipalities should consider those activities that can directly or indirectly alter the natural hydrograph of a stream and potentially degrade an otherwise stable aquatic habitat. These factors are particularly important when considering impacts to wetlands, riparian areas, ground water, small rivers, and streams. In addition, the installation of detention or rapid infiltration ponds may have negative impacts on ground water. The installation of culverts or concrete drainage channels and other such structures typically increases the volume and velocity of runoff, which can lead to increased erosion, siltation, and sedimentation in receiving waters. Therefore, installation of these structures can contribute to the degradation of a neighboring habitat.

Public Involvement

Municipal applicants must ensure that they provide adequate public education and ample opportunities for public participation. Public participation should focus on spreading awareness of program objectives and components. Education and public involvement programs must be defined as part of the *Proposed Storm Water Management Program* [§122.26(d)(2)(iv)]. Generally, the public should be involved as early as possible in storm water management initiatives.

Conflict and confusion can be minimized if the program includes a schedule for initial public contact and milestones for public involvement throughout the development and implementation phases. Public education programs are expected to target specific

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audiences, including those regulated or affected by the storm water management program (e.g., developers, building contractors, and industrial operators) and those that can assist with program implementation (e.g., volunteers and citizens). For example, one large municipal applicant (Seattle) described an existing public participation program in its Part 1 Application submission. Elements of this program may be instructive to municipalities completing Part 2 of the application because it has generic components that are likely to be applicable to other large (and perhaps medium) municipalities. Excerpts from Seattle's public involvement program are provided in Exhibit 2-3 for reference.

Elements of this municipality's program that are particularly important to consider include of the role of an advisory and outreach group and its relationship to the entire process. Effective public participation programs clearly identify the role of the public

The potential exists for a considerable range in the level of participation the public may actually have in the decision-making process. Generally, the municipal authority is going to make the decisions. However, the authority can choose to use the "participation" process to simply inform the public of decisions, or to allow the views of the public to be registered prior to decision milestones In other cases, although uncommon, the public may have an actual voice or vote in making decisions.

The timing and frequency of meetings and the duration of the groups established for public participation will usually be dictated by the nature of the issues being addressed For example, an ad hoc group established to address a single issue may discover that the issue cannot be effectively addressed without consideration of a broader range of issues that the municipality may also be considering In this instance it may be appropriate for the group to expand its scope, hold regular meetings, and actively participate in the authority's decision making process Therefore, applicants should outline in their Part 2 applications how such coordination will be accomplished

Intergovernmental Coordination

If a number of municipal entities (e.g., multiple cities or a city and a county) are participating in the permit application process as coapplicants, various mechanisms can be used to improve intergovernmental coordination to ensure that the roles and responsibilities of each entity are well defined. Each entity must fulfill its responsibilities to implement applicable program measures. Examples of some of the appropriate coordination techniques and their benefits include:

- **Memoranda of agreement (MOA).** MOAs can define specific municipal roles, responsibilities, and points of coordination that help minimize duplication of effort and ensure accountability;

- **Cross-training of staff.** This allows for the identification of gaps in staffing (e.g., neglected areas of responsibility or insufficient staff levels) as well as providing the benefits of increased versatility and opportunities for learning from others;

- **Interagency advisory committees.** Their objective is to arm decision makers with a comprehensive understanding of the implications of proposed activities or decisions; and

- **Regularly scheduled intermunicipal staff meetings.** These can facilitate an open and thorough exchange of information and solidify new lines of communication

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Exhibit 2-3
Excerpts from a Public Involvement Program

The public involvement program [of the City of Seattle] has been designed to assist in developing an acceptable city-wide plan for addressing drainage and water quality problems. Acceptable is defined as a plan that is both technically sound and sensitive to the needs and interests of the citizens. The involvement program has two major elements: a Citizen Advisory Committee (CAC) and a community outreach effort The initial role of the CAC was to provide guidance to City staff and consultants preparing various sections of a Comprehensive Drainage Plan Until the adoption of the Comprehensive Drainage Plan by the City Council, the CAC provided direction on drainage policy issues, assisted with the public review of the draft plan and environmental impact statement (EIS), and helped coordinate comments sent to the city from the public during the review period. Following council adoption of the plan, the CAC was reconstituted into a Drainage and Wastewater Advisory Committee which serves as an on-going sounding board to the Drainage and Wastewater Utility, the mayor, and the City Council on both sewer and drainage matters.

The community outreach effort was established for two purposes. The first was to ensure adequate public review and support of the Comprehensive Drainage Plan and EIS Comments received during the review were used by the Drainage and Wastewater Utility, the mayor, and the City Council in making decisions about the Drainage Plan and the City's on-going drainage program. The second purpose was to begin educating residents and business people about the importance of their role in solving flooding, landslide, and water quality problems throughout the city. This community outreach/education role remains an on-going effort of the Drainage and Wastewater Utility.

Source City of Seattle, *NPDES Storm Water Permit Application, Part 1*, City of Seattle, November 1991 37

Single municipalities with separate governing functions may face the same challenges as coapplicants when they prepare their Part 2 applications. Many of the same coordination steps may be necessary within a single municipal jurisdiction. The need for *intra*governmental coordination may be most crucial in large municipalities that have functions that impact storm water quality spread throughout the organizational structure of the municipality. For example, a planning department may be in charge of implementing a stream buffer policy, while a public works department may plan, site, and construct storm water BMPs Still other agencies may be responsible for implementing erosion and sediment control requirements, and permitting and inspection functions. Storm water-related responsibilities within governmental organizations may be allocated in this manner due to the relatively recent emergence of storm water quality as an important issue. Nonetheless, effective coordination within the government of a single municipality may be as critical to the success of the storm water management program as is intergovernmental coordination for coapplicants Therefore, applicants should outline in their Part 2 applications how such coordination will be accomplished.

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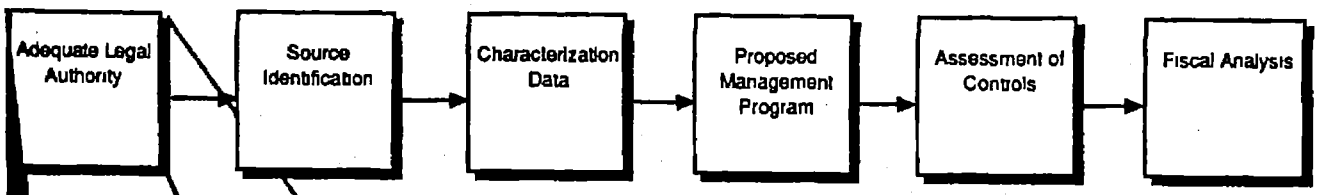
CHAPTER 3
ADEQUATE LEGAL AUTHORITY



Adequate Legal Authority

Part 1

- Identify existing ordinances that control storm water discharges to the MS4
- Determine gaps in legal authority and develop schedule

Part 2

- **Demonstrate that legal authority has been obtained to control industrial discharges, illicit discharges, dumping, and contributions of pollutants from coapplicants.**
- **Show that legal authorities are enforceable.**

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3.0 ADEQUATE LEGAL AUTHORITY

3.1 BACKGROUND

A crucial requirement of the NPDES storm water regulation is that a municipality must demonstrate that it has adequate legal authority to control the contribution of pollutants in storm water discharged to its MS4. This guidance manual and the storm water program emphasize development and implementation of storm water management programs as described in Chapter 6. In order to have an effective municipal storm water management program, a municipality must have adequate legal authority to control the contribution of pollutants discharged to the MS4.

Part 1 of the permit application requires applicants to describe their existing legal authority to control the discharge of pollutants from MS4s and evaluate the adequacy of these ordinances. Where existing ordinances were lacking, a proposed schedule to obtain the necessary authority was included with the Part 1 application. In Part 2 of the application, municipal applicants must demonstrate that they now possess adequate legal authority to:

- Control construction site and other industrial discharges to the MS4;
- Prohibit illicit discharges and control spills and dumping;
- Control potential sources of pollutants from discharges to or from coapplicants' MS4s, or MS4s that are interconnected or shared with other entities;
- Require compliance with all regulations and statutes, and
- Carry out inspection, surveillance, and monitoring procedures

Section 3.2 reviews each of these regulatory requirements. Section 3.3 describes specific procedures a municipality may use to demonstrate adequate legal authority.

3.2 SUMMARY OF REGULATORY REQUIREMENTS

3.2.1 Control Construction Site and Other Industrial Discharges to the MS4.

> §122.26(d)(2)(i)(A) [The applicant 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 sites of industrial activity.

The municipality, as a permittee, is responsible for compliance with its permit and must have the authority to implement the conditions in its permit. To comply with its permit, a municipality must have the authority to hold dischargers accountable for their contributions to separate storm sewers.

"Control," in this context, means not only to require disclosure of information, but also to limit, discourage, or terminate a storm water discharge to the MS4. For example, construction sites (of 5 or more acres) and other industrial activities that discharge storm water through MS4s are required to obtain individual NPDES permits or coverage under general NPDES permits from EPA or an authorized NPDES State. These permits require compliance with applicable Federal and State regulations. However, a municipality, to satisfy its permit conditions may need to impose additional requirements on discharges

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from permitted industrial facilities, as well as discharges from industrial facilities and construction sites not required to obtain permits. Therefore, a municipality should develop a mechanism to assure that all industrial facilities and constructions sites that discharge to the MS4 know their obligation to comply with the applicable terms of the municipality's storm water ordinances.

3.2.2 Prohibit Illicit Discharges and Control Spills and Dumping

> §122.26(d)(2)(i)(B) [The applicant must demonstrate that it can prohibit] through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer
>
> §122.26(d)(2)(i)(C) [The applicant must demonstrate that it can 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

To demonstrate that it possesses adequate legal authority to control storm water discharges, a municipality must be able to effectively prohibit illicit discharges and illegal dumping An illicit discharge is "any discharge that is not composed entirely of storm water except discharges pursuant to a NPDES permit . . . and discharges resulting from fire fighting activities" [40 CFR 122.26(b)(2)].

3.2.3 Control Contributions of Coapplicants

> §122 26(d)(2)(i)(D) [The applicant must demonstrate that it can control] through inter-agency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system

An operator of a MS4 may participate in an application with one or more other operators, or may submit an individual application for the separate storm sewer it operates. As indicated in the box above, the operator of a discharge from a large or medium MS4 may submit, through the use of interjurisdictional agreements, a system-wide permit application. The system-wide application can accommodate existing storm water programs, on a watershed basis, as well as programs which must take into account regional differences in climate, geography, and political institutions. Such an application should cover issues of liability, financial contributions, access to records, enforcement responsibilities, and any other applicable areas of mutual concern.

When two or more municipalities submit a joint application, each coapplicant must demonstrate that it individually possesses adequate legal authority over the entire municipal system it operates or owns. A coapplicant need not fulfill every component of legal authority specified in the regulations, as long as the combined legal authority of all coapplicants satisfies the regulatory criteria for every segment of the MS4 (including authority over all sources that discharge to the MS4).

As coapplicants, for example, a county and a flood control district within that county may together possess adequate legal authority. The flood control district may have legal authority to build, operate, and maintain structures associated with major drainage channels within the county. The county itself may have legal authority to control pollutants in discharges from privately owned lands to the MS4s and legal authority to build, operate, and maintain structures associated with minor drainage channels that tie into major drainage channels. In this situation, the combined legal authority of the coapplicants may be adequate for the system, provided that the only discharge to major drainage channels comes from the county's separate storm sewer system. As another example, a department of transportation or flood control district with no land use authority could be a co-permittee with

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a city that does possess land use authority over the entire jurisdiction.

Coapplicants also may use interjurisdictional agreements to show adequate legal authority and to ensure planning, coordination, and the sharing of the resource burden of permit compliance When more than one entity is submitting an application for a MS4 (either as coapplicants or as individual applicants for different parts of a system), the role of each party must be well defined. Each applicant or coapplicant must show the ability to fulfill its responsibilities, including legal authority for the separate storm sewers it owns or operates.

Applicants and coapplicants may use the procedures outlined in Section 3 3 to demonstrate adequate legal authority in their Part 2 permit applications. These procedures are guidelines, however, and are not intended to be the only possible approaches that applicants may follow.

3.2.4 Require Compliance with all Regulations and Statutes

To meet the requirements of §122 26(d)(2)(i)(E), the applicant must show that it has adequate authority to enforce its ordinances.

> **§122 26(d)(2)(i)(E)** [The applicant must demonstrate that it can require] compliance with conditions in ordinances, permits, contracts or orders

One acceptable way to support a declaration of adequate legal authority, including the ability to enforce appropriate ordinances, is for the municipality to provide a certification from the Municipal General Counsel or equivalent The certification should state that the applicant has the legal authority to apply and enforce the requirements of §122 26(d)(2)(i)(A)-(F) in State or local courts The certification would, therefore, cite specific ordinances and the reasons why they are enforceable. The statement should discuss what the municipality can do to ensure full compliance with §122.26(d)(2)(i).

In a Part 2 application, through a statement from the Municipal General Counsel or through some other method, a municipality should identify the administrative and legal procedures available to mandate compliance with appropriate ordinances, and, therefore, with permit conditions. Applications should contain descriptions of how ordinances are implemented and appealed In particular, a municipality should indicate if it can issue administrative orders and injunctions or if it must go through the court system for enforcement actions

3.2.5 Carry Out Inspection, Surveillance, and Monitoring Procedures

In their Part 2 applications, municipalities must propose programs to control the contributions of pollutants from industrial facilities and prohibit illicit discharges For both of these activities, municipalities must have the legal authority to carry out inspection, surveillance, and monitoring procedures necessary to determine compliance.

> **§122.26(d)(2)(i)(F).** [The applicant must demonstrate that it can 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.

To meet this requirement, municipalities may wish to consider establishing ordinances that require industrial facilities to perform inspections and report the results to the city. In many municipalities, these facilities may perform similar inspections under a pretreatment program. In their Part 2 applications, municipalities should provide

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documentation of their authority to enter, sample, inspect, review, and copy records, etc , as well as demonstrate their authority to require regular reports

3.3 PROCEDURES FOR DEMONSTRATING ADEQUATE LEGAL AUTHORITY

The Part 2 application requires the applicant or coapplicants to cite and describe specific ordinances currently in effect and demonstrate that the jurisdiction for these ordinances covers the entire area served by the MS4 In addition, the applicant may elect to discuss specific changes in ordinances passed since the submission of the Part 1 permit application to illustrate how legal authority has evolved to meet the regulatory requirements in §122 26(d)(2)(i) One method by which an applicant can partially demonstrate that it has adequate legal authority is to develop a matrix that compares, in a side-by-side format, the regulatory requirements in §122 26(d)(2)(i)(A)-(F) and the municipality's legal authority Once completed, the matrix would indicate whether an adequate legal framework exists to address all key regulatory requirements identified in §122 26(d)(2)(i)(A)-(F). Furthermore, the matrix could also illustrate where the authority to mandate compliance is vested.

In order to support an assertion of adequate legal authority, applicants should include the complete text of the applicable portions of the ordinances or other such provisions in the application The applicant should also provide a specific explanation of why and how the language of a particular ordinance or other authority meets Federal regulatory requirements The application should indicate to whom the ordinance applies and how it will operate to control, prevent, or stop discharges that violate permit conditions. For example, the municipality may describe and provide an excerpt from a city ordinance that prohibits non-storm water discharges to the MS4.

Appendix C illustrates one way to detail the existence of ordinances that establish the legal authority required in §122 26(d)(2)(i) A narrative discussion of the historical use of these ordinances to control pollutants in storm water discharges also may be included The example in Appendix C shows what the applicant may do to satisfy §122.26(d)(2)(i)

Substantial effort should be devoted to obtaining the necessary legal authority before the Part 2 application is submitted However, some municipalities may find that the two-year application process does not allow enough time to secure adequate legal authority as described in this section. This may be due to the need for State statutory or legislative changes In this instance, the Part 2 application must include a detailed description of what changes are needed and a schedule of when they will be accomplished. The schedule must include timetables for drafting proposed changes, public comment periods, and final authorizations

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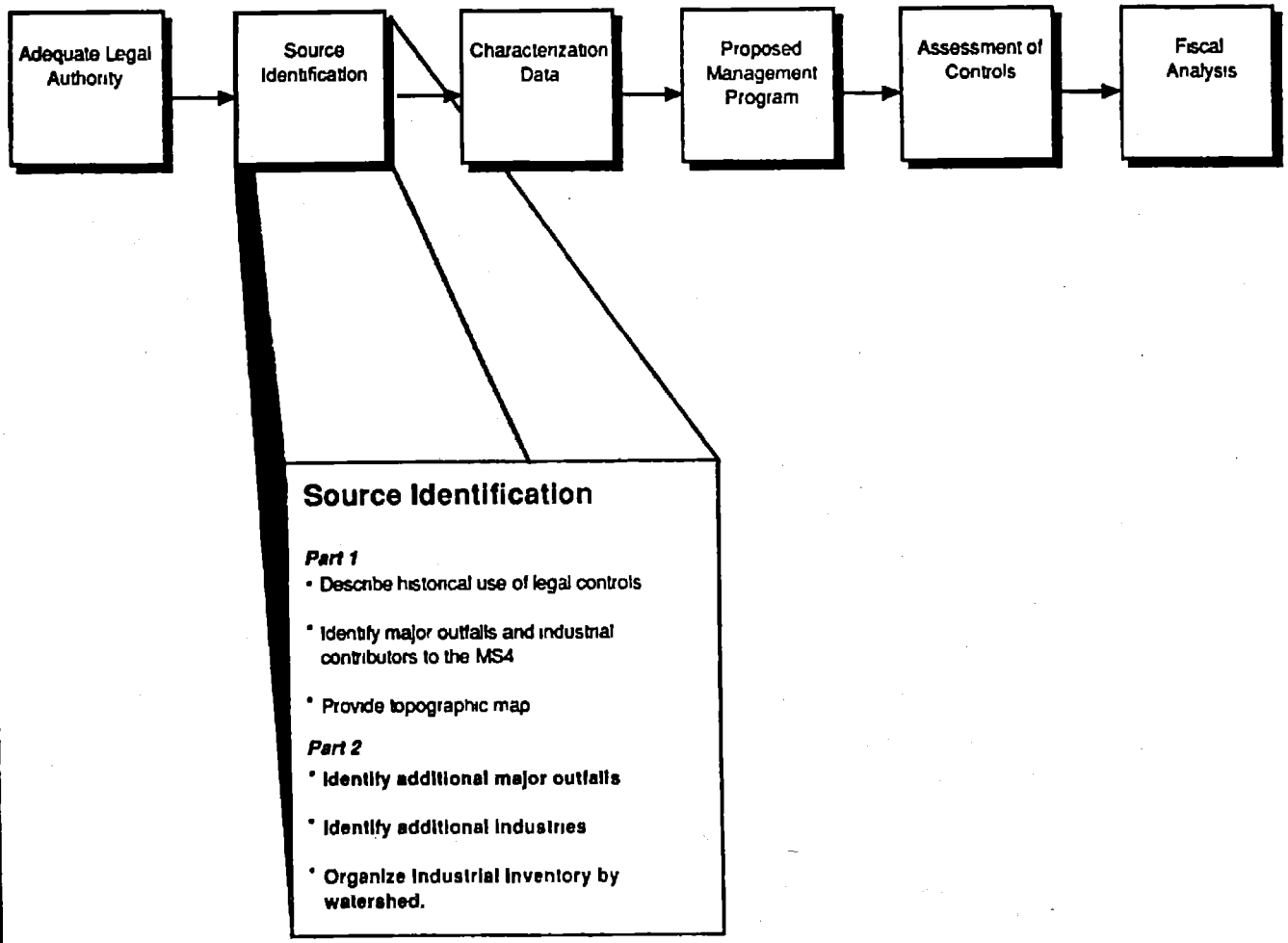
CHAPTER 4
SOURCE IDENTIFICATION



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4.0 SOURCE IDENTIFICATION

4.1 BACKGROUND

In Part 1 of the NPDES storm water permit application, applicants are required to identify the location of known major outfalls discharging to waters of the United States from MS4s. Applicants also are required to provide information and data on existing land use activities. The identification of outfalls and land use activities is the first step in the process of:

- Identifying the sources of pollutants in storm water runoff;
- Linking the sources of pollutants in runoff to specific water quality impacts and other impacts that may result in degradation of aquatic resources;
- Identifying those activities or physical factors that have the most significant impact on water quality;
- Defining control measures that yield improvements in storm water quality; and
- Developing methodologies by which engineers, urban planners, and managers can make long term decisions that not only provide for economic growth, but also have discernible environmental benefits through imposed storm water controls.

The source identification requirements in the Part 2 permit application reflect three basic steps. First, municipalities must identify any major outfalls that were not already identified in the Part 1 application. Second, applicants must compile an inventory of industrial activities that may discharge storm water to a MS4. Third and finally, applicants must organize the inventory of industrial activities on a watershed basis.

Organizing the inventory by watershed allows the municipality to focus on activities within discrete areas that may contribute pollutants in storm water discharges to waters of the United States. For example, combining outfall data with the industrial inventory organized by watershed may help the municipality to identify probable areas of illicit connections. This information will also be useful for municipalities when they develop specific strategies [e.g., best management practices (BMPs)] as part of their proposed storm water management programs. The following sections discuss regulatory requirements and procedures for completing the source identification section of the Part 2 permit application. Section 4.2 provides guidance on identifying major outfalls, Section 4.3 provides guidance on compiling an inventory of industrial dischargers, and Section 4.4 provides guidance on organizing the inventory of industrial discharges by watershed.

4.2 MAJOR OUTFALLS

The first portion of the Part 2 Source Identification provision states:

> §122.26(d)(2)(ii) *Source Identification.* [The applicant must provide the] location of any major outfall that discharges to waters of the United States that was not reported [in Part 1 of the application]

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4.2.1 Definition of a Major Outfall

According to 40 CFR 122 26(b)(5), a major outfall is a MS4 outfall that discharges from a single pipe with an inside diameter of at least 36 inches The term also includes discharges from a single conveyance other than a circular pipe serving a drainage area of more than 50 acres.

For those municipal separate storm sewer systems that receive storm water runoff from lands zoned for industrial activity, major outfalls also include outfalls that discharge from a single pipe with an inside diameter of 12 inches or more, or discharge from other than a circular pipe associated with a drainage area of 2 acres or more. This definition also applies to outfalls of drainage areas that have both industrial and non-industrial activity. For example, if a three acre drainage area is zoned half woodland and half industrial, the discharges from that area would still be considered a major outfall. Because the definition of major outfall includes consideration of drainage area, municipalities may need to consider conveyances such as ditches and swales when identifying major outfalls

4.2.2 Identifying Major Outfalls

The first step in this section of the Part 2 application is the identification of major outfalls not identified in the Part 1 application [§122.26(d)(2)(ii), cited in box above]. When identifying these major outfalls, municipalities should build upon the approach used in the Part 1 application. One way to identify major outfalls is a review of sewer system maps. These maps can provide information on sewer system type (e g , separate storm versus combined sewer), pipe size, and outfall location However, depending upon the age of the sewer system maps, they may not provide complete information about newly developed areas or improvements to older areas Often, interviews with sewer system maintenance personnel can provide information on the most recent changes to the sewer system The municipality should also consider conducting field surveys (e g., visual inspection of the banks of receiving waters) to locate major outfalls

When submitting a Part 2 permit application, municipalities should include a brief description of how additional major outfalls were identified This description is not intended to be a lengthy list of each sewer system employee interviewed, but rather an outline of the methods employed

4.3 INVENTORY OF INDUSTRIAL DISCHARGERS

The second step in this portion of the Part 2 application is assembling an inventory of industrial storm water dischargers

> **§122 26(d)(2)(ii)** *Source Identification*
> 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

This section describes how municipalities may develop the inventory of industrial facilities Section 4.4, below, provides guidance on organizing these facilities by watershed.

4.3.1 Facilities that must be Included in the Inventory

As stated above, applicants must provide an inventory of each facility that may discharge to the MS4 storm water associated with industrial activity. Industrial storm water dischargers that must be included in this inventory fall into 11 classes of industrial activities as defined in the November 1990

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regulations Six of these classes were defined in a narrative format and five were defined by Standard Industrial Classification (SIC) codes. Specific categories of industries are identified in §122.26(b)(14)(i)-(xi). Exhibit 4-1 provides a list of the SIC codes and industry categories cited in the regulatory definition.

4.3.2 Identifying the Industrial Facilities

As a first step in developing a comprehensive industrial storm water inventory, the applicant must review **facility notifications**. Industrial facilities were required to notify municipalities by May 15, 1991, of their intent to discharge storm water to the municipal storm sewer system [§122.26(a)(vi)(4)]. Each facility should have submitted to the municipality information including facility name, facility location, and facility type (such as SIC code or other industry categorization).

In addition, municipalities should explore other sources of information on industrial facilities to help identify gaps in inventory. One specific source of information a municipality should review is **facility information submitted under other programs**. For example, SIC codes are often required for air pollution permit applications, hazardous materials management permits, pretreatment program applications, building permits, business licenses, or local tax rolls. A municipality may take the list of SIC codes provided in Exhibit 4-1 and compare it with existing information on SIC codes or industrial categories which has been submitted by industrial facilities under other programs.

Under 40 CFR 122.28, facilities that discharge storm water associated with industrial activity must submit an individual permit application, participate in a storm water group permit application, or file a **Notice of Intent (NOI)** to be covered by a general permit. These applications and NOIs are another source of information on industrial dischargers. For existing facilities, applications or NOIs were to be submitted by October 1, 1992; for new facilities, they must be submitted prior to the commencement of industrial activity However, in the Intermodel Surface Transportation Efficiency Act of 1991, Congress provided that permit application requirements be reserved for industrial activities owned or operated by municipalities with a population of less than 100,000, with the exception of airports, power plants, and uncontrolled sanitary landfills If EPA is the permitting authority in a State, applications and NOIs should be submitted to EPA, if a State has NPDES authority, they should be submitted to the State. Section 308 of the CWA provides the legal authority for any individual (including a municipality) to obtain information from the NPDES permitting authority. A municipality may be able to obtain a list of the facilities in its jurisdiction that have applied for coverage under a general or individual permit or that have applied for coverage as a member of a group

Additional sources of information on industrial facilities may include **zoning maps** showing industrial parks, manufacturing and industrial listings in **telephone books, trade association listings, pretreatment industrial waste surveys, the Chamber of Commerce Manufacturing Directory, and Dunn and Bradstreet.**

In the Part 2 application, a municipality should provide a brief description of the sources it reviewed in identifying the industrial dischargers. As part of the proposed storm water management program, which is described in Chapter 6, municipalities should describe a plan for collecting new or updated information on industrial dischargers throughout the life of the permit.

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Exhibit 4-1
Industry Categories Cited in the
Definition of Storm Water Associated with Industrial Activity

1. 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 11 below.

2 Facilities described by SIC 24 (except 2434), 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373 *

3. Facilities described by SIC 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 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, by-products, or waste products located on the site of such operations

4 Hazardous waste treatment, storage, or disposal facilities, including those that are operating under interim status or a permit under Subtitle C of RCRA.

5. 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.

6. Facilities involved in the recycling of materials (metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards) including but not limited to SIC 5015 and 5093

7. Steam electric power generating facilities, including coal handling sites.

8. Transportation facilities described by SIC 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 1 - 7 or 9 - 11 are associated with industrial activity.

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Exhibit 4-1 (continued)

9. 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 is 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 located within the facility, or areas that are in compliance with Section 405 of the CWA.

10 Construction activity including clearing, grading, and excavation activities except operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale **

11 Facilities described by SIC 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, 4221-25, (and which are not otherwise included within categories 2 - 10).*

Source 55 FR 48065, November 16, 1990

*Please note the SIC 285 is covered under Category 11 Also note that for the industries identified in Category 11, the term includes only storm water discharges from all areas (except access roads and rail lines) where material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery are exposed to storm water

**On June 4, 1992, the United States Court of Appeals for the Ninth Circuit found that EPA's rationale for exempting construction sites of less than five acres and certain uncontaminated storm water discharges from Category 11 light industrial facilities from Phase I of the storm water program to be invalid and has remanded these exemptions for further proceedings (see *Natural Resources Defense Council* v *EPA* No 91-70176)

4.4 ORGANIZING THE INDUSTRIAL INVENTORY BY WATERSHED

Once the industrial inventory is complete, the applicant must organize the inventory by watershed, or drainage area. The main objective of this requirement is to associate discrete discharges with specific watersheds, which may help the municipality identify relationships between pollutant sources and receiving water quality problems To help organize the industrial inventory by watershed, municipalities should consider the long-term benefits of using automated database systems to help organize and update information on

- Locations of major outfalls or system modifications;
- Land use designations and composition;
- Dischargers of storm water associated with industrial activity,
- Other NPDES permit holders,
- Location/inventory of structural controls, and
- Locations of illicit connections

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This information can help satisfy the requirement that discharges of storm water associated with industrial activity be organized by watershed Using an automated database system or the map submitted in the Part 1 application may be helpful in satisfying this requirement However, the regulations do not require Part 2 applicants to use a particular database or submit certain information, and municipalities may elect to use other methods.

The following procedure is provided as an example of one way to organize industrial dischargers by watershed:

1. Create a transparent overlay of tax maps covering the entire area served by the MS4.

2 Indicate on the maps the location of each industrial activity according to its address with an appropriate symbol or code.

3 Produce an overlay of existing watersheds from a topographical map, for example, United States Geological Survey (USGS) maps, covering the area that the MS4 supports Previously performed hydrological surveys may be helpful in delineating the boundaries of existing watersheds Municipalities may elect to sub-divide existing watersheds into smaller units if this will assist in management planning.

4 Align the tax map and watershed overlay so that industrial activity locations can be transposed to the watershed overlay.

A number of PC-based tools can be used to organize information on facilities and outfalls. For example, computer-aided design (CAD) packages, in conjunction with third-party software packages, are specifically designed to present information on separate transparent layers that can be "turned off and on" when necessary One layer could contain information on watershed topography and another could contain the locations of industrial storm water dischargers. Additional layers might contain information on the layout of the municipal system, locations of structural source controls and outfalls, and land-use patterns (both present and future)

A CAD-based system can be useful, not only in presenting information easily and graphically, but also in its ability to transfer spatial data, such as XYZ coordinates, to commonly available PC-based database applications This spatial data can be merged with other databases containing more generic information including facility name, address, and SIC codes However, one potential drawback to CAD systems is that most of them cannot store "real-world" (e g., latitude-longitude) coordinates and are not generally designed for spatial analyses

Information stored in a CAD format may also be input into a Geographic Information System (GIS) With some conversion, the CAD system coordinates may be transformed into the "real-world" coordinates typically employed by GIS GIS are integrated database management systems designed for the input, storage, retrieval, analysis, output, and display of geographically or spatially indexed data

The key attribute of GIS is the relational database capabilities that make these systems powerful tools for conducting spatial analyses. Using GIS, a municipality could overlay several layers of data and derive new information from this existing information. For example, using GIS, an applicant could overlay a map showing the 100-year flood plain with a map showing locations of industrial facilities The GIS could then calculate the amount of industrial area within the 100-year flood plain and plot this data on a new overlay This type of spatial analysis might be a powerful tool in the design of the municipality's storm water management program.

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Another benefit of GIS is the ability for common data to be shared efficiently among several agencies. For example, the flood management agency, department of transportation, and storm water control agency could all contribute data to and use analyses from the same GIS. On the other hand, one potential drawback to GIS is their relatively high cost. Often, developing accurate, appropriate base maps is one of the most resource intensive parts of the system.

The techniques presented in this section to organize industrial dischargers by watershed are not the only methods that the applicant can use For example, municipalities may elect to present the information in tabular form. Using a CAD, GIS, or other automated system is entirely up to the municipality There is no requirement that municipalities use these systems in the development of either the Part 1 or Part 2 NPDES permit applications Each applicant will have to examine its existing resources (including computer systems, personnel, and budget) and projected needs before deciding which method will be the most efficient and most useful in the long term

A discussion of maintaining and/or updating the industrial inventory is provided in Section 6.3.3.2 of this guidance.

Exhibit 4-2 illustrates an example of the procedure discussed in Sections 4.3 and 4 4

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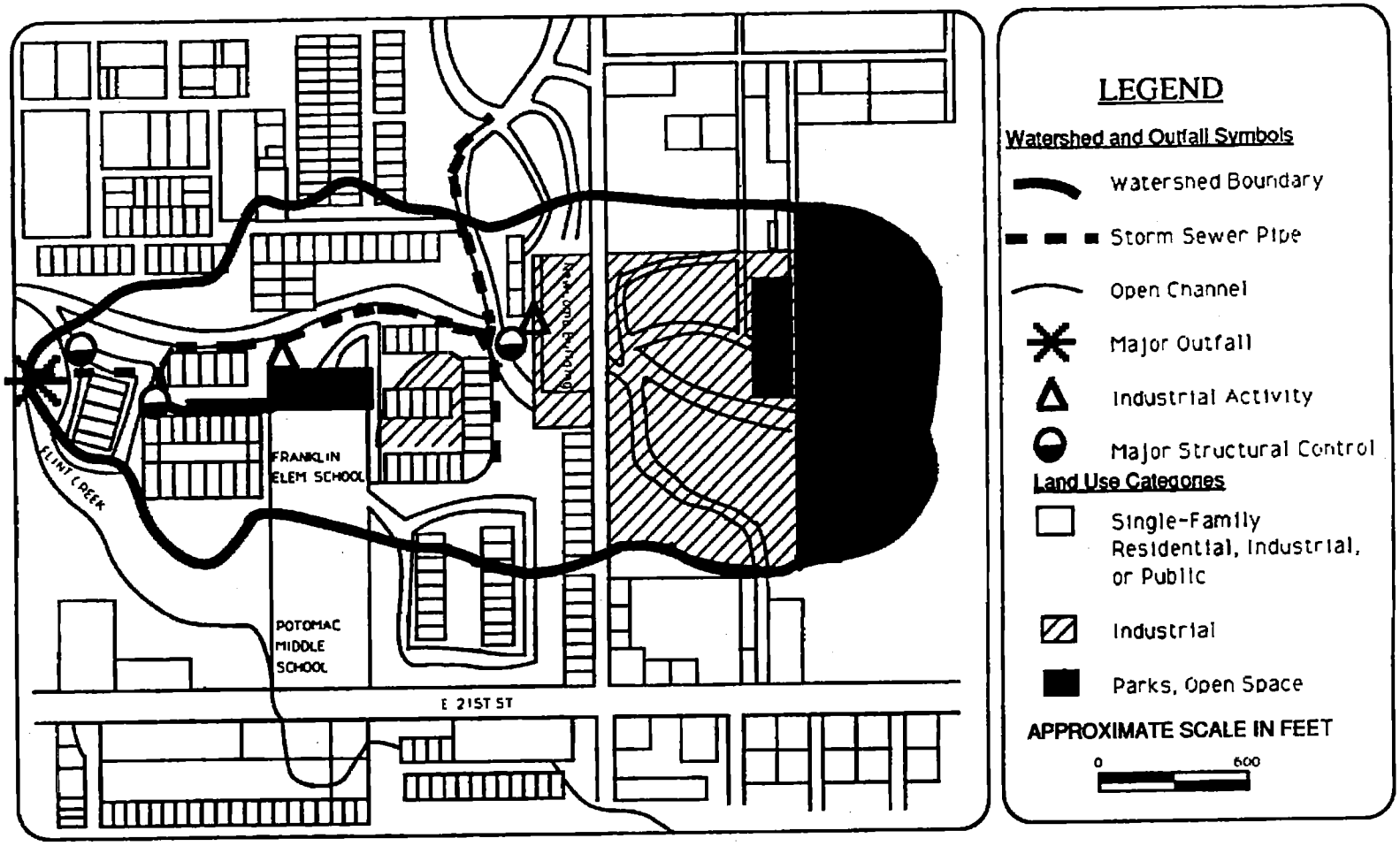
Exhibit 4-2
Example of a Map Organizing Industry by Watershed



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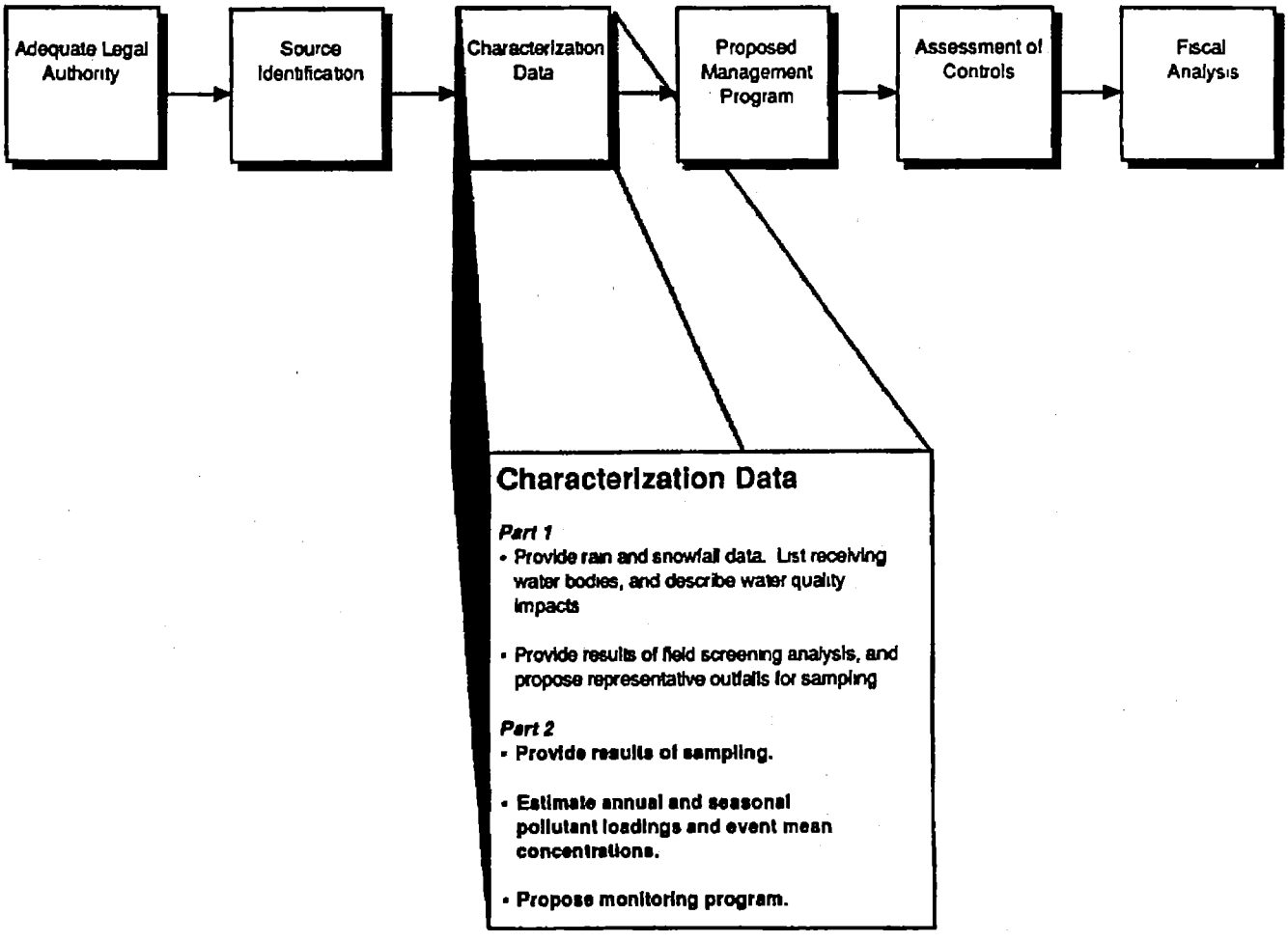
CHAPTER 5
CHARACTERIZATION DATA



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5.0 CHARACTERIZATION DATA

5.1 BACKGROUND

5.1.1 Objective of this Section

This section addresses the requirements for reporting the physical and chemical characteristics of municipal storm water runoff as specified by 40 CFR 122 26(d)(2)(iii). These requirements describe the minimum quantitative and descriptive data necessary to begin characterizing storm water discharges.

The applicant is encouraged to provide additional information, if available, which may provide a basis for a more effective storm water management program. The additional information may also help the permitting authority make more informed decisions regarding the specifications of the permit to be issued.

The NPDES permit application regulations require the applicant to identify all major outfalls that are part of the MS4 [§122.26(d)(1)(iii) and 126(d)(2)(ii)]. Part 1 requires the municipality to propose a sampling plan that identifies 5-10 outfalls that would be appropriate for representative data collection under Part 2 of the application [§122.26(d)(1)(iv)(E)]. The next step is to collect and analyze samples from these outfalls (or others designated by the permitting authority) for a variety of pollutant parameters from 3 representative storm events.

5.1.2 Potential Impacts of Storm Water Runoff

The Nationwide Urban Runoff Program (NURP) study showed that discharges from MS4s contribute to the degradation of water quality in the Nation's waters (EPA, 1983). The NURP study also concluded that the effects of urban runoff on receiving water quality are very site specific The effects depend on the types, size, and hydrology of the water body, the designated beneficial use, the pollutants which affect that use, the urban runoff quality characteristics, and the amounts of urban runoff dictated by local rainfall patterns and land use. *The National Water Quality Inventory, 1990 Report to Congress* as required by Section 305(b) of the Clean Water Act, stated that one-third of the impairment in assessed waters is due to storm water runoff (EPA, 1990d)

Quantity Impacts

Urbanization often increases the quantity and reduces the quality of storm water runoff For example, vegetated or forested areas with pervious surfaces are often replaced with impervious surfaces (e g , concrete and asphalt) that prevent or minimize the amount of rainfall available for ground water recharge This increases the volume and velocity of storm water runoff.

Vegetated areas play a crucial role in ground water recharge and in the maintenance of stream baseflow This is especially true during extended dry periods, when ground water is often the only source that preserves stream baseflow In highly urbanized areas, ground water recharge may be so severely reduced that ground water flow to perennial streams during dry periods is not sufficient. Further, the natural hydrology of a watershed is often altered by urbanization, because developing areas often provide drainage appurtenances that rapidly conduct storm water runoff away from these areas Such drainage may also affect the geometry of natural streams, especially where natural streams have been modified through the installation of man-made channels Ultimately, reduced perviousness due to urbanization increases the magnitude and the frequency of localized flooding which can have the long term effect of substantially increasing the width of natural streams through erosion and scouring

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Increases in peak discharge velocity and runoff volume can also result in substantial erosion of natural streambanks and the washout of benthic habitats. Since streambeds often consist of unconsolidated silt and sediment, they may be stripped away substantially by excessive discharge velocities Increased discharge velocities can also lead to undercutting and destabilization of streambanks, which may cause erosion that extends beyond the natural boundary of the streambank

Further, silt and sediment can increase the turbidity of the receiving water, thus interfering with the growth of aquatic plants which depend on photosynthesis. Increased turbidity can also interfere with aquatic feeding, eliminate spawning areas for fish, and cause abrasion and clogging of fish gills. Also, because silt and sediment may remain in the watershed, they can blanket benthic habitats and severely reduce streamflow capacity

In the presence of excessive volumes of storm water runoff and discharge velocities, the net impact on receiving waters can be almost indistinguishable from impacts commonly associated with the discharge of toxics (e g , increased mortality, reduced biodiversity, and reduced reproduction)

Deposition and Resuspension of Toxicants

Research is currently on-going to examine the impact of the deposition and resuspension of toxicants as a result of wet weather events Questions about the survivability of benthic habitats when exposed to toxicants in deposited sediments still remain. The impact of resuspended toxicants from the sediments is not well known since toxics are often bound to sediment particles that may reduce the concentrations available for biological uptake and subsequent bioaccumulation The applicant should also be aware that different metal contaminants in sediments can exhibit different solubilities Under varying conditions of pH and temperatures, metals deposited in sediment can become soluble again and be reintroduced into the water column

Excessive Bacterial Levels

The NURP study final report concluded that "coliform bacteria are present at high levels in urban runoff and can be expected to exceed EPA water quality criteria during and immediately after storm events." Thus is of significant concern, particularly in swimming and shellfish areas.

Dissolved Oxygen Depression

The presence of oxygen-consuming pollutants in receiving waters can lead to severe dissolved oxygen depression Factors that can cause dissolved oxygen depression include the resuspension of biodegradable organic material (which can occur in the presence of high flow velocities) or the discharge of organic pollutants in storm water discharges. The NURP study demonstrated that storm water discharges exhibit biochemical oxygen demand (BOD) levels in excess of levels commonly associated with secondary treated effluent from publicly owned treatment works (POTWs). Severe dissolved oxygen depression could contribute to fish kills, which are one of the most readily observable impacts of pollution on receiving waters.

Eutrophication

Eutrophication, or the aging of a water body, can be accelerated by excessive nutrient loadings from storm water. Advanced stages of eutrophication are often associated with substantial variations in dissolved oxygen concentration. Nutrients of concern are nitrogen and phosphorus. Phosphorus is typically the growth-limiting nutrient for plants in fresh water systems. Storm water discharges routinely contain excess concentrations of these nutrients, which can lead to excessive algal growth, commonly referred to as algal blooms. Excessive concentrations of algae can cause odor and taste problems in drinking water and can result in aesthetically unpleasant

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environments. In addition, the eventual decomposition of large concentrations of algae can depress dissolved oxygen in the water body to levels where fish kills occur. In nature, the process of eutrophication occurs over a substantial period of time, however, storm water discharges can rapidly accelerate this process.

Exceedance of Chronic Toxicity Criterion

Long-term exposure to toxics in excess of chronic toxicity criteria can cause sublethal effects on aquatic life. Indicators of chronic toxicity include reduced fertility, reproduction, and growth rates and a decline in the diversity of aquatic organisms The NURP study clearly indicated that storm water discharges contain concentrations of trace metals, such as lead, cadmium, zinc, and copper in amounts that exceed the chronic toxicity criteria. Prolonged exposure to chronic concentration levels of toxics can also be lethal to aquatic organisms, primarily from the bioaccumulation of toxics within the cell tissue of the organism over a extended period of time

Thermal Impacts

The temperature of storm water runoff may become significantly elevated via conductive and convective heat transfer with impervious, man-made surfaces In the case of contact with impervious surfaces, the resulting temperature elevation of storm water runoff can be substantial. For example, the surface temperature of parking lots during summer months may exceed 100 degrees Fahrenheit. Consequently, storm water runoff from these parking lots will be elevated in temperature. Many aquatic organisms are extremely sensitive to changes in water temperature. Increased water temperature also reduces dissolved oxygen in streams, rivers, lakes, and wetlands Therefore, significant discharges of storm water at elevated temperatures can, over the long term, lead to the alteration of aquatic populations.

5.1.3 Use of the Characterization Data

The NURP study analyzed storm water discharge from 28 sites representing 12 major river basins of the United States NURP detected 77 EPA priority pollutants present in the storm water discharges sampled, including samples with concentrations that exceeded water quality criteria for certain pollutants. Those pollutants detected in at least 10 percent of the samples studied in NURP are identified in Exhibit 5-1.

The data gathered for storm water discharge characterization can be used to create a baseline measurement of pollutant concentration and loadings The data also can be used to evaluate the effectiveness of best management practices (BMPs) as well as help identify storm water control priorities. In addition, it can be used to help identify the sources of pollutants in storm water runoff, to help establish an effective monitoring program for the life of the permit, and to help predict the impact of storm water runoff on receiving waters that are known to be impaired.

5.1.4 Storm Water Sampling and Analysis Procedures

The regulation requires that the process of collecting quantitative data for storm water characterization follow certain guidelines

> §122.26(d)(2)(iii) *Characterization data* When "quantitative data" for a pollutant are required under paragraph (d)(1)(ii)(A)(3) of this paragraph, the applicant must collect a sample of effluent in accordance with 40 CFR 122.21(g)(7) and analyze it for the pollutant in accordance with analytical methods approved under 40 CFR part 136 When no analytical method is approved the applicant may use any suitable method but must provide a description of the method

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Exhibit 5-1. Priority Pollutants Detected in at Least 10% of NURP Samples.

PARAMETERS	FREQUENCY OF DETECTION (%)
Metals and Inorganics	
Antimony	13
Arsenic	52
Beryllium	12
Cadmium	48
Chromium	58
Copper	91
Cyanides	23
Lead	94
Nickel	43
Selenium	11
Zinc	94
Pesticides	
Alpha hexachlorocyclohexane (alpha-BHC)	20
Alpha endosulfan	19
Chlordane	17
Lindane (gamma BHC)	15
Halogenated aliphatics	
Methane, dichloro-	11
Phenols and cresols	
Phenol	14
Phenol, pentachloro-	19
Phenol, 4-nitro	10
Phthalate esters	
Phthalate, bis(2-ethylhexyl)	22
Polycyclic aromatic hydrocarbons	
Chrysene	10
Fluoranthene	16
Phenanthrene	12
Pyrene	15

Source: U.S. Environmental Protection Agency, *Results of the Nationwide Urban Runoff Program* EPA Planning Division (National Technical Information Service (NTIS) Accession No. PB84-8552) December 1983

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The data collection procedures must follow the guidelines for storm water sampling outlined in §122.21(g)(7), *Effluent Characteristics*. This portion of the NPDES regulation describes the conditions under which a storm water discharge will be sampled, and which collection procedure (grab sample versus flow-weighted composite sample) is required for the water quality parameter being analyzed. These guidelines are discussed in more detail in Sections 5.3.2 and 5.3.4 of this guidance manual. In addition, EPA has available a *Storm Water Sampling Guidance Document* that describes in detail the methods used for storm water discharge sampling (EPA, 1992a).

The methods for the chemical analyses of storm water discharge samples must be conducted in accordance with 40 CFR Part 136, *Guidelines for Establishing Test Procedures for the Analysis of Pollutants*. These guidelines refer the applicant to EPA-approved methods and cite the source of the approved methods (e.g., Standard Methods for the Examination of Water and Wastewater, ASTM methods, etc.). Note that alternative methods (i.e., those not included in Part 136) may be used under certain circumstances (see Section 5.3.4) as described in 40 CFR Part 136, and reiterated in the Characterization Data section of Part 2 of the storm water discharge NPDES permit.

The specific constituent pollutants and water quality parameters that must be analyzed in the storm water samples are presented in Section 5.3.4.

5.2 SUMMARY OF REGULATORY REQUIREMENTS

The following is a summary of the characterization data requirements for the Part 2 application:

- Quantitative data on physical and chemical characteristics of the discharge taken from at least 5 to 10 representative outfalls chosen by the permitting authority (Section 5.3).
- Estimates of both the annual pollutant load and event mean concentration of the cumulative discharges from all municipal outfalls during a storm event (Section 5.4).
- A proposed schedule to provide estimates for each major outfall of the seasonal pollutant load and the event mean concentration for constituents detected in required sampling (Section 5.5); and
- A proposed monitoring program for the life of the permit that meets specific requirements established in the regulations (Section 5.6).

5.3 QUANTITATIVE AND QUALITATIVE DATA REQUIREMENTS

5.3.1 Selection of Representative Sampling Sites

In the Part 1 application, the municipality is required to describe a plan for obtaining characterization data [§122.26(d)(1)(iv)(E)]. The plan should reflect the requirements of §122.26(d)(2)(iii).

Different types and intensities of land use activities influence, in part, the types of pollutants and the pollutant concentrations in municipal storm water runoff. Therefore, Part 1 of the permit application [§122.26(d)(1)(iii)(B)(2)] requires the applicant to describe the land use activity within the area to be covered by the permit. In Part 1, the applicant also must select a subset of all the major outfalls (see Section 4.2.1 for definition of major outfall) identified that represented surface runoff discharge of the various land use activities described. In some cases, a municipality preparing a Part 2 application may want to supplement its sampling program by collecting and analyzing samples from major outfalls that were not identified in the Part 1 application or designated by the permitting authority. This additional sampling may provide the

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municipality with data that better characterizes its MS4 discharges

5.3.2 Criteria for Storm Water Discharge Sampling

Land use activities are not the only factors that affect the pollutant composition of storm water runoff Storm water composition also varies according to the nature of the storm event (e.g , duration, volume), and the composition may vary throughout the duration of a single storm event (i.e., the initial discharge, or "first flush," tends to have higher pollutant loads). In order to obtain data that represents an "average" storm event, EPA requires samples from three separate storm events to characterize the surface water runoff; however, the permitting authority may allow exemptions

> §122.26(d)(2)(iii)(A)(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),

The criteria for sampling storm water discharge are detailed in §122.21(g)(7), *Effluent Characterization* EPA's *Storm Water Sampling Guidance Document* addresses these criteria. For the purpose of this discussion, a brief synopsis of these criteria follows:

- For each outfall or field screening point selected, samples must be collected from three separate storm events.
- The three storm events must be at least one month apart
- Each sampled storm event must have a rainfall of at least 0 1 inch in the drainage area
- There must be no storm event in excess of 0 1 inch in the drainage area for at least 72 hours prior to the sampled storm event
- The rainfall event should not vary by plus or minus 50 percent from the average or median per storm volume and duration for the region.

EPA understands that climatic conditions may make it difficult for some municipalities to sample storm events meeting these criteria. For example, storm events may be so infrequent in arid and semi-arid areas that sufficient samples cannot be obtained by the application deadline. In other areas, storms may be so frequent that it may not be possible to wait the required 72 hours between storm events. In such cases, the applicant should confer with the permitting authority in advance. In instances where representative storm events do not occur prior to the application due date, the municipality should submit its application with as much information as possible. It should include an explanation [certified by a principal executive officer or ranking elected official in accordance with §122.22(a)(3)] as to why sampling data were unavailable.

The municipality may need to perform some initial research and calculation to meet the requirements listed above In order to determine what constitutes an average storm event for the area, the applicant should contact the National Weather Service or National Oceanographic and Atmospheric Administration's National Climate Center Weather data is also available commercially and from airports. The applicant may also refer to the information provided in the *Storm Water Sampling Guidance Document.*

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5.3.3 Narrative Description of Storm Event

> **§122.26(d)(2)(iii)(A)(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;

Under §122 26(d)(2)(iii)(A)(2), the municipality must provide a narrative description of each storm that produced the discharge to be chemically and physically characterized Such a narrative description must include

- The date and duration of the rainfall event that produced the discharge sampled Measurements describing the peak intensity of the storm, if available, should also be reported,
- The amount of rainfall Rainfall conditions may vary significantly across large drainage areas, so rainfall characteristics should be spatially averaged over the drainage area, if possible If more than one rain gauge is used, averages should be reported. Rain gauges operated near the drainage area by the National Weather Service may be used, or the discharger may collect this information,
- The time elapsed since the last rainfall event greater than 0.1 inches. Historical rainfall data from rainfall gauges can be used to provide this information. If a gauge records only daily data, municipal field personnel could be asked to provide information on times during the day a rainfall event began or ended

5.3.4 Chemicals/Water Quality Parameters to be Measured

The storm water discharge samples must be analyzed for a number of pollutant parameters

> **§122.26(d)(2)(iii)(A)(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
>
> [*Note that total kjeldahl nitrogen is actually a substitute for total ammonia plus organic nitrogen*]

The complete list of chemicals is provided in Exhibits 5-2, 5-3, and 5-4. Exhibits 5-2 and 5-3 are derived from 40 CFR Part 122, Appendix D, Tables II and III, respectively. Exhibit 5-4 comes from the text of the regulation (see box above) The EPA-approved analysis procedure for the pollutants in Exhibits 5-2 and 5-3 can be found in 40 CFR Part 136. If a municipality is seeking approval to use an alternative method of analysis, then a request should be made according to procedures outlined in 40 CFR 136 4

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Exhibit 5-2: Pollutants Listed in Table II in Appendix D of 40 CFR Part 122

Pollutant		Pollutant	
Volatiles		**Acid Compounds**	
Acrolein	1 2 Dichloropropane	2 Chlorophenol	
Acrylonitrile	1,3-Dichloropropylene	2,4-Dichlorophenol	
Benzene	Ethylbenzene	2,4-Dimethylphenol	
Bromoform	Methyl bromide	4,6-Dinitro-o-cresol	
Carbon tetrachloride	Methyl chloride	2,4-Dinitrophenol	
Chlorobenzene	Methylene chloride	2-Nitrophenol	
Chlorodibromomethane	1,1,2,2-Tetrachloroethane	4-Nitrophenol	
Chloroethane	Tetrachloroethylene	p-Chloro-m-cresol	
2 Chloroethlyvinyl ether	Toluene	Pentachlorophenol	
Chloroform	1,2-trans-Dichloroethylene	Phenol	
Dichlorobromomethane	1,1,1-Trichloroethane	2,4,6-Trichlorophenol	
1,1 Dichloroethane	1,1,2-Trichloroethane		
1,2 Dichloroethane	Trichloroethylene		
1 1-Dichloroethylene	Vinyl chloride		
Base/Neutral		**Pesticides**	
Acenaphthene	Diethyl phthalate	Aldrin	Endrin
Acenaphthylene	Dimethyl phthalate	Alpha BHC	Endrin aldehyde
Anthracene	Di n-butyl phthalate	Beta BHC	Heptachlor
Benzidine	2 4-Dinitrotoluene	Gamma BHC	Heptachlor epoxide
Benzo(a)anthracene	2,6-dinitrotoluene	Delta-BHC	PCB-1242
Benzo(a)pyrene	Di-n-octyl phthalate	Chlordane	PCB-1254
3,4-benzofluoranthene	1,2-diphenylhydrazine (as azobenzene)	4 4'-DDT	PCB-1221
Benzo(ghi)perylene	Fluoranthene	4 4 DDE	PCB-1232
Benzo(k)fluoranthene	Fluorene	4,4'-DDD	PCB-1248
Bis(2 chloroethoxy)methane	Hexachlorobenzene	Dieldrin	PCB-1260
Bis(2-chloroethyl)ether	Hexachlorobutadiene	Alpha-endosulfan	PCB 1016
Bis(2-chloroisopropyl)ether	Hexachlorocyclopentadiene	Beta-endosulfan	Toxaphene
Bis(2-ethylhexyl)phthalate	Hexachloroethane	Endosulfan sulfate	
4-bromophenyl phenyl ether	Indeno(1,2,3-cd)pyrene		
Butylbenzyl phthalate	Isophorone		
2-Chloronaphthalene	Naphthalene		
4-Chlorophenyl phenyl ether	Nitrobenzene		
Chrysene	N-nitrosodimethylamine		
Dibenzo(a,h)anthracene	N nitrosodi-n-propylamine		
1,2 Dichlorobenzene	N-nitrosodiphenylamine		
1,3-Dichlorobenzene	Phenanthrene		
1,4-Dichlorobenzene	Pyrene		
3,3 -Dichlorobenzidine	1,2,4-trichlorobenzene		

Source 40 CFR Part 122 Appendix D

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Exhibit 5-3: Pollutants Listed in Table III in Appendix D of 40 CFR Part 122

Pollutant	Pollutant	Pollutant
Antimony, total	Copper, total	Silver, total
Arsenic, total	Lead, total	Thallium, total
Beryllium, total	Mercury, total	Zinc, total
Cadmium, total	Nickel, total	Cyanide, total
Chromium, total	Selenium, total	Phenols, total

Source 40 CFR Part 122, Appendix D

Exhibit 5-4. Conventional Pollutants Listed in Section 122.26(d)(2)(iii)(A)(3)

Pollutant	Pollutant
Total suspended solids (TSS)	pH
Total dissolved solids (TDS)	Total Kjeldahl nitrogen (TKN)*
COD	Nitrate plus nitrite
BOD_5	Dissolved phosphorus
Oil and grease	Total ammonia plus organic nitrogen
Fecal coliform	Total phosphorus
Fecal streptococcus	

* Total ammonia plus organic nitrogen is interchangeable with TKN

Source 40 CFR 122 26(d)(2)(iii)(A)(3)

Section 122 21(g)(7) specifies that certain pollutant parameters will be analyzed on grab samples taken from the outfall, whereas the remainder of the pollutant parameters require that composite samples be taken from the outfall These types of sampling procedures are differentiated as follows:

Grab samples: discrete, individual samples taken within a short period of time (usually less than 15 minutes). Analysis of grab samples characterizes the quality of a storm water discharge at a given time of the discharge. The following measurements must be made from grab samples:

- pH
- Temperature
- Cyanide
- Total phenols
- Residual chlorine
- Oil and grease
- Fecal coliform
- Fecal streptococcus

Note that measurements of temperature and pH must be taken in the field to avoid time-dependent changes that may occur between sampling time and actual analyses

Flow-weighted composite samples: single unit volumes composed of a mixture of samples collected proportional to flow throughout the entire runoff event or at least for the first three hours of the storm water event, if it lasts more than three hours. The flow-weighted composite sample must consist of at least three discrete aliquots per hour from the storm water discharge, or a continuous sampler may be used.

All parameters (see Exhibits 5-2, 5-3, 5-4) not listed under the description of grab samples above must be analyzed from flow-

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weighted composite samples Details on taking flow-weighted composite samples may be found in the EPA *Storm Water Sampling Guidance Document*.

5.3.5 Additional Quantitative Data

Section 122 26(d)(2)(iii)(A) concludes with a provision that allows the permitting authority to request additional quantitative data if necessary to determine permit conditions.

> **§122 26 (d)(2)(iii)(A)(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),

To ensure the storm water discharge system is accurately represented, the permitting authority may require that quantitative data include additional parameters and may establish specific sampling conditions, such as:

- Location where the sample is taken;
- Season of sample collection;
- Form of precipitation (snowmelt, rainfall);
- Evidence of impact to aquatic ecosystems, or
- Other parameters necessary to ensure the system is accurately characterized.

The data generated from the qualitative and quantitative analyses described under §122.26 (d)(2)(iii)(A) will be used to calculate the annual pollutant loads and event mean concentrations for each pollutant as described in subsequent parts of this section Estimates of annual pollutant loads and event mean concentrations would then be used to assist in establishing storm water management priorities and selecting BMPs

5.4 ESTIMATION OF SYSTEM-WIDE EVENT MEAN CONCENTRATIONS AND ANNUAL POLLUTANT LOADS

The applicant must submit estimates of the event mean concentration and annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls.

> **§122.26(d)(2)(iii)(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(g)(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,

Estimates of annual pollutant loads will be somewhat imprecise; however, municipalities should exercise best professional judgement in deriving these estimates A description of what assumptions were made to derive pollutant loadings must be included.

Under §122.26(d)(2)(iii)(B) (see box above) applicants must provide the following:

- Estimates for the event mean concentration for pollutants listed in Exhibit 5-5 below, which can be used to estimate the annual pollutant load associated with all municipal outfalls identified under §122 26(d)(1)(iii) and (d)(2)(ii);

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- A description of the procedures for estimating constituent loads and concentrations, and
- Details on data analysis, models used, and calculation methods

Data sources and procedures that municipal applicants may use to estimate event mean concentrations and annual pollutant loads of the cumulative discharges are discussed below.

The primary purpose for estimating annual pollutant loads and event mean concentrations is to assign priorities for implementing BMPs. Municipalities should consider the magnitude of individual pollutant loadings when assigning priorities to resources to reduce these loadings. The areas receiving the highest priority for implementation of BMPs will be those portions of the MS4 that appear to contribute the largest load of pollutants to the system. Therefore, it is the relative value of these calculations that is of importance within this regulation, not the absolute value.

Over time the accuracy of the available methods to calculate loads and concentrations will improve and the use of these estimates may assume a larger role in determining permit conditions and estimating the success of the comprehensive municipal storm water management program. The emphasis for now, however, is on the application of the most practicable methods to reasonably estimate annual loads and event mean concentrations.

5.4.1 Data Sources

The Part 1 application requires municipalities to submit all existing storm water sampling data, along with all relevant water quality data, sediment data, fish tissue or other biosurvey data taken over the past 10 years. All historical data must accompanied by a narrative description of the watershed served by the outfall from which the data are obtained, a description of the sampling and quality control program, and the monitoring location of the receiving water.

To estimate an annual pollutant load for a given pollutant, a value must be derived for the average concentration, or event mean concentration, of that pollutant. To derive this value, applicants may use either site-specific data, or data from a national or regional study, such as NURP.

Municipalities with adequate historical data may choose to use these data to estimate annual pollutant loads in the Part 2 application. However, many applicants may not have enough site-specific data to develop valid estimates. These applicants may choose to use generic data (e.g., from regional and national studies), such as the data provided in the NURP study. The NURP study's estimated range of detected concentration for specific pollutants is summarized in Exhibit 5-6.

Exhibit 5-5: Pollutants for which Event Mean Concentrations and Annual Pollutant Loads Must be Calculated

Pollutant	Pollutant
BOD_5	Total phosphorus
COD	Dissolved phosphorus
TSS	Cadmium
Dissolved solids	Copper
Total nitrogen	Lead
Total ammonia plus organic nitrogen	Zinc

Source: 40 CFR 122.26(d)(2)(iii)(B) (55 FR 48070, November 16, 1990)

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Exhibit 5-6. NURP Study Range of Detected Concentration for Specific Pollutants

Parameter	Concentrations µg/L
Metals and inorganics:	
Antimony	2.6 - 23
Arsenic	1 - 50.5
Beryllium	1 - 49
Cadmium	1 - 14
Chromium	1 - 90
Copper	1 - 100
Cyanides	2 - 300
Lead	4 - 23,000
Nickel	1 - 182
Selenium	0.2 - 0.8
Zinc	10 - 2400
Pesticides:	
Alpha-hexachlorocyclohexane (alpha-BHC)	0.027 - 0.10
Alpha-endosulfan	0.008 - 0.20
Chlordane	n/a
Lindane (gamma-BHC)	0.007 - 0.1
Halogenated aliphatics:	
Methane, dichloro-	5 - 14.5
Phenols and cresols:	
Phenol	1 - 13
Phenol, pentachloro-	1 - 115
Phenol, 4-nitro	1 - 37
Phthalate esters:	
Phthalate, bis(2-ethylhexyl)	4 - 62
Polycyclic aromatic hydrocarbons:	
Chrysene	0.6 - 10
Fluoranthene	0.3 - 2
Phenanthrene	0.3 - 10
Pyrene	0.3 - 16

Source. U.S. Environmental Protection Agency, *Results of the Nationwide Urban Runoff Program*, EPA Planning Division (National Technical Information Service (NTIS) Accession No. PB84-8552) December 1983

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The applicant should be aware of limitations associated with data from national and regional studies before deciding on methods to estimate pollutant loadings In some cases, it may be more appropriate to use any available site-specific data rather than data from national or regional studies. For example, the NURP study did not collect pollutant concentration data from industrial areas. In this instance, even limited site specific concentration data from industrial areas may be more meaningful.

EPA encourages applicants to seek data from a variety of sources to better characterize the quality of their storm water discharges. Regardless of the data source, a description of the procedures for estimating constituent loads and concentrations, including any modeling, data analysis, and calculation methods, must be included

There will be a degree of uncertainty associated with estimating pollutant loadings in the Part 2 application The requirement to calculate pollutant loadings and concentrations is intended to be a planning and screening effort to assign program priorities, and not necessarily to determine absolute values.

5.4.2 Event Mean Concentrations

Event mean concentrations (C_i in Equation 1 on page 5-16) are determined from analyses of flow-weighted composite samples collected from each of the designated field screening points. Section 2 2 4 of the *Storm Water Sampling Guidance Document* describes procedures for collecting flow-weighted composite samples (EPA, 1992a). Concentration values must be reported in the applicant's Part 2 Permit Application for each representative storm event sampled. The applicant should report the average of these results as the event mean concentration for each parameter measured Municipalities are encouraged to present data in a tabular format However, the applicant has flexibility to present the data in other ways, provided the data is clearly presented.

As stated previously, applicants must sample storm events for at least three hours, or for the entire storm event if it lasts less than three hours If a storm event lasts more than three hours, the applicant may choose among three approaches for calculating the event mean concentration of the storm First, the applicant may report the event mean concentration for the first three hours of the event (or longer, if the applicant monitored more than three hours). Second, if the applicant has data available on the correlation between flow and concentration which allows it to be more specific about the event mean concentration, an estimation technique may be used to derive the event mean concentration. If the applicant uses such an estimation technique, the methodology must be explained Third and finally, the applicant may monitor the entire storm event and report the actual event mean concentration.

Whichever approach the applicant uses, the same method should be used to derive event mean concentrations in the future. This will assist the applicant in identifying meaningful trends in changes in event mean concentrations over time.

5.4.3 Annual Pollutant Loadings

Municipalities may choose from a variety of acceptable procedures for estimating the annual pollutant loads of the cumulative discharge. This guidance contains an example of calculating the annual pollutant loads using the "simple method," which is adapted from Schueler (1987). The guidance also discusses some dynamic models that applicants may wish to employ.

Regardless of which method applicants choose, they must describe and document the specific technique used. The description should include (but is not limited to) the key equations used to calculate reported values, such as.

- Assumptions for selecting site-specific parameters (e g., runoff coefficients),

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- References to any source documentation (e g , previously completed studies or reference textbooks), and

- Justification for any assumed parameter values

The Simple Method

The following method of computing pollutant loadings is referred to as the "simple method" and is adapted from Schueler (1987). For purposes of satisfying Part 2 application requirements, the simple method provides a quick and reasonable estimate of pollutant loadings with a minimal amount of data required Although the regulations require a system wide (cumulative) annual pollutant load calculation for each of the pollutants listed in Exhibit 5-5 (above), the single pollutant load values provide limited insights into potential problem areas and what BMPs might yield the best results. Consequently, the municipality may want to consider using the simple method to estimate "individual" pollutant loadings from drainage areas The individual pollutant loadings can be aggregated to derive a cumulative annual pollutant loading for the entire MS4 In the procedure below, for example, Step 1 computes the annual loading for each outfall of the MS4 Then in Step 2, the resulting pollutant loadings are summed to derive annual pollutant loads on a per-watershed basis In Step 3, the annual pollutants loads for each watershed are summed to derive a system-wide annual pollutant load.

As stated above, this procedure is only one example of how a municipality could calculate a system-wide annual pollutant load. Estimates of annual pollutant loads for individual outfalls, watersheds, or other discrete areas are not specifically required by the regulations However, municipalities will find such estimates helpful in making relative comparisons among different areas of the MS4 Ultimately, these estimates could assist the municipality with selecting BMPs and assigning priorities to potential problem areas

Step 1: Use the Simple Method to Calculate Annual Pollutant Loads on a Per-Outfall Basis

The first step in this example is to calculate annual pollutant loads for individual outfalls. However, the applicant may choose to begin by calculating annual pollutant loads for each watershed or other discrete area. As stated above, this example uses the simple method, which is given by the following equation:

EQUATION 1:

$$L_i = \left[\frac{(P)(CF)(Rv_i)}{12}\right](C_i)(A_i)(2.72)$$

where: L_i = Annual pollutant load (lb/outfall/yr)
P = Annual precipitation (in/yr)
CF = Correction factor that adjusts for storms where no runoff occurs (a value of 0 9 is typically used)
Rv_i = Weighted-average runoff coefficient for the area served by the outfall (the calculation of runoff coefficients is discussed below)
C_i = Event mean concentration of pollutant (mg/L)
A_i = Catchment area (acres)

The numbers 12 and 2.72 are conversion factors that account for unit conversions.

Each of the parameters in Equation 1 is defined below:

- **Annual pollutant load** is the total amount of a specific pollutant discharged in pounds per time period (in this case, per year) for the particular segment of the MS4 being modeled (in this case for each outfall) Pollutant loads may also be expressed for alternative time periods, or on a system-wide or watershed basis

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- **Annual precipitation** is the total inches of rainfall occurring in a single year plus the contribution of snowmelt Estimates of the annual rainfall can be based on the rainfall data provided in Part 1 of the application

- **Correction factor** is an adjustment factor for the number of storm events that do not actually produce any runoff (i.e., the percentage of storm events that have a total accumulation greater than a specific threshold value). This value will vary by region. Without this adjustment factor, the municipality would be assuming that all storm events produce runoff, which may or may not be the case. A typical value for this correction factor is 0.9 (90%). However, this value can vary between climatic regions. Municipalities should review historical rainfall data to estimate the percentage of storm events that produce runoff versus the number of storm events per year.

- **Weighted-average runoff coefficient** is a relative measure of imperviousness or the percentage of rainfall that becomes surface runoff Runoff coefficients are a function of the type of surface, intensity of the rainfall, the degree of soil saturation and storativity (storage capacity) of the soil. To determine runoff coefficients, the municipality may use Equations 2 or 3 (which follow). Alternatively, the municipality may use actual field measurements, relevant hydrologic studies, average values published in civil engineering reference manuals, or default values provided in Exhibit 3-12 of EPA's *NPDES Storm Water Sampling Guidance Document*

- **Event mean concentration of pollutant** is the event mean concentration value for the specific pollutant determined from the analysis of flow-weighted composite samples. Equation 1 requires a value for each pollutant concentration As discussed previously, the applicant may use site-specific concentration data (e g , storm water sampling data) or generic (e g , NURP) data to derive event mean concentrations In other words, the applicant should use best professional judgement to decide which of the following concentration values to use

  – a mean concentration value from the NURP study;

  OR

  – an average of all event mean concentrations from all samples over three representative storm events;

  OR

  – an event mean concentration attributable to a specific land use activity

  The applicant will have to consider the extent of the variability of the data when selecting an appropriate concentration value. NURP or other regional studies used to estimate pollutant concentrations can be compared to existing site-specific data in order to assess the uncertainty associated with generic approaches.

- **Catchment area** is the size of the drainage area for the particular segment of the MS4 being modeled (in this case, the outfall drainage area). Areas that are served by combined sewers or that are not otherwise served by the MS4 should not be included

Weighted-average runoff coefficient. Runoff coefficients can be based on flow measurements or estimated from land use characteristics. In order to determine an average runoff coefficient for an area with a diversity of land

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use activities, the following equation should be used to estimate a weighted-average runoff coefficient

EQUATION 2

$$Rv_i = \frac{(\sum A_i R_v)}{\sum A_i}$$

where. Rv_i = Weighted-average runoff coefficient
A_i = Catchment area (acres)
R_v = Catchment runoff coefficient

As an alternative to Equation 2, Equation 3 can be used to estimate weighted-average runoff coefficients from percent imperviousness data (Shelley, 1986)

EQUATION 3

$$Rv_i = 0.05 + 0.009 * I$$

where. Rv_i = Weighted-average runoff coefficient
I = Percent imperviousness

The percent imperviousness can be estimated from land use data Residential land can be assumed to be 24% impervious, commercial land 75% impervious; industrial land 55% impervious; and open space 15% impervious The percent imperviousness of residential land was estimated from the following empirical equation of NURP and USGS data, which relates population density to percent imperviousness

EQUATION 4

$$I = 9 * D^{0.5}$$

where I = Percent imperviousness
D = Population density (persons/acre)

Similar to Equation 1, individual parameters for Equations 2, 3, and 4 can be used on a system-wide basis, or modified to reflect more realistic conditions within smaller or discrete segments (e g , individual watersheds or outfalls).

Step 2. Use the Per-Outfall Annual Pollutant Loads to Calculate Per-Watershed Annual Pollutant Loads

If the simple method is used to compute the annual loading on a per-outfall basis, Equation 5 may be used to estimate annual pollutant loadings on a per watershed basis. The approach of computing pollutant loadings on a watershed basis is used by some counties where larger watersheds are segregated into smaller watersheds or drainage areas on the basis of similar land use designations One county uses this method in conjunction with forecasts of future development within the county to develop preliminary estimates of future pollutant loadings This approach minimizes the possibility of computing an annual pollutant loading that is too conservative.

EQUATION 5

$$L_w = \sum L_i$$

where: L_w = Annual pollutant load for a particular watershed
ΣL_i = Summation of individual annual pollutant loadings from all major outfalls within a specific watershed

Step 3: Use the Watershed-Based Annual Pollutant Loads to Calculate System-Wide Annual Pollutant Loads

To calculate the annual loadings system-wide, use the following equation

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EQUATION 6

$$L_n = \sum L_w$$

where L_n = Annual pollutant load for an entire MS4

ΣL_w = Summation of individual annual pollutant loadings from all watersheds within a municipal separate storm sewer system

Dynamic Models

In instances where a municipality has a significant amount of historical data for the drainage areas serviced by storm sewer outfalls, including historical precipitation data and receiving water concentration and flow data, the MS4 may elect to use dynamic models to derive pollutant loads and to analyze the effects of MS4 discharges on receiving waters.

Dynamic models are designed to calculate a complete probability distribution for the output being modeled Therefore, dynamic models take into consideration the inherent variability of data associated with MS4 discharges, such as variations in concentration, flow rate, and runoff volume

One benefit of using a dynamic model is that the calculation of a complete probability distribution allows the modeler to consider a multitude of "what-if" scenarios. For example, when sufficient historical data is available, the modeler could consider the benefits and risks associated with alternative BMP strategies.

Dynamic models have one additional benefit over steady-state models in that dynamic models determine the entire discharge concentration frequency distribution. Consequently, this would enable the modeler to examine the effects of storm water discharges on receiving water quality in terms of the frequency by which water quality standards may be exceeded For purposes of computing pollutant loadings, a number of models are available including EPA's Stormwater Management Model (SWMM) and Hydrologic Simulation Program (HSPF), U S Army Corps of Engineers' Storage, Treatment, Overflow, Runoff Model (STORM), and Illinois State Water Survey's Model QILLUDAS (or Auto-QI).

Regardless of the method employed, the applicant must document how pollutant loadings are derived Applicants must provide estimates of annual pollutant loads and event mean concentrations for each outfall with their Part 2 applications. However, some outfalls will need to be more completely characterized, and conditions will change after the permit is approved. This is one reason why, as described in Section 5.4, data collection will continue throughout the term of the permit. Estimates of the individual contribution of pollutant loadings for each watershed or major outfall will help the applicant select priorities for specific watersheds.

5.5 PROPOSED SCHEDULE FOR SEASONAL LOADS AND REPRESENTATIVE EVENT MEAN CONCENTRATIONS OF MAJOR OUTFALLS

§122.26(d)(2)(iii)(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;

Seasonal pollutant loads are important because they are a more accurate representation of loadings that may occur during a short time interval. To further refine the annual pollutant load estimates, Part 2 requires the applicant to propose a schedule to estimate seasonal

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pollutant loadings and event mean concentrations for each major outfall

The quality of the data available when the Part 2 application is prepared will affect the accuracy and usefulness of the initial estimates of pollutant loadings and average concentrations These estimates can be improved as more site-specific data are collected during the term of the permit. A long-term site specific monitoring program will capture the variability in data that is essential to estimate more accurate pollutant loadings over time. Therefore, the impacts associated with these loadings can also be estimated with greater certainty. In addition, a site specific record collected over a longer time frame allows the effectiveness of the comprehensive municipal storm water management program to be evaluated

Estimates must be submitted for any contaminant detected in any sample required under the Part 2 sampling effort [§122.26(d)(2)(iii)(B)]. Seasonal pollutant load estimates are required for any pollutants listed in Exhibits 5-2, 5-3, and 5-4 that were detected during the sampling procedure described in Section 5 3.4. Therefore, the analyses required for seasonal pollutant loads will potentially be more comprehensive than the analyses of annual pollutant loads This results from the possibility that additional pollutants will be detected as part of the storm water characterization studies.

In some regions, precipitation patterns vary significantly from season to season, resulting in significantly different pollutant loadings throughout the year. In arid and semi-arid parts of the country, pollutants accumulate during dry spells, resulting in significantly higher pollutant concentrations in storm water discharges after extended dry weather Because of the buildup of accumulated pollutants, pollutant concentrations in discharges from MS4s are typically highest during the "first flush," or initial discharge

In other regions, pollutants that accumulate in snow may lead to high pollutant concentrations in runoff from the spring thaw Therefore, using an annual average pollutant loading might disguise the impact of shock loadings (discharges that occur within a very short time period and which often exceed acute toxicity criteria) of certain pollutants. Numerous factors contribute to the total volume of snowmelt runoff including shortwave and longwave radiation, condensation or vaporization, convected heat transfer by wind, heat content of rain water, and conductive heat transfer from the ground. Therefore, for regions with significant snowfall, pollutant loading estimates need to be adjusted to account for the additional volume of runoff attributable to snowmelt.

Since snowmelt runoff can occur in either the presence or absence of a storm event, the computation of seasonal pollutant loadings becomes significantly more complex The determination of total snowmelt runoff, however, is beyond the scope of this manual. Affected municipalities are encouraged to contact the U.S. Geological Survey or the Army Corps of Engineers for historical data on snowmelt runoff.

The effects of pollutant load can also vary by season Nutrient pollutant loads from storm water discharges can promote algal blooms in receiving waters during the spring and summer, but they may be of little consequence during winter in surface waters with good flushing characteristics. Quantifying seasonal variations in pollutant loads may aid the development of more cost-effective storm water management programs.

Pollutant loads also may vary significantly from one outfall to another. Within a drainage area, the type of land use, the percent of surface that is impervious, and the extent of exposure of storm water to contaminants affect the pollutant load from an outfall. Procedures for estimating seasonal pollutant loadings must be proposed for major outfalls only

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Under §122.26(d)(2)(iii)(C) the regulation requires a schedule to provide estimates of:

- The seasonal pollutant load for each identified major outfall.
- The event mean concentration of a representative storm for any constituent detected in any sample required.

The following steps can be taken to develop a proposed schedule for estimating seasonal loadings at major outfalls:

1. Use historical or long-term hydrologic data to define seasons.
2. Describe the procedure to be used to estimate seasonal loads. This could be an adaption of the simple method or another mathematical model used for annual loads (e.g., instead of using a total annual rainfall accumulation, use an average rainfall accumulation associated with a specific season). If the simple method is used, the municipality could still use Equation 1. However, the amount of rainfall (P) would no longer be an annual value. Instead, it would be the amount of rainfall associated with a particular season defined by the municipality. In addition, the applicant may have to adjust the average runoff coefficient to reflect seasonal changes (e.g., frozen ground can behave like an impervious surface and substantially increase the amount of runoff). Lastly, substantial differences in the frequency and duration of seasonal storm events may increase or decrease the correction factor CF (e.g., during a dry season, the number of storms that actually produce runoff may be substantially lower than during a wet weather season).
3. Identify data elements that need to be refined. In cases where there is substantial seasonal variation, revised runoff coefficient values may be necessary For example, during rainy seasons, ground surfaces are more saturated than during the dry season As a result, the same amount of rainfall in the wet season will lead to a greater volume of storm water runoff than in the dry season.
4. Proposed procedures for collecting the appropriate data or otherwise improving estimates.
5. Provide an approximate time frame for data collection and submission of seasonal load estimates.

Proposed procedures for estimating seasonal pollutant loadings and event mean concentrations should explain when and how data used for the estimates will be obtained. The data can be based on site-specific information, or they can be obtained from municipal systems with similar characteristics (such as Regional NURP data).

5.6 COLLECTION OF REPRESENTATIVE DATA FOR PROPOSED MONITORING PROGRAM FOR THE TERM OF THE PERMIT

Under §122.26(d)(2)(iii)(D), applicants are given the opportunity to propose monitoring programs to be carried out during the term of the permit.

> **§122.26(d)(2)(iii)(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.

Applicants should consider their specific needs and identify priorities for the proposed

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monitoring program After receiving the Part 2 application, the permitting authority will review proposed monitoring programs and make appropriate adjustments when establishing permit conditions

The applicant must propose a 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.

Municipalities must submit sampling data over the life of a permit so that changes in storm water quality can be assessed Like initial sampling data, the data from an ongoing monitoring program can be used by the municipality to allocate resources to achieve reduction in pollutants The monitoring data will also serve as an environmental indicator of the success of the storm water management program. Many municipalities may require an extended period of time (possibly the entire permit term) and substantial data to definitively evaluate the effectiveness of a storm water management program. Therefore, a plan for data collection must be proposed by the municipality for the five-year term of the permit. During the permit term, the results of the monitoring program will be submitted in the municipality's annual report [§122.42(c)(4), discussed in Section 7.3 of this guidance].

5.6.1 Goals of a Monitoring Program

The first and most important step in developing a proposed monitoring program is to define the program's objectives as clearly as possible Development of monitoring program goals should be closely coordinated with development of the proposed storm water management program Applicants are required to propose monitoring programs as part of their proposed management programs to reduce pollutants from industrial site runoff. The monitoring plan is part of *Characterization Data* [§122 26(d)(2)(iii)]. The storm water management program is discussed in Section 6.

A comprehensive monitoring program should be designed to support specific goals, including·

- Characterizing discharges;
- Evaluating the source of specific pollutants,
- Evaluating the performance of specific source controls; and
- Identifying the full range of chemical, physical, and biological water quality impacts.

5.6.1.1 Characterizing Discharges

Monitoring pollutants in discharges from MS4s serves several purposes. Quantitative data on specific pollutants in storm water runoff can support estimates of annual and seasonal pollutant loadings and modelling efforts to identify the magnitude of water quality impacts. Over the long term, monitoring data may suggest that new outfalls should be selected for sampling As municipalities gain experience in storm water sampling, they likely will target BMPs that achieve the greatest improvements in storm water quality.

5.6.1.2 Evaluating the Source(s) of Specific Pollutants

Some sources of storm water (e.g., industrial sources that must be covered by NPDES permits, highways with heavy traffic flows, and large parking lots) are expected to generate significantly higher concentrations of pollutants than typical urban runoff. Monitoring efforts to quantify sources of

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priority pollutants can provide support for resource allocations to address pollutant sources posing the greatest environmental risk How proposed monitoring efforts will be structured to identify and quantify pollutant sources should be discussed in proposed storm water management programs.

The monitoring program may also include procedures to conduct dry-weather monitoring over the term of the permit to help detect illicit discharges and improper dumping. This can include recording visual observations and odors observed in dry weather flows.

5.6.1.3 Evaluating the Performance of Specific Controls

Pollutant removal efficiencies are fairly well known for certain structural BMPs. However, sampling may still be necessary to ensure that the BMP is meeting original design expectations The expected pollutant removal efficiency for a structural control must take into account site-specific conditions For example, an infiltration basin has a certain expected pollutant removal efficiency, but actual field efficiency is affected by subsurface soil conditions and the extent and frequency of maintenance

The efficiency of a particular structural control will be affected by many factors, such as detention time. However, efforts to determine the efficiency of structural controls must include consideration of pollutant concentrations and flow volumes into and out of the control. The efficiency of nonstructural source controls can be characterized by comparing discharges at a given location before and after the control measures are implemented. Over time, sufficient monitoring data may be gathered to draw substantive conclusions about the effectiveness of certain BMPs. Alternatively, discharges from a sampling site with source controls can be compared with discharges from a similar site that lacks source controls Efforts to monitor the effectiveness of controls should be closely coordinated with the assessment of control efficiencies discussed in Chapter 7

5.6.1.4 Identifying the Full Range of Chemical, Physical, and Biological Water Quality Impacts

Characterizing the effect of storm water discharges on water quality is complicated by a number of factors. EPA recommends an integrated approach to assessing water quality impacts associated with discharges from MS4s Monitoring procedures that help assess water quality impacts include:

- Discharge and receiving water monitoring to support water quality models and to identify hydraulic impacts of increased peak flows and to identify parameters of concern, and
- In-stream monitoring of water chemistry;
- Bioassessments and biosurveys; and
- Sediment sampling

Discharge and Receiving Water Monitoring to Support Water Quality Models

As discussed above, when there is sufficient historical data available from monitoring, these data may be used as inputs to models that predict or validate the effects of pollutant loadings from MS4s on receiving water quality characteristics. In addition to monitoring data, data on receiving water quality characteristics are also necessary to calibrate a particular model.

Once the model has been calibrated to reflect site-specific conditions, future monitoring data could be used to validate long term reductions in pollutant loadings, the effectiveness of nonstructural BMPs, and/or pollutant removal efficiencies of existing structural controls

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The information gathered from this approach may also help define those BMPs that which appear to be the most effective. For example, in developing areas, monitoring data could eventually support future planning efforts that would seek to minimize the impact of future development on local receiving waters.

In-stream Monitoring

Using models to estimate pollutant concentrations in receiving waters can be inaccurate In-stream monitoring can directly measure pollutant concentrations. General designs for in-stream monitoring are:

- **Monitoring above and below a set location** This method is generally more useful for evaluating control effectiveness than documenting the severity of a diffuse source of pollutants

- **Monitoring at different times** Monitoring at different times and seasons can provide valuable information on seasonal variations in pollutant concentrations Dry weather in-stream monitoring can be compared with in-stream monitoring during storm events

- **Paired watersheds.** Evaluating similar water bodies can document management program improvements by controlling for meteorologic and hydrologic variability. This approach can also be used to compare receiving waters to background conditions associated with undeveloped watersheds

Detailed guidance on applying these approaches is provided in the draft *Nonpoint Source Monitoring and Evaluation Guide*, February 26, 1988. Nonpoint Source Branch, U S EPA

Bioassessments and Biosurveys

A biological assessment, or "bioassessment," is an evaluation of the biological condition of a water body using biological surveys and other direct measurements of resident biota in surface waters. A biological survey or "biosurvey," consists of collecting, processing, and analyzing representative portions of a resident aquatic community to determine the community structure and function Biosurveys and bioassessments can be used directly to evaluate the overall biological integrity (structure and/or functional characteristics) of an aquatic community Deviations from the biological integrity can be measured directly using biosurveys only when the impacted community is compared against a predetermined reference condition. Without the proper reference conditions, biosurveys may underestimate the extent of impairment.

Biosurveys are useful in that they can assess or detect the aggregate effect of impacts upon an aquatic community where discharges are multiple, complex, and variable, and where point, nonpoint, and storm water discharges are all affecting the biological condition of the receiving water Because of this, biosurveys cannot measure the impacts of one particular discharge or effluent being discharged to receiving waters. Currently, biosurveys cannot be used as a predictive water quality assessment tools.

Biosurveys provide a useful monitor of both aggregate ecological impact and historical trends in the condition of an aquatic ecosystem They can also detect impacts that other assessment methods may miss. More importantly, biosurveys can detect impacts caused by habitat degradation such as channelization, sedimentation, and historical contamination that disrupt the interactive balance of the components of the aquatic community

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Sediment Sampling

Pollutants, both organic and inorganic, associated with storm water discharges may become physically or chemically bound with sediment particles Depending upon the size distribution of the sediment particles, a portion of the contaminated sediment particles will settle out of the water column Consequently, the potential exists for a buildup of contaminated sediment over time. The effects of heavily contaminated sediments on both benthic habitat and water quality have been documented to the extent that EPA is developing sediment quality criteria (SQC) that will allow assessments of the toxicological effects of contaminated sediments on varying types of receiving waters.

The amount of sediment material found in storm water discharges suggests that applying sediment quality criteria could be a useful component of a monitoring program. For example, sediment quality criteria could be a valuable preventative tool to ensure that point source discharges of storm water do not cause or contribute to the contamination of sediments

In addition, a MS4 could make comparisons of field measurements to sediment quality criteria as a means of providing an early warning of a potential problem. Consequently, an early warning could provide an opportunity to take corrective action to prevent further contamination For long term planning, consideration could also be given to the feasibility of establishing target levels or goals that would ensure that point sources discharges of storm water do not contribute to sediment contamination

5.6.2 Monitoring Procedures

Monitoring procedures will depend on the objectives of the monitoring effort To a large extent, the type of receiving water will be an important factor in developing monitoring procedures and techniques. For example, grab samples may be appropriate for monitoring discharges from a retention pond, while composite samples may be appropriate for monitoring flows into the pond The following information, at a minimum, should be included for each sampling site.

- The criteria for storm selection,
- Whether grab, composite, continuous, or other sampling techniques are to be used,
- The criteria on when to begin and end sample collection;
- The basis for selecting the time interval between sequentially collected samples,
- How seasonal factors affect the selection of monitoring frequencies,
- The method of estimating rates or volumes of flow passing the sampling point, and
- The analytical methods used for analyzing pollutant parameters and their detection limits

Location of Monitoring Sites and Description of Drainage Basins

The selection of monitoring sites should depend on the goals of the monitoring program. Applicants should identify the location of each proposed monitoring site and the boundary of its drainage basin. They should describe the estimated size and land use characteristics of the drainage basin for each sampling location The applicant also should explain why the sampling sites are representative or will otherwise provide information to support a monitoring program goal. Other monitoring sites can be selected to evaluate unique conditions in the drainage area that have significant or unusual potential for generating pollutants in storm water discharges

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Samples should be analyzed in accordance with the analytical methods approved under 40 CFR Part 136

Parameters to be Analyzed

The applicant must list all parameters to be analyzed, which should depend on the objective of the sampling effort. For example, it may only be necessary to monitor several indicator parameters (such as TSS, settleable solids, nutrient, and a metal) to characterize the pollutant removal efficiency of a wet pond.

Sampling Equipment

The applicant must describe the equipment to be used in the proposed sampling program. Only the primary pieces of equipment need be identified. Descriptions can be made by reference to equipment supplied by a vendor or manufacturer if distinctive enough to be readily identified.

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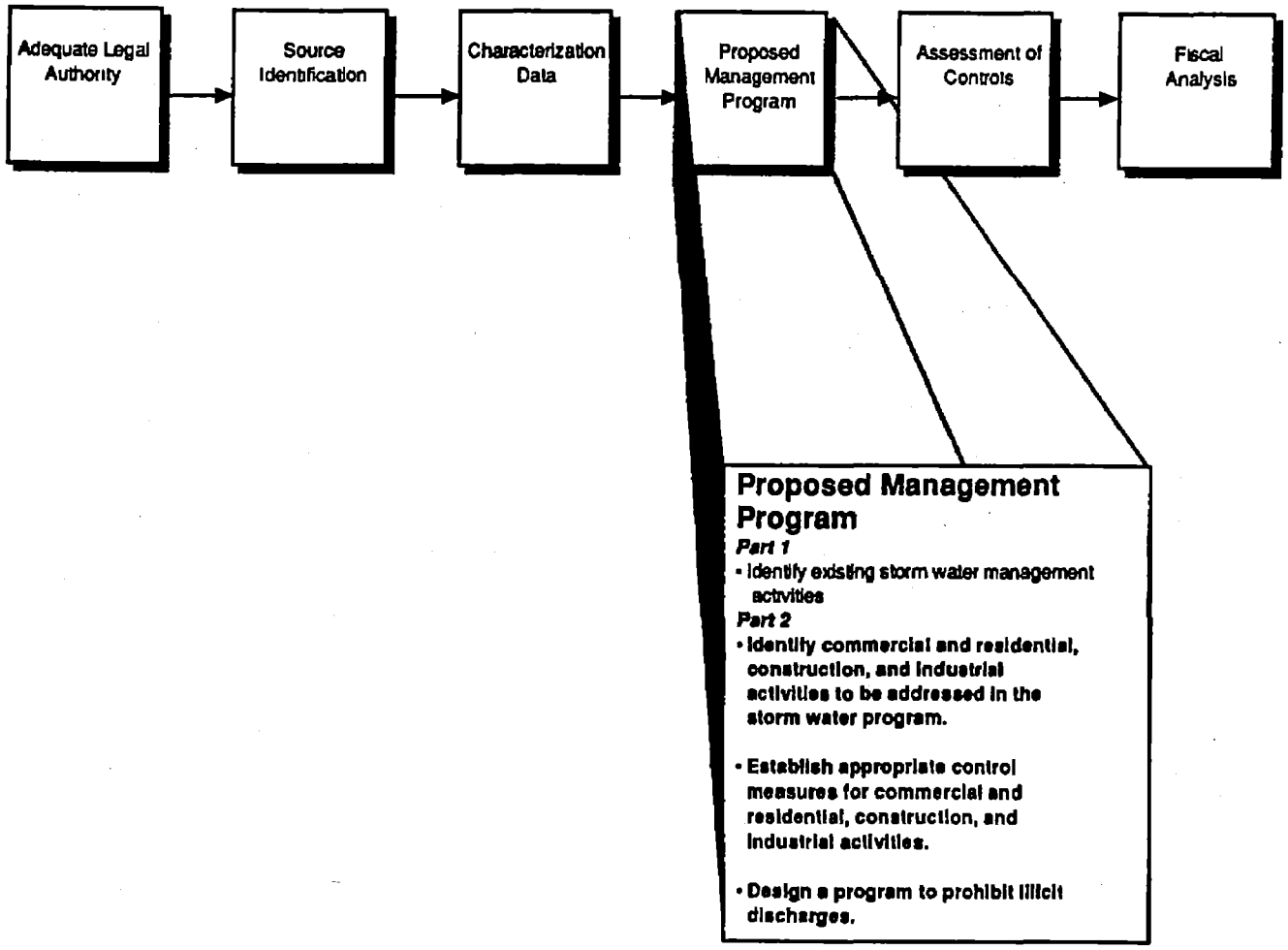
CHAPTER 6
PROPOSED MANAGEMENT PROGRAM



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6.0 PROPOSED MANAGEMENT PROGRAM

6.1 BACKGROUND

Under the Part 2 application requirements, municipalities must propose site-specific storm water management programs. This is the most important aspect of the permit application. The Part 2 application requirements provide each MS4 with the flexibility to design a program that best suits its site-specific factors and priorities.

The regulations require the applicant to provide a description of the range of control measures considered for implementation during the term of the permit. Applicants must meet all the requirements of the Part 2 application regulation. However, flexibility in developing permit conditions is encouraged by allowing municipalities to emphasize the controls that best apply to their MS4. For example, a municipality that expects significant new development may focus more on requirements for new development and construction, while a municipality that does not expect significant new development may focus more on a program to prohibit illicit discharges or control industrial contributions. In any case, a satisfactory proposed management program will address· management practices; control techniques and systems; design and engineering methods, and other measures to ensure the reduction of pollutants to the "maximum extent practicable (MEP)."

If the municipality proposes a thorough and complete program, the permitting authority is likely to incorporate all or part of the proposed management program into the NPDES storm water permit written for that municipality Therefore, the proposed programs provide municipalities with the opportunity to have substantial input into their NPDES permit conditions.

This section of the guidance manual describes the minimum information requirements for proposed storm water management programs. Examples of how the program elements should be addressed are provided. These examples illustrate minimum information requirements for the program elements, and occasions when municipalities may opt to go beyond minimum requirements in order to meet the MEP standard

6.2 SUMMARY OF REGULATORY REQUIREMENTS

The municipality must develop and submit a proposed management program that covers the duration of the permit The program must integrate the information and actions described in the Part 1 application and portions of the Part 2 application (see Chapters 3, 4, and 5 of this guidance). The regulatory requirements for the proposed management program are in 40 CFR 122.26(d)(2)(iv)

At a minimum, the proposed management program must include:

- A comprehensive planning process that involves both public participation and intergovernmental coordination;
- A description of management practices, control techniques, and system design and engineering methods to reduce the discharge of pollutants to the MEP; and
- A description of staff and equipment available to set up and assess the storm water management program.

Additional provisions under §122 26(d)(2)(iv)(A) require applicants to include:

- Programs to control storm water runoff from commercial and residential areas, construction sites, and industrial

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facilities (including waste handling sites), (Section 6 3),

- Identification of structural control measures to be included in these proposed programs, such as detention controls, infiltration controls, and filtration controls that the municipality plans to apply to the activities addressed in its storm water management program (Section 6.4); and

- Programs to detect and remove illicit discharges, and to control and prevent improper disposal into the MS4 of materials such as used oil or seepage from municipal sanitary sewers (Section 6.5).

6.3 PROGRAMS TO CONTROL STORM WATER RUNOFF FROM COMMERCIAL AND RESIDENTIAL AREAS, CONSTRUCTION SITES, AND INDUSTRIAL FACILITIES

A proposed management program must identify the activities or areas that require controls to reduce pollutants in storm water runoff Specifically, a proposed management program must address storm water runoff from commercial and residential areas (Section 6.3.1), construction sites (Section 6.3.2), and industrial facilities (Section 6.3 3). Also, areas where illicit connections or illegal discharges may occur must be identified (Section 6.5).

In addition to the requirements of the proposed storm water management program, other provisions of the Part 1 and Part 2 applications require information that will help enable the municipality to focus on identifying activities and areas that may need control measures Examples of these provisions include

- Identification of sources [Part 1, §122 2(d)(1)(iii)(B)(3)-(4), and Part 2, §122 26(d)(2)(ii)];

- Identification of water bodies that may be adversely affected by storm water runoff [Part 1, §122 26(d)(1)(iv)(C)],

- Organization of sources by watershed [Part 2, §122 26(d)(2)(ii)],

- Description of land use activities [Part 1, §122 26(d)(1)(iii)(B)(2)];

- Results of field screening analysis [Part 1, §122 26(d)(1)(iv)(D)];

- Results of the sampling program [Part 2, §122 26(d)(2)(iii)(A)(3)],

- Estimates of annual pollutant loads and event mean concentrations, and schedules to submit seasonal pollutant loads and event mean concentrations [Part 2, §122.26(d)(2)(iii)(B) and (C)], and

- Findings from an on-going monitoring program [Part 2, §122 26(d)(2)(iii)(D)].

6.3.1 Commercial and Residential Activities

Under §122.26(d)(2)(iv)(A), applicants must propose structural and source control measures to reduce pollutants from commercial and residential areas.

> **§122.26(d)(2)(iv)(A)** [The proposed management program must include 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

To ensure that proposed control measures are effective, the applicant should study how storm water runoff from pollutant sources affects the existing municipal system, how the proposed

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control measures will enhance the existing system, and what impact the proposed measures will have on receiving waters The control measures should recognize and emphasize the interaction between pollutant sources and the physical attributes of the municipal system and receiving waters.

Specific commercial and residential activities that must be addressed include maintenance activities and a maintenance schedule for structural controls to reduce pollutants in storm water runoff. This provision is discussed in Section 6.4.2. Other activities to be addressed include:

- Post-construction controls to reduce pollutants in discharges to MS4s resulting from new development and significant redevelopment (Section 6 3 1 1),
- Practices for maintaining and operating public streets, roads, and highways that will reduce the impact on receiving waters from storm water runoff discharges (Section 6 3 1 2);
- Procedures to assure that the impacts on receiving waters from flood management projects are assessed, and that existing structural control devices have been evaluated to determine if retrofit controls are feasible (Section 6 3.1.3);
- A program to monitor pollutants in runoff from operating or closed municipal landfills that identifies priorities and procedures for inspections and establishing and implementing control measures (Section 6.3 1.4); and
- A program to reduce to the maximum extent practicable, pollutants in storm water runoff associated with the application of pesticides, herbicides, and fertilizer (Section 6 3.1.5).

To reduce pollutants in storm water runoff from commercial and residential activities, a proposed management program might include the use of infiltration devices, detention and retention basins, vegetated swales, water quality inlets (which may include oil and water or oil/grit separators), screens, channel stabilization/riparian habitat enhancement efforts, wetland restoration and preservation projects, as well as various source control strategies and other nonstructural control measures

6.3.1.1 New Development and Significant Redevelopment

Summary of Regulatory Requirement

New development or redevelopment often increases impervious land surfaces, which usually leads to increased pollutant levels in storm water runoff Chemical and thermal changes in storm water runoff are commonly associated with new development and can adversely affect the quality of receiving waters In addition, urbanization results in an increase in the volume of storm water discharges.

The Nationwide Urban Runoff Program (NURP) study (EPA, 1983) and more recent investigations indicate that controlling the contribution of pollutants in storm water discharges at the onset of land development is the most cost-effective approach to storm water quality management Mitigating problems caused by pollutants after they have entered a MS4 is often more expensive and less efficient than preventing or reducing the discharge of pollutants at the source Therefore, a satisfactory proposed management program will propose structural and nonstructural measures to reduce pollutants in storm water discharges from areas of new development and redevelopment Examples of such measures are discussed below

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§122.26(d)(2)(iv)(A)(2) [The applicant must include a] description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed

Provisions under §122.26(d)(2)(iv)(A)(2) focus on the reduction of pollutants in storm water runoff **after** construction in areas where new development or redevelopment is completed Controls that are required **during** construction are discussed in Section 6.3 2 of this guidance

Post-Construction Controls

Proposed storm water management programs should include planning procedures for both during and after construction to implement control measures to ensure that pollution is reduced to the maximum extent practicable in areas of new development and redevelopment. Design criteria and performance standards may be used to assist in meeting this objective

Further, storm water management program goals should be reviewed during planning processes that guide development to appropriate locations and steer intensive land uses away from sensitive environmental areas A municipality may, for example, include provisions in the planning process that ensure that all new development in targeted areas or zones provides for a certain percentage of undisturbed area to assist in preserving post-development runoff quality and velocity as similar as possible to pre-development conditions In its Part 2 application, a municipality should describe how it plans to implement the proposed standards (e g , through an ordinance requiring approval of storm water management programs, a review and approval process, and adequate enforcement)

The proposed storm water management program should identify and include **planning procedures and control measures** that will be used in the municipality.

Planning Procedures

Comprehensive planning procedures typically involve incorporation of land use goals and objectives into a plan document or a plan map. These plans are often called Master Plans, Comprehensive Land Use Plans, or Comprehensive Zoning Plans

Comprehensive or master plans are often non-binding. They provide support and direction to local officials that have the authority to make land use decisions

While applicants do not need to submit a complete comprehensive or master plan with the Part 2 application, they should detail the planning process employed by the municipality. They must thoroughly describe how the municipality's comprehensive plan is compatible with the storm water regulations The description should clearly

- Identify management objectives for streams, wetlands, and other receiving waters;
- Identify areas where urban development is likely to occur and areas that are sensitive to the effects of urbanization. Consideration should be given to receiving waters, topography, soil types, ground water uses and potential impacts, and other relevant factors;
- Describe standards such as design criteria and performance standards for storm water controls for new developments, such as buffer zones,

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open space preservation, erosion and sediment controls, etc.;

- Describe other measures to minimize the effects of new development on storm water quality (these may include local code and ordinance requirements); and

- Identify or discuss the site development review process for the evaluation and approval of storm drainage or storm water management programs. Requirements in drainage or storm water management programs can be coordinated with review of other related plans such as those for site grading or landscaping.

There will be great variation among municipalities in their sophistication of land use planning If the municipality has recently updated its land use plan, it may detail storm water quality issues In other instances, there may be no policy to include storm water quality considerations in land use decisions. In such cases, the applicant must describe how consideration of those activities that affect storm water quality are to be incorporated into the municipality's comprehensive or master plan and its approval process for construction projects

Control Measures

Most traditional storm water control measures focus on efficient collection and conveyance of storm water runoff to an offsite location This approach can increase downstream property damage due to increased storm water runoff quantity and flow velocity. Corrective action often involves expensive public works projects, such as enlarging and reinforcing channels or constructing swales to provide an adequate outfall from affected or damaged areas The traditional approach has typically involved downstream channel stabilization projects However, these projects may also result in increased storm water runoff quantity and flow velocity.

Some recent approaches to storm water management include preserving the natural features of a watershed by maintaining vegetative cover and establishing buffer zones and open space or green areas. The benefit of employing this approach is the protection afforded to riparian areas and wetlands, as well as the preservation of a stable watershed. One additional benefit from this approach includes maintaining ground water recharge through infiltration. These approaches to storm water management minimize the impact of erosion, flooding, and other damage to natural drainage features such as streams, wetlands, and lakes. Preservation of natural habitat can be achieved through effective storm water quality control measures More recent approaches use storm water to:

- Recharge ground water sources with runoff from impervious areas;

- Preserve baseflows of surface water bodies;

- Augment water supplies used for street cleaning and other municipal functions, such as watering public lawns,

- Increase recreational opportunities including swimming, fishing, and boating; and

- Sometimes, augment drinking water supplies if it is treated and in compliance with all applicable drinking water standards.

The municipality should consider storm water controls and structural concerns in planning, zoning, and site or subdivision plan approval. An example of effective structural control is described in Exhibit 6-1. Non-structural control measures are highly recommended for new development. They can be included during the planning, site-selection, and development stages. Examples of non-structural controls include street sweeping, buffer strip preservation, and public education.

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Exhibit 6-1
Storm Water Programs in Delaware and Florida

Delaware requirements for on-site measures include water quality ponds with permanent pools Ponds must be designed to release the equivalent volume of runoff from the first 1/2 inch of runoff from the site over a 24-hour period and have a storage volume designed to accommodate at least 1/2 inch of runoff from the site Water quality ponds without permanent pools may also be used in Delaware's program. These pools are to be designed to release the first inch of runoff from the site over a 24-hour period.

Developers are instructed to consider infiltration practices only after ponds are eliminated for engineering or hardship reasons. Infiltration structures must be designed to accept at least the first inch of runoff from all streets, roadways, and parking lots Other practices may be acceptable if they meet the equivalent removal efficiency of 80 percent for suspended solids. More stringent requirements may be established on a case-by-case basis.

The 80 percent removal efficiency for suspended solids that Delaware requires takes into account pollutant settling. The 24-hour detention period allows for substantial settling where most of the pollutant removal occurs. In addition, the requirement that the first inch of runoff be released over a period of no less than 24 hours reduces downstream erosion

Source Schueler, 1987

For significant redevelopment, municipalities can incorporate both structural and nonstructural storm water controls However, there are generally far more constraints and limitations on the control opportunities available at redevelopment sites One of the primary constraints is the availability of sufficient open area to accommodate structural controls such as detention ponds. In instances where redevelopment is occurring in densely urbanized areas, storm water runoff volumes may be so large that sufficient storage capacity can not be provided without further compounding problems associated with siting and retrofitting existing storm water conveyance systems In such cases, the municipality should consider nonstructural control measures such as traffic flow control, the use of porous construction materials for roads and parking lots, revisions to street sweeping or deicing policies, or public education programs

6.3.1.2 Public Streets, Roads, and Highways

Summary of Regulatory Requirement

Public streets, roads, and highways can be significant sources of pollutants in discharges from MS4s Therefore, proposed management programs must include a description of practices for operation and maintenance of public streets, roads, and highways, and procedures for reducing the impact of runoff from these areas on receiving waters.

§122.26(d)(2)(iv)(A)(3) [The application must include 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

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Road maintenance practices, especially snow management and road repair, and traffic are significant sources of pollutants in storm water discharges Measures to reduce the pollutants in storm water runoff from these sources should be addressed in the proposed management program

Snow Management

Deicing salts are the main source of pollutants in runoff of urban snowmelt. Municipalities can reduce these pollutants by calibrating equipment, educating equipment operators, using alternative deicing materials, and properly storing deicing materials. As alternatives to deicing salts, the Federal Highway Administration is considering many materials that may be less polluting. However, most of these deicers contain sodium or chloride ions that are harmful to roadside trees, shrubs, and soils. One deicer, calcium magnesium acetate (CMA) may be the best option for environmentally sensitive areas (Chollar, 1990) In salt storage facilities, salt piles should be completely covered, storage and handling areas should have impervious surfaces, and contaminated runoff should be contained

Road Repair

Road maintenance and repair activities may contribute pollutants through erosion caused by the elimination of stabilizing vegetation from roadside shoulders and ditches. Maintenance crews can decrease the potential for erosion by disturbing only the area under repair. Graded areas should also be limited in size so that repairs can be completed the same day and graded areas stabilized by the end of the workday. Other measures to reduce pollutants in storm water include scheduling potential pollutant-causing repair work during dry seasons, when possible

Municipal equipment yards and maintenance shops that support road maintenance activities can also be significant sources of pollutants Therefore, municipalities should consider instituting procedures that address spill prevention, material management practices, and good housekeeping

Traffic

Oil and grease and metals from traffic are the pollutants of most concern with respect to aquatic toxicity and their ability to "wash off" roadways and enter a MS4

In almost all instances, the pollutant concentrations in initial storm water discharge from heavily travelled streets is significant When the initial runoff reaches the velocity needed to entrain particulates, highly soluble pollutants that have accumulated between storms are transported to the storm sewer system. Therefore, shortly after a storm event begins, the pollutant loading in the initial flow to a MS4 is often the greatest

Pollutants from traffic can be minimized by using nonstructural controls (e.g , traffic reduction and improved traffic management), structural controls (e g , traditional and innovative BMPs), and changing maintenance activities. Traditional structural controls to reduce pollutants in road runoff include vegetated swales, infiltration devices and detention/retention basins Highways often afford opportunities for using structural controls such as detention basins on entrance or exit ramps and upstream or downstream of culvert crossings (Steward, 1992). Smaller roads may also have low-cost structural control opportunities available at culvert crossings such as vegetated swales Many structural controls can also be placed on public or private land that is outside the right-of-way, but still may be proximate enough to capture road runoff. Any time controls are placed at culvert crossings, potential wetland impacts and instream treatment issues need to be considered

Maintenance activities that can reduce pollutants in storm water discharges include catch basin cleaning, litter control, and targeted street sweeping For municipalities that have

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developed transportation plans under the Clean Air Act, applicants should describe how they will review the plan, and amend it where appropriate, to address water quality concerns Potential locations for installing new structural controls to reduce pollutants from road and highway runoff should be identified by applicants.

6.3.1.3 Flood Management Projects

Summary of Regulatory Requirement

The traditional focus of storm water management in many communities has been water quantity (i e., flood) control. The proposed management program must demonstrate that flood management projects take into account the effects on the water quality of receiving water bodies, and the program must discuss whether existing structural flood control devices can be retrofitted to control water quality.

> §122.26(d)(2)(iv)(A)(4) [The application must include 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

Opportunities for pollutant reduction should be considered when determining specific controls to be proposed as the MEP standard in the storm water management program.

Control Measures

Storm water management devices and structures that focus solely on water quantity are usually not designed to remove pollutants, and may sometimes harm aquatic habitat and aesthetic values. For example, channels that are completely lined with concrete typically do not provide for aquatic habitat and tend to increase potentially erosive velocities and elevate ambient water temperatures, resulting in downstream channel enlargement and increased pollutant loadings However, this condition can be mitigated through alternative stabilization methods.

Channel management measures that can enhance streams and their ecological values include corridor preservation, biological bank treatment, and, where necessary, geomorphic restoration (Ferguson, 1991). The municipality may also install structural devices to dampen the hydraulic energy of the flow and minimize downstream erosion. As another example, willow saplings could be planted between rip-rap, timbers, and other stabilization structures that are anchored into terraces on the side of the streambank.

Flood-control projects can be built or subsequently modified to address water quantity and water quality concerns. Sometimes existing flood control structures can be retrofitted to provide water quality benefits as well as water quantity control (EPA, 1989b). Basin retrofits are a common example. For such a retrofit, dry flood control or detention basins can be converted to wet basins by modifying outlet orifices Additional storage can be obtained by raising the elevation of the basin embankment.

Dry retention basins, or extended dry or wet retention basins can be used to improve water quality. Dry retention basins are not as efficient or as effective in improving water quality as extended dry or wet retention basins, but dry retention basins are generally less costly to design and maintain. The decision to use dry retention or extended dry or wet retention basins should consider all these factors.

Optimally, such measures should be considered in the planning process (discussed previously). However, they can also be implemented later in the land development

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process (e g , site review or public facilities requirements stage)

If a flood control authority is responsible for a portion of the MS4, the applicant should take the lead in coordinating efforts to incorporate pollutant reduction considerations in flood control projects EPA recommends the use of Memoranda of Agreement and Memoranda of Understanding to clarify roles and responsibilities between two or more political entities.

6.3.1.4 Municipal Waste Facilities

Applicants must describe programs that identify measures to monitor and reduce pollutants in storm water discharges from facilities that handle municipal waste, including sewage sludge.

> §122.26(d)(2)(iv)(A)(5) [The application must include a] description of a program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste which shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges

The first step is to identify facilities that handle municipal waste and summarize their operations The types of facilities that should be included are

- Active or closed municipal waste landfills,
- Publicly owned treatment works, including water and wastewater treatment plants,
- Incinerators,
- Municipal solid waste transfer facilities
- Land application sites,
- Uncontrolled sanitary landfills,
- Maintenance and storage yards for waste transportation fleets and equipment,
- Sites for disposing or treating sludge from municipal treatment works; and
- Other treatment, storage, or disposal facilities for municipal waste.

Applicants may combine this part of the proposed management program with the program established under §122 26(d)(2)(iv)(C), which sets standards for monitoring and controlling pollutants from similar types of solid waste facilities (e.g , those with hazardous wastes, or subject to the requirements of SARA Title III—Section 313 of the Emergency Protection and Community Right-to-Know Act). Monitoring should include all the parameters listed in §122 26(d)(2)(iv)(C) and any additional parameters listed in an effluent guideline. Procedures to evaluate, inspect, monitor, and establish control measures for municipal waste sites over the term of the NPDES permit should be described For example, after one year of monitoring each waste handling facility category listed above, the municipality may have collected enough data to decide which facilities or types of facilities should receive a higher priority for pollutant reduction More attention could then be focused on the high-priority sites

6.3.1.5 Pesticides, Herbicides, and Fertilizers

The proposed management program must include a description of procedures to reduce the contribution of pollutants associated with pesticides, herbicides, and fertilizers discharged to the MS4.

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§122 26(d)(2)(iv)(A)(6) [The application must 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 proposed program should include educational measures for the public and commercial applicators, and should include integrated pest management measures that rely on non-chemical solutions to pest control. The program should also describe how educational materials will be developed and distributed Applicants are encouraged to consider providing information for the collection and proper disposal of unused pesticides, herbicides, and fertilizers, or to establish their own program An effective and safe program would include

- Development of an inventory of products that may be accepted under the program, and collection of the Material Safety Data Sheets (MSDSs) for these products,
- Identification of transportation, storage, and disposal requirements,
- A shelf-life program to dispose of expired products,
- Applicator training or certification (the pretreatment program may be helpful as a source of industry-specific information or as a model approach for obtaining and tracking information on chemical applicators and distributors), and
- Safety training

Any certification/training program for the collection and disposal of pesticides, herbicides, and fertilizers must be in compliance with Federal, State, and local laws such as the Resource Conservation and Recovery Act, the Federal Insecticide, Fungicide, and Rodenticide Act, the Department of Transportation's hazardous materials regulations, and State and local ordinances.

In addition, applicants must include a discussion of controls for the application of pesticides, herbicides, and fertilizers in public-rights-of-way and at municipal facilities Planting low-maintenance vegetation, such as perennial ground covers, reduces pesticide and herbicide use. Native vegetation is often preferable because there is less need to apply fertilizers and herbicides, and to perform other forms of maintenance, such as mowing (Horner, 1988).

If herbicides are used, a herbicide-use plan must be proposed as part of the storm water management program The plan might include

- A list of selected herbicides and their specific uses,
- Information about the formulations of various products, including how to recognize the chemical constituents from the label, and directions and precautions for applicators that explain if products should be diluted, mixed, or only used alone,
- Application methods and estimated quantities to be used,
- Equipment use and maintenance,
- Training in safe use, storage, and disposal of pesticides (safety requirements for individual products are listed on the products' MSDSs),
- Inspection and monitoring procedures, and

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- Recordkeeping and public notice procedures

6.3.2 Construction Sites

As specified in §122 26(d)(2)(iv)(D), applicants must describe proposed regulatory programs to reduce pollutants in storm water runoff from construction sites to the MS4.

> **§122.26(d)(2)(iv)(D) [The application must include a] description of a program to implement and maintain structural and nonstructural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system**

This part of the proposed management program must address

- Implementation of BMPs,
- Procedures for reviewing site plans to ensure that they are consistent with local sediment and erosion control plans,
- Inspection of construction sites; and
- Enforcement measures and educational activities for construction site developers and operators

EPA encourages municipalities to (1) coordinate requirements to reduce pollutants in construction site runoff with management programs to reduce pollutants from new development, and (2) maintain, to the degree possible, pre-construction hydrologic conditions (Section 6 3 1 1) Applicants are encouraged to describe these two proposed management program components together Implementation of this program component will rely on the establishment and maintenance of both structural and nonstructural BMPs This requirement extends to all construction activity within the municipality

All construction sites, regardless of size, must be addressed by the municipality To begin to identify these sites, the applicant should obtain lists of construction site operators that are covered by general or individual storm water NPDES permits from the NPDES permitting authority However, construction sites not covered by a storm water discharge permit also need to be addressed by the municipality. The best way to identify these construction sites and implement an effective BMP program to reduce pollutants in their runoff is through the site planning process (see Section 6.3.2.1).

The BMPs envisioned for construction site runoff are generally well established technologies and practices They rely predominantly on erosion and sediment controls and other measures applicable to construction sites (e.g , control of solid wastes, and prohibitions on discharging concrete truck washing runoff into storm drains) The technologies proposed should be referenced, and a description of when and how the controls will be used should be included Municipality-specific technical guidance for construction site operators, such as handbooks and inspection checklists, are examples of suitable reference sources If an applicant chooses to develop such handbooks and checklists, they should be referenced and described in the application

The major requirements of this program component include

- Site planning that considers the potential impacts on water quality,
- Nonstructural and structural best management practices,
- Procedures that consider physical site characteristics when identifying priorities for inspection and enforcement, and
- Educational and training measures for construction site operators

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Each of these requirements, and the reasons that they are important elements of a proposed storm water management program, is described in more detail below

6.3.2.1 Site Planning

Sediment runoff rates from construction sites are typically 10 to 20 times greater than those of agricultural lands, and 1,000 to 2,000 times those of forest lands. Over a short period, construction sites can contribute more sediment to streams than had been deposited over several decades Runoff from construction sites can also include other pollutants such as phosphorus and nitrogen from fertilizer, pesticides, petroleum derivatives, construction chemicals, and solid wastes

To address these problems, the proposed management program should describe procedures for site planning that consider potential water quality impacts

> §122 26(d)(2)(iv)(D)(1) [The program for construction sites must include a] description of procedures for site planning which incorporate consideration of potential water quality impacts

The objective is for the municipality and the developer to address storm water discharges from construction activity early in the project design process so that potential water quality impacts can be eliminated or minimized and consequences to the aquatic environment assessed Nonstructural approaches to minimize the generation of runoff from the construction site will also need to be considered These measures may include phasing development to coincide with seasonal dry periods, minimizing areas that are cleared and graded to only the portion of the site that is necessary for construction, exposing areas for the briefest period possible, and stabilizing and reseeding disturbed areas rapidly after construction activity is completed

It is often easier and more effective to incorporate storm water quality controls during the site plan review process or earlier The process typically culminates with the developer of the construction site submitting detailed engineering plans to the municipality for review and approval

Upon completion of the site plan review stage, the developer and the municipality have invested considerable time and money into the project If storm water quality issues are considered only after significant detailed engineering has gone into the project, municipal site reviewers may only address minor drainage issues. In recent years, however, many municipalities have developed separate teams of site inspectors to implement erosion and sediment control measures in the field. In these municipalities, site inspectors should be part of the site review team (if they are not already) in order to incorporate their expertise on the appropriate erosion and sediment controls for the given circumstances

The above discussion reinforces the importance of site planning, as described in the section on site planning for new development (Section 6.3 1) In general, the sooner planners consider storm water quality issues, the better the opportunity for efficient and effective pollutant reduction In some cases storm water issues should be considered in the conceptual stage of planning (e g , as a planning or zoning function)

Some municipalities include a final step in the planning process that requires a developer to provide a far greater level of design detail than earlier conceptual design approvals This step may be required as a condition of the final approval for certain zoning categories Municipalities with such a step in the development process can consider potential storm water quality issues in detail at this stage Municipalities that do not currently require such detailed plans should consider adopting this procedure as part of their storm water management program

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6.3.2.2 Nonstructural and Structural BMPs for Construction Activities

This component of the proposed management program should describe requirements for nonstructural and structural BMPs that operators of construction activities that discharge to MS4s must meet

> **§122.26(d)(2)(iv)(D)(2)** [The program for construction sites must include a] description of requirements for nonstructural and structural best management practices

As indicated above, applicants must propose site review and approval procedures that address sediment and erosion controls, storm water management, and other appropriate measures Approvals should be clearly tied to commitments to implement structural and nonstructural BMPs during the construction process Appropriate structural and nonstructural control requirements will vary by project Project type, size, and duration, as well as soil composition, site slope, and proximity to sensitive receiving waters will determine the appropriate structural and nonstructural BMPs Municipalities should acquire the authority to require operators to install and maintain applicable erosion and sediment control plans Exhibit 6-2 summarizes common construction-site BMPs

A description of the local erosion and sediment control law or ordinance is needed to satisfy this program requirement The description should include information that links the enforcement of the law or ordinance to the legal authority of the applicant, as discussed in Section 3 of this manual

While many municipalities have erosion and sediment control ordinances in place, their effectiveness is often limited because they are not adequately implemented and enforced Examples include silt fencing that is not maintained or excavated soils that are placed directly on top of the silt fencing Therefore, construction sites covered under NPDES permit regulations must indicate whether they are in compliance with State and local sediment and erosion control plans Site inspections are expected to be the primary enforcement mechanism by which erosion and sediment controls are maintained

To ensure that developers are in compliance with erosion and sediment control plans, applicants may wish to consider expanding the use of performance bonds. This approach might depart from a traditional site bonding approach For example, the size of bonds could be based on the amount of earth disturbed, the slope of the site, changes in grades, soil type, proximity to surface waters, sensitivity of surrounding area, and other relevant factors. In addition, the bond could clearly specify the storm water quality controls that must be included in the development. Appropriate maintenance and site cleanup could be tied to the bond-release process

6.3.2 3 Site Inspections and Enforcement of Controls For Construction Sites

Storm water BMPs associated with construction activities are highly susceptible to damage due to the intensity of activities commonly associated with construction Consequently, inspections are crucial to the effective operation of storm water BMPs Therefore, the proposed management program should describe construction site inspection and enforcement procedures The procedures should be flexible so that they can be tailored to specific construction activities and physical characteristics of the construction site

> **§122 26(d)(2)(iv)(D)(3)** [The program for construction sites must include 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

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Exhibit 6-2
Construction Site Controls and Their Applicability

Control Type	Slope Protection	Waterway Protection	Surface Drainage	Enclosed Drainage	Large Flat Areas	Borrow Areas	Adjacent Properties
Non-structural (cover)							
temporary seeding	●		●		●	●	●
mulching & matting	●				●	●	
plastic covering	●					●	
retain natural vegetation	●	●	●	●	●	●	●
buffer zones	●	●	●	●	●	●	●
seeding & planting	●				●	●	
sodding	●		●		●	●	●
topsoiling					●	●	
Structural-erosion control							
gravel entry/truck wash			●		●		
road stabilization			●				
dust control							
pipe slope drains					●	●	●
subsurface drains	●						
surface roughening	●				●		
gradient terraces	●					●	
bioengineered slopes	●					●	
level spreader			●				
interceptor dikes/swales	●					●	●
check dams			●				●
outlet protection		●	●				
riprap	●	●	●				
vegetative streambank stabilization		●					
bioengineered streambank stabilization		●					
structural streambank stabilization		●					
Structural-sediment retention							
filter fence		●		●			●
gravel filter berm	●	●			●		●
storm drain inlet protection	●			●			●
sediment trap or sump		●	●		●	●	●
sediment pond or basin		●	●	●	●	●	●

Source: Modified from WDOE *Public Review Draft - Stormwater Management Manual for the Puget* [illegible] Washington State Department of Ecology, Publication #90-73 June 1991

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Effective inspection and enforcement requires adequate staff, systematic inspection procedures, penalties to deter infractions, and intervention by the municipal authority to correct violations. Enforcement mechanisms, such as the ability to require additional storm water controls, administrative penalties (e.g., stop work orders) and injunctive relief (via citizen suits) also must be described. In addition, the applicant should describe who has the authority to require compliance.

Proposed procedures for inspecting construction sites may include minimum frequencies and an inspector's checklist. For example, the State of Delaware requires a minimum of one inspection every two weeks for sites over 50,000 square feet.

The proposed program should also specify the minimum number of inspectors that will be employed during the permit term and how they will be trained. For example, some erosion and sediment control programs require that certified private inspectors be used. In such case, procedures for inspector training and certification must also be described.

In formulating procedures to identify priorities for inspecting sites and enforcing control measures, applicants are encouraged to begin early in the process (i.e., at the site planning stage, as discussed previously) and continue throughout all ground disturbing activities. Once the nature of the construction activity has been established or perhaps modified during the site plan review process, the physical site constraints can be evaluated so that effective controls can be implemented.

For example, if the controls specified in the site plan prove to be ineffective, or if changes occur that were not anticipated during the planning process, site inspection and enforcement mechanisms can be required to mitigate the potential for pollutants to enter a downstream MS4. In this instance, a perimeter barrier, such as a temporary diversion dike, could be used to divert the concentrated runoff to a pipe slope drain terminating with a level spreader. The spreader would dissipate the erosive velocity of the runoff and release it into an undisturbed area beyond the limits of the clearing and grading at the toe of the slope.

The proximity and sensitivity of the receiving water to which the construction site discharges is an important consideration. For construction sites that discharge to receiving waters that do not support their designated use or other waters of special concern, additional construction site controls are probably warranted and should be strongly considered. These receiving waters are identified in the Part 1 municipal NPDES storm water permit application [§122.26(d)(1)(i)(C)].

6.3.2.4 Educational Measures for Construction Site Operators

Construction site operators often need training and education about the sources, control, and impacts of pollutants in runoff from construction sites (see Virginia, 1988). Therefore, applicants must describe examples of informational materials and activities to be used in education programs.

> §122.26(d)(2)(iv)(D)(4). [The program for construction sites must include a] description of appropriate educational and training measures for construction site operators.

Implementation and enforcement of erosion and sediment controls have historically been major problems even with many programs that may be otherwise exemplary. Therefore, technical information on how to incorporate storm water management with erosion and sediment control and other BMP training courses are recommended for municipal employees and construction site operators. Training on the available alternatives will help operators recognize and correct problems promptly. *Tools for such training* include videos, workshops, seminars, and demonstrations or field trips

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An acceptable program must include a training program, which should be supplemented by a certification program for all construction site operators (contractors and developers) plan reviewers, and inspectors that work on sites that discharge to a MS4 For example, one NPDES State has a certification program based on adequate training and minimum-competency level testing of all private individuals involved in the preparation and implementation of erosion and sediment control plans

6.3.3 Program to Control Pollutants in Storm Water Discharges from Waste Handling Sites and from Industrial Facilities

> §122.26(d)(2)(iv)(C) [The application must include 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 storm water regulations envision that NPDES permitting authorities and municipal operators will cooperate to develop programs to monitor and control pollutants in storm water discharges to municipal systems from various sites that handle waste and certain industrial facilities

Operators responsible for storm water discharges associated with industrial activity must obtain NPDES permits from EPA or an authorized NPDES State These industrial storm water permits will establish requirements such as controls, practices, and monitoring for storm water discharges from the industrial facilities to the MS4 The industrial storm water permits will also provide a basis for enforcement actions directly against the industrial owner or operator

NPDES permits for MS4s will establish responsibilities for municipal system operators to control pollutants from industrial storm water discharged through their system. Proposed storm water management programs must address the reduction of pollutants in storm water discharges from municipal landfills; hazardous waste treatment, storage and disposal facilities; facilities subject to SARA Title III; and other priority industrial facilities, as determined by the applicant. Municipalities should consider the information gathered for the Part 1 application and other parts of the Part 2 application (particularly the Source Identification and Characterization Data components) when prioritizing storm water discharges from these sites. In addition, Appendix B contains a list of pollutants commonly associated with various industries.

In the Part 2 application, the Source Identification component (see Section 4 of this guidance manual) requires the applicant to provide an inventory of pollutant sources, organized by watershed. This inventory identifies and describes the products and services of each industrial facility that may discharge storm water to the MS4. The *Source Identification* component suggests applicants use standard industrial classification (SIC) codes for this description. EPA strongly recommends this information be used to identify priority waste handling sites and industrial facilities. A similar technique could be developed for sites that do not meet the regulatory definition of "storm water discharge associated with industrial activity" (i.e. not included in the *Source Identification* and *Discharge Characterization* components), but are identified as a high priority under the proposed management program. Applicants can obtain information on how SIC codes are used to describe the industrial facilities located within their jurisdictions from their NPDES permitting authority

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Characterization data should also be evaluated. Applicants should analyze quantitative data from representative outfalls to establish a monitoring and control program.

An integral part of this requirement is the adequacy of the applicant's legal authority. If a municipality believes that a discharge of storm water associated with industrial activity violates the industrial facility's NPDES permit limits, but the municipality does not have authority over the discharge, the municipality should contact the NPDES permitting authority for appropriate action. Examples of possible actions by the NPDES permitting authority are·

- For a facility that already has a NPDES individual permit, the permit may be reopened and further controls imposed,
- For a facility covered by a NPDES general permit, an individual site-specific permit application may be required, or
- For a facility not covered by a NPDES storm water permit, a permit may be required

The municipality is ultimately responsible for discharges from their MS4. Consequently, the proposed storm water management program should describe how the municipality will help EPA and authorized NPDES States

- Identify priority industries discharging to their systems,
- Review and evaluate storm water pollution prevention plans and other procedures that industrial facilities must develop under general or individual permits;
- Establish and implement BMPs to reduce pollutants from these industrial facilities (or require industry to implement them), and
- Inspect and monitor industrial facilities to verify that the industries discharging storm water to the municipal systems are in compliance with their NPDES storm water permit, if required

6.3.3.1 Identifying Priorities

Proposed management programs must clearly identify priority industrial facilities.

> **§122.26(d)(2)(iv)(C)(1). [The applicant must] identify priorities and procedures for inspections and establishing and implementing control measures for such discharges**

This section discusses how applicants might identify priority facilities Section 6.3.3.2 discusses how municipalities might develop procedures for inspections and implementation of control measures

At a minimum, priority facilities include:

- Operating and closed municipal landfills;
- Hazardous waste treatment, disposal or recovery facilities, and
- Facilities subject to SARA Title III

Municipalities must identify these and other priority industrial facilities and describe the criteria used to identify them For example, information from the Toxics Release Inventory is one source a municipality could use to identify industrial facilities subject to SARA Title III. Other sources may include CWA Section 205 or 208 use-attainability studies, other studies that indicate a site-specific beneficial use impairment immediately downstream of a storm water outfall, or records of industrial pretreatment programs or other permit programs that identify facilities that may be the source of a use impairment or

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a major contribution of pollutants The program should also describe procedures for modifying the inventory of priority industries based on additional evaluation that occurs throughout the permit term

Applicants may initially focus their implementation efforts on known pollution sources The municipality may have previously identified these sources, or they may be identified through existing information compiled during the permit application process However, the initial management program implementation strategy should be based on information gathered while completing the *Adequate Legal Authority, Source Identification,* and *Discharge Characterization* sections of the permit application (See Chapters 3, 4, and 5, respectively)

During the term of the permit, as additional information becomes available, the municipality should target and set priorities for other program elements that emerge. For example, if the municipality has incomplete characterization data about waste handling sites identified in this program component because the inventory of dischargers to the MS4 has not been completed, the municipality could propose to direct monitoring programs to those areas Upon acquiring sufficient characterization data, the priority of the sites discharging to these portions of the MS4 can be either determined or modified

As noted above, when identifying priority sites, applicants must consider all the facilities listed in §122 26(d)(2)(iv)(C)(*1*). When municipalities develop criteria for identifying additional priority industrial facilities, they are advised to consider, at a minimum:

- The type of industrial activity (SIC codes can help characterize the type of industrial activity),
- The use and management of chemicals or raw products at the facility and the likelihood that storm water discharge from the site will be contaminated; and
- The size and location of the facility in relation to sensitive watersheds

6.3.3.2 Developing Procedures

This program component should describe the specific steps that the municipality will take if it identifies a waste handling site or priority industrial facility when preparing the Part 2 application or during the permit term [§122.26(d)(2)(iv)(C)(*1*), printed in the box above]. The proposed management program must include procedures for inspecting priority industrial sites. The results of inspection may be used as a basis for requiring storm water management controls and enhanced pollution prevention measures. It should also establish an inspection schedule for each priority facility at the time it is identified

Applicants may want to consider establishing prior notification procedures The applicant will need to evaluate the legal authority it has over priority facilities to determine if prior notification is required This is another example of how EPA expects the different components of the application process to be linked In this instance, the Adequate Legal Authority section is tied directly to the prior notification procedure of the inspection and evaluation component of the proposed management plan

Applicants also should consider developing inspection documents such as standard forms or checklists for recording observations Forms and checklists can be used to identify high risk areas of priority facilities and to make comparisons among sites When characterization data or baseline estimates are factored into the evaluation process, the effectiveness of pollution prevention activities at a particular site could be quantified and compared to similar sites Other procedures that applicants should describe to effectively incorporate inspections as well as establish and implement control measures for these types of discharges can be derived from monitoring data

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Applicants also should describe a procedure for conducting follow-up inspections, where necessary, as part of this program component For example, follow-up inspections might be needed to verify the installation of a specific control or implementation of a practice specified in a negotiated agreement between the municipality and the industrial site A system-wide approach to establishing priorities for inspection procedures is recommended. The system-wide approach should begin with the evaluation of existing information, followed by the identification and evaluation of new information during the permit term. Therefore, applicants should link these procedures with information from the *Source Identification* and *Discharge Characterization* components

6.3.3.3 Establishing and Implementing Controls

A municipality must consider if it should place more stringent controls on discharges associated with industrial activity than are required in an industrial facility's existing NPDES storm water permit [§122 26(d)(2)(iv)(C)(1) printed in box above] Usually, the municipality will not need to impose controls beyond those required in the industrial facility's NPDES storm water permit (for more information on appropriate controls, refer to *Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices,* EPA 832-R-92-006, September, 1992)

However, nothing in the Federal regulations would prohibit the municipality from requiring additional controls beyond the permit requirements for industrial activities For this reason, EPA recommends that municipal applicants incorporate a provision in the proposed storm water management program that allows the municipality to require priority industrial facilities to implement the controls necessary for the municipality to meet its permit responsibilities

Finally, the applicant should suggest procedures for requiring pollutant control measures in runoff from priority industrial facilities Applicants should provide information to the industrial facilities that discharge to the MS4s and industry-specific guidance on appropriate control measures that industries discharging to their systems should follow (WDOE, 1991).

Priority industrial facilities should focus on controlling activities such as the use, storage, and handling of toxic chemicals Standard methods for implementing control measures at different types of facilities should be described To facilitate this, municipalities should obtain copies of the pollution prevention plans developed by industrial permittees Control measures that the municipality may suggest include preventing exposure of pollutant sources to precipitation, on-site pretreatment, and oil/water separators Applicants should provide a schedule for setting up this program component at priority industrial facilities. The schedule should include educational services for industrial site operators and technical BMP guidance, training courses, videos, workshops, and seminars for plan reviewers, inspectors, contractors, and developers

6.3.3.4 Inspection and Monitoring

The proposed management program should describe the inspection procedures that will be followed Storm water inspections can be coupled with inspections for other purposes (e.g., pretreatment programs, fire and safety) Proposed management programs should address minimum frequency for routine inspections. For example, how often, how much of the site, and how long an inspection may take are appropriate to explain in this proposed management program component Applicants should also describe procedures for conducting inspections and provide an inspector's checklist

In addition these inspection procedures should identify the minimum number of inspectors that will be employed and describe

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the programs to train them For example, if the number of inspectors is expected to increase over the term of the permit, it should be noted in the proposed management program. Also, if storm water inspections are combined with other program inspections, means of cross-training inspectors and coordinating schedules should be outlined

Municipalities are urged to evaluate pollution prevention plans and discharge monitoring data collected by the industrial facility to ensure that the facility is in compliance with its NPDES storm water permit Site inspections should include (1) an evaluation of the pollution prevention plan and any other pertinent documents, and (2) an on-site visual inspection of the facility to evaluate the potential for discharges of contaminated storm water from the site and to assess the effectiveness of the pollution prevention plan. A municipality could begin the inspection process with information from the facility's notification to the municipality, which should have been submitted by May 15, 1991. Industrial facilities must also submit an individual NPDES permit application, participate in a group storm water permit application, or file a Notice of Intent (NOI) to be covered by a general permit to the NPDES permitting authority Section 308 of the CWA provides the legal authority for any individual (including a municipality) to obtain information from the NPDES permitting authority

The proposed management program also must include a description of a monitoring program for storm water discharges associated with industrial facilities [§122.26(d)(2)(iv)(C)(2)]

The monitoring program should describe the framework and rationale for selecting monitoring sites Sites that may be appropriate for monitoring include locations with several upstream industrial facilities, industrial facilities that are representative of a significant number of similar facilities, and priority industrial sites with significant potential for high levels of pollutants in their storm water discharges The description of the proposed

§122.26(d)(2)(iv)(C)(2) [The application must 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 qualitative 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 40 CFR 122.21(g)(7)(iii) and (iv).

monitoring program should address how the monitoring data will be used and what the frequency of the monitoring will be.

Identifying who will actually conduct the monitoring (e g , industry or municipality) is appropriate to include in the program description. Linking this element of the monitoring program to the Adequate Legal Authority section of the permit application is vital The legal authority to require monitoring should prescribe the specific monitoring protocols required elsewhere in the regulation [§122 26(d)(2)(i)(F)]. Applicants should describe proposed procedures for monitoring industrial facilities, including methods for determining parameters to be sampled throughout the term of the permit **At a minimum, parameters that must be considered for monitoring include**

- Any pollutant limited in effluent limitations guidelines for the subcategory of industry;
- Any pollutant that is controlled in a NPDES permit for the process discharge from an industrial site,
- Oil and grease, COD, pH, BOD_5, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen; and

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- Certain pollutant(s) known or suspected to be in the discharge, based on §122 21(g)(7)(iii) and (iv) (Section 5 3).

If a municipality believes (based on the results of monitoring and inspections) that an industrial facility is not meeting its NPDES permit requirements, the municipality should petition the NPDES authority to either require the facility to change its pollution prevention plan or institute an enforcement action. Municipalities may also file citizen suits under CWA Section 505 to enforce the conditions of the NPDES permit.

6.4 STRUCTURAL CONTROLS

6.4.1 Description of Structural Controls

Applicants are required to identify the location of major structural controls for storm water (retention basins, detention basins, major infiltration devices, etc) in Part 1 of the application [§122 26(d)(1)(iii)(B)(5)] In Part 2, applicants must describe additional controls that they plan to implement [§122 26(d)(2)(iv)] The controls must address the activities described in Section 6 3 In addition, the applicant must describe maintenance procedures [§122 26(d)(2)(iv)(A)(1), discussed in Section 6 4 2] Later, when the municipality submits its annual report, it will have to report on its progress in implementing these controls [§122 42(c)(1), discussed in Section 7.3 of this guidance]

The matrix in Exhibit 6-3 provides information on commonly used structural and source control BMPs. Structural practices to control urban storm water runoff rely on three basic mechanisms **detention, infiltration, and** filtration More detailed technical information about source controls (particularly in the selection of structural BMPs) is available in the technical BMP manuals (MWCOG, 1991, Schueler, 1987, WDOE 1991; and EPA 1990c) The following summary of structural and source control BMPs draws extensively from those manuals

Applicants should note that CWA Section 404 permits may be required for some structural controls, including any control projects that involve the discharge of dredged or fill material into waters of the United States, including wetlands. States may also require permits that address water quality and quantity. To the extent possible, municipalities should avoid locating structural controls in natural wetlands. Before considering siting of controls in a natural wetland, the municipality should demonstrate that it is not possible or practicable to construct them in sites that do not contain natural wetlands, and that the use of other nonstructural or source controls are not practicable or as effective. In addition, impacts to wetlands should be minimized by identifying those wetlands that are severely degraded or that depend on runoff as the primary water source. Moreover, natural wetlands should only be used in conjunction with other practices, so that the wetland serves a "final polishing" function (usually targeting reduction of primary nutrients and sediments). Finally, practices should be used that settle solids, regulate flow, and remove contaminants prior to discharging storm water into a wetland

Another concern for siting controls is the possible adverse effect that infiltration and detention controls may have on ground water. This issue is addressed in more detail in Section 7.2.3

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Exhibit 6-3
Structural Controls Matrix

CONTROL AND MAINTENANCE REQUIREMENTS	ADVANTAGES	DISADVANTAGES
Extended Detention Dry Basin • Periodic mowing • Regular debris removal • Sediment removal annually	• Provides peak flow control • Possible to provide good particulates removal • Can serve large development • Requires less capital cost and land area when compared to wet basin • Does not usually release warmed or oxygen-depleted water downstream • Protects against downstream channel erosion • Can create valuable wetland and meadow habitat when properly landscaped	• Low removal rates for soluble pollutants • Generally not feasible for drainage areas less than 10 acres • If not adequately maintained, can become a nuisance; (becomes unsightly, breeds mosquitos, and creates undesirable odors) • Periodic mowing and maintenance can be detrimental to nesting birds or other animals inhabiting the area
Vegetative Filter Strip • Inspection • Fertilizer use if necessary to maintain stable vegetation	• Low maintenance requirements • Can be used as part of the runoff conveyance system to provide pretreatment • Can reduce particulate pollutant levels in areas where runoff velocity is low to moderate • Enhances urban wildlife habitat diversity • Economical	• May concentrate water, significantly reducing effectiveness • Soluble pollutant removal highly variable • Limited feasibility in highly urbanized areas where runoff velocities are high and flow is concentrated • Requires periodic repair, regrading, and sediment removal to prevent channelization • Maintenance can be detrimental to nesting birds or other animals inhabiting the area • Fertilizer use can lead to higher nutrient loadings in storm water runoff
Grassed Swale • Periodic mowing • Fertilizer use if necessary to maintain stable vegetation	• Requires minimal land area • Can be used as part of the runoff conveyance system to provide pretreatment • Can provide sufficient runoff control to replace curb and gutter in single-family residential subdivisions and on highway medians • Economical and aesthetically pleasing	• Low pollutant removal rates • Leaching from culverts and fertilized lawns may actually increase the presence of trace metals and nutrients • Fertilizer use can lead to higher nutrient loadings in storm water runoff

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Exhibit 6-3 (continued)
Structural Controls Matrix

CONTROL AND MAINTENANCE REQUIREMENTS	ADVANTAGES	DISADVANTAGES
Porous Pavement • Routine removal of fine particles from surface • May need weight limit of traffic imposed for protection	• Provides ground water recharge • Provides water quality control without additional consumption of land • Can provide peak flow control • High removal rates for sediment, nutrients, organic matter, and trace metals • When operating properly can replicate pre-development hydrologic conditions • Eliminates the need for storm water drainage, conveyance, and treatment systems off-site	• Requires regular maintenance • Possible risks of ground water contamination • Only feasible where soil is permeable, of sufficient depth to bedrock and water table, and gentle slopes are present • Not suitable for areas with high traffic volume or heavy vehicles • Need extensive feasibility tests, inspections, and very high level of construction workmanship • High failure rate due to clogging • Not suitable to serve large offsite pervious areas • Limited use in snowy climates where sanding and salting operations occur
Concrete Grid Pavement • Periodic mowing, if planted	• Provides peak flow control • Provides ground water recharge • Provides water quality control without additional consumption of land	• Requires regular maintenance • Not suitable for area with high traffic volume • Possible risk of contaminating ground water • Only feasible where soil is permeable, of sufficient depth to bedrock and water table, and gentle slopes are present
Filtration Basin • Periodic vacuuming and power washing	• Ability to accommodate moderately large-sized development (3-80 acres) • Flexibility to provide or not provide ground water recharge • Can provide peak volume control	• Requires pretreatment of storm water through sedimentation to prevent filter media from premature clogging

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Exhibit 6-3 (continued)
Structural Controls Matrix

CONTROL AND MAINTENANCE REQUIREMENTS	ADVANTAGES	DISADVANTAGES
Wet Retention Basin • Periodic dredging, preferably from forebay area, if properly designed • Mowing of impoundment to prevent successional growth	• Provides peak flow control • Can serve large developments; most effective for large, intensively developed sites • Enhances species diversity, aesthetics, and provides recreational benefits • Little ground water discharge • Permanent pool in wet ponds helps prevent scour and resuspension of sediments • Provides moderate to high removal of both particulate and soluble pollutants	• Generally not feasible for drainage area less than 10 acres • Potential for safety and liability issues if not properly built and maintained • If not adequately maintained, can become a nuisance; (becomes unsightly, breeds mosquitos, and creates undesirable odors) • Requires considerable space, which limits use in densely urbanized areas with expensive land and property values • Not suitable for hydrologic soil groups "A" and "B" (SCS classification) • Potential for thermal discharge and oxygen depletion, which may severely impact downstream aquatic life
Extended Detention Wet Basin • Periodic dredging of sediment forebay	• Provides peak flow control • Can serve large developments; most effective for large, intensively developed sites • Enhances species diversity, aesthetics, and provides recreational benefits • Permanent pool in wet ponds helps prevent scour and resuspension of sediments • Provides better nutrient removal than traditional wet basin	• Not feasible for drainage area less than 10 acres • Potential for safety and liability issues if not properly built and maintained • If not adequately maintained, can become a nuisance; (becomes unsightly, breeds mosquitoes, and creates undesirable odors) • Requires considerable space, which limits use in densely urbanized areas with expensive land and property values • Not suitable for hydrologic soil groups "A" and "B" (SCS classification) • Potential for thermal discharge and oxygen depletion, which may severely impact downstream aquatic life

Sources Modified from MWCOG, 1991, Schueler 1987, and WDOE, 1991

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6.4.1.1 Detention Controls

Detention controls temporarily store storm water runoff to control peak runoff rates and provide a reduction in pollutant concentrations by the gravitational settling of suspended solids and associated contaminants Except for incidental losses due to evaporation or percolation, essentially all the detained water is subsequently discharged to a surface water conveyance (e.g., a stream or MS4). The most common examples of detention practices are extended detention basins and wet (retention) basins

Variations on these basic detention controls include constructed storm water wetlands and multiple pond systems These types of controls also rely on detaining flows (leading to sedimentation) as the primary means of pollutant removal Recent investigations suggest that wetlands vegetation within a detention control can also reduce nutrient loads and certain other pollutants by incorporating them into plant tissue

If properly designed, detention controls can protect downstream channels by reducing the frequency of bankfull flood events and associated erosion Reduction in velocity and sediment load is also important for minimizing the adverse impacts of discharges to MS4s Detention facilities also can provide terrestrial and aquatic wildlife habitat if they are landscaped and planted appropriately

When considering detention controls, the municipality should consider the potential negative effects of downstream warming that may be caused by the shallowness of the water in the control The municipality should also consider negative impacts of detention controls, such as reduced baseflow; bacterial contamination due to waterfowl, and potential impacts to wildlife from concentrated contaminants, waterfowl diseases, and maintenance practices Safety and liability issues and nuisance factors, such as mosquitoes and odor, also should be considered. Setting detention controls in sensitive floodplains or in existing wetlands should generally be avoided. The flooding effect of impounding and detaining water is a particular concern if the upstream watershed drains more than 250 acres, because the volume of runoff and required detention times can cause inundation of upstream channels to occur.

Detention controls incorporating multiple pond systems and/or constructed storm water wetlands also treat runoff through the processes of absorption, filtration, biological uptake, volatilization, precipitation, and microbial decomposition. Recent investigations by the Metropolitan Washington Council of Governments suggest that multiple pond systems, in particular, have shown potential to provide higher and more consistent levels of treatment than traditional detention controls The redundancy afforded by the multiple pond system generally increases the reliability of the control. However, the potential concerns and drawbacks affecting retention basins also apply to these systems Many of these systems are currently being designed to include vegetative buffers and deep water areas to enhance wildlife habitat and to improve the appearance of the facility If a municipality selects one of these more innovative designs, it should recognize that periodic maintenance is necessary The effectiveness of these controls, like most controls, depends on proper operation, maintenance, and monitoring of the entire system

Wet (Retention) Basins

Wet (retention) basins are designed to maintain a permanent pool of water and temporarily store storm water runoff until it is released at a controlled rate Unlike extended detention ponds, wet basins cannot detain runoff for long times, because most of their storage capacity is needed for holding the permanent pool Enhanced designs include a forebay to trap incoming sediment where it can be easily removed A fringe wetland also can be established around the perimeter of the basin Similar to detention controls, locating

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retention basins in sensitive floodplains or existing wetlands should be avoided if possible

Extended Detention Basins

Extended detention basins temporarily detain a portion of storm water runoff for 24 to 48 hours after a storm, gradually releasing the stored water through a fixed opening to allow urban pollutants to settle out. The basins normally return to a "dry" condition between storm events and do not have any permanent standing water. These basins are typically composed of two stages: an upper stage, which remains dry except during larger storms, and a lower stage, which is designed for typical storms. Pollutant removal from extended detention basins can be enhanced if they are equipped with plunge pools near the inlet, a micropool at the outlet, and an adjustable reverse-sloped pipe as the extended detention control device.

Water Quality Inlets

Water quality inlets (also referred to as catch basins) are small underground systems that, like retention basins, rely on settling to remove pollutants before discharging water to the MS4. Several designs of water quality inlets exist. In their simplest form, catch basins are single-chambered storm water inlets with the bottom lowered to provide 2 to 4 feet of additional space between the outlet pipe and the bottom of the structure for collection of trash and sediment. Some water quality inlets include a second chamber with a sand filter to provide additional removal by filtration The first chamber provides effective removal of coarse particles and helps prevent premature clogging of the filter media.

Water quality inlets may include an oil/grit separator. There are 3 basic types of oil/grit separators the spill control (SC), the coalescing plate interceptor (CPI), and a design credited to the American Petroleum Institute (API). Most of the oil/grit separators that are promoted for use in reducing hydrocarbon loads in storm water are a modification of the API design, although there are appropriate applications for all three separator designs. Oil/grit separators based on the API design consist of three chambers. The first chamber removes coarse material and debris. The second chamber provides separation of oil, grease, and gasoline from the storm water runoff; and the third chamber provides a safety relief should a blockage occur.

Recent experiences have shown that, because of their volume limitations, oil/grit separators have limited pollutant removal effectiveness. They are perhaps the best example of a structural control that is only effective with frequent maintenance. Proper disposal of the standing water, trapped sediments, and floating hydrocarbons are problems in the few locations that have been studied.

Constructed Storm Water Wetlands

Constructed storm water wetlands are a hybrid, drawing on elements of detention and retention basins. Constructed storm water wetlands are shallow pools and are often designed to simulate the pollutant removal functions of natural wetlands. Enhanced designs may include a sediment forebay, carefully contoured topography, and multiple species of wetland plants. Constructed storm water wetlands, while a promising technology for pollutant removal from storm water, may not replicate all the ecological functions of natural wetlands.

6.4.1.2 Infiltration Controls

Infiltration controls rely chiefly on absorption to treat storm water discharges. In the ideal case, storm water percolates through a porous medium and into native soils where filtration and biological action remove pollutants Typical controls of this type include infiltration trenches, infiltration basins, filtration basins, porous pavement, and concrete or block pavers. Systems that rely on soil absorption work best in deep, highly permeable soils that

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are at least four feet away from the seasonal ground-water table.

The Soil Conservation Service (SCS) classifies soils into four major soil groups A-D. The soil groups are as follows:

Group A: Sand, loamy sand
Group B: Sandy loam, loam
Group C: Silt loam, sandy clay loam
Group D: Clay loam, silty clay loam, sandy clay, silty clay, and clay

Soils in Group A provide the highest infiltration rate while soils in Group D provide the lowest Suitable soils for infiltration-type controls typically fall in soil groups A and B. Other types of soils may be suitable, provided the clay content does not exceed 30 percent (clay has very low hydraulic conductivity). The clay content of soil may be determined from the SCS soil textural triangle, which can be found in many civil engineering references texts

If suitable soils are available, the widespread use of infiltration in a watershed can be useful in helping to maintain, restore, or replicate pre-development hydrology. Specific benefits of infiltration often include increased dry-weather baseflow in streams and a reduction in the frequency of bankfull floods. However, infiltration systems are not recommended unless soil conditions warrant. Also, infiltration should not be used where ground water requires protection. For example, the use of infiltration-type controls may not be appropriate in areas that recharge sole source aquifers.

Infiltration Basins

Infiltration basins are areas that intercept incoming storm water runoff and temporarily store it until it gradually infiltrates into the soil surrounding the basin. Infiltration basins should be designed to control drainage areas ranging from about 5 to 50 acres. They also should drain within 48 to 72 hours to maintain aerobic conditions favoring bacteria that aid in pollutant removal, and to ensure that the basin is ready to receive the next storm The runoff entering the basin is usually pretreated to remove coarse sediment that may clog the surface soil pores on the basin floor. Concentrated runoff may flow through a sediment trap or by sheet flow (vegetative filter strip).

Infiltration Trenches

Infiltration trenches are shallow (e.g., 2 to 10 feet deep) excavated ditches or vaults that have been backfilled with a coarse stone aggregate. The aggregate forms an underground reservoir that has approximately 40 percent void space. Storm water runoff diverted into the trench gradually infiltrates from the bottom of the trench into the subsoil and eventually into the ground water. Variations in the design of infiltration trenches include dry wells and percolation pits that are designed to control small volumes of runoff, such as the runoff from a rooftop A more complex variation is the enhanced infiltration trench, which is equipped with filter fabric or a more extensive pretreatment system to remove sediment and oil. Depending on the quality of the runoff, pretreatment may be necessary to lower the failure rate of the trench. Infiltration trenches are generally best suited for drainage areas of less than 10 acres They are particularly applicable for use on residential lots, small commercial areas, down slope from parking lots, and under drainage swales.

Grassed Swales

A grassed swale is an infiltration method that is usually used as a form of pretreatment before discharging runoff to another storm water control device (e.g., a detention basin) However, the grassed swale itself is a control that can remove significant amounts of pollutants through sediment entrainment A grassed swale is a shallow, vegetated, man-made ditch with the bottom elevation above the water table to allow runoff to infiltrate into the ground water. The vegetation helps to

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prevent erosion, filters sediment, and allows for some uptake of nutrients.

Porous Pavement

Porous pavement, which is basically traditional asphalt aggregate without the fine particles, is an alternative to conventional pavement. Proper design and application of this control can reduce or eliminate the need for curbs and gutters, storm drains and sewers, and offside controls. Instead, runoff is diverted through a porous asphalt layer into an underground stone reservoir. The stored runoff gradually exfiltrates out of the stone reservoir into the subsoil. Soil considerations are important when evaluating the appropriateness of this control. Generally, grades should be gentle, and subsoil should be at least 3 feet thick (to bedrock) and moderately permeable (capable of infiltrating about one half inch per hour). Because porous pavement tends to clog with fine sediments and because it loses its effectiveness under heavy loads, its application should generally be limited to low-traffic areas (e g., overflow parking areas) and areas that are not exposed to large bearing loads caused by heavy vehicles

Concrete Grid Pavement

Concrete grid pavement has concrete blocks with regularly interdispersed void areas that are filled with pervious materials, such as gravel, sand, or grass The blocks are typically placed on a sand or gravel base. They are usually designed to provide a load-bearing surface adequate for supporting vehicles, while allowing infiltration of surface water into the underlying soil

6.4.1.3 Filtration Controls

Filtration controls treat storm water flows by using vegetation or sand to filter and settle pollutants Generally, these controls are most effective before the flows become concentrated (e g sheet flow) In certain instances, infiltration and treatment in the subsoil also may occur through the processes of absorption and adsorption After passing through the filtration media, the treated water is usually directed to a stream or MS4, although it may be evaporated or percolated into the ground Filtration controls include filter strips, grass swales, and sand filters Sand filters are particularly useful for ground water protection Applicants must consider the influence of climate when they select vegetative systems

Vegetative Filter Strips

Vegetative filter strips (also called bio-filters) are vegetated sections of land designed to accept runoff as overland sheet flow from upstream development They may adopt any natural vegetated form, from grassy meadow to small forest. The dense vegetative cover facilitates sediment reduction and pollutant removal Filter strips cannot treat high-velocity flows Therefore, these strips generally have been recommended for use in agriculture and low-density development and other situations where runoff does not tend to be concentrated Unlike grassed swales, filter strips are effective only for overland sheet flow, as opposed to concentrated flow Grading and level spreaders can be used to reduce the energy of concentrated flows and distribute the runoff evenly across the filter strip Vegetative filter strips are often used as pretreatment for other structural practices, such as infiltration trenches Leaving a buffer of natural vegetation along an urban stream valley is an example of a vegetative filter strip and also an example of a nonstructural control

Filtration Basins

Filtration basins are usually small impoundments lined with filter media, such as sand or gravel Storm water drains through the filter media and perforated pipes into the subsoil For optimal pollutant removal, recommended detention times range from 24 to 48 hours with a maximum drainage area of about 50 acres Grassed swales or other structural controls can be used to filter coarse sediments and thereby minimize clogging of the filter medium

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6.4.2 Maintenance Activities

After summarizing the location of major structural storm water controls, applicants must submit a description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants.

> §122.26(d)(2)(iv)(A)(1) [The application must 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.

Typical maintenance requirements include:

- Inspection of basins and ponds after every major storm for the first few months after construction and annually thereafter,
- Mowing of grass filter strips and swales at the frequency necessary to prevent woody growth and promote dense vegetation,
- Regular removal of litter and debris from dry ponds, forebays, and water quality inlets,
- Periodic stabilization and revegetation of eroded areas,
- Periodic removal and replacement of filter media from infiltration trenches and filtration ponds,
- Deep tilling of infiltration basins to maintain infiltrative capability, and
- Frequent vacuuming or jet hosing of porous pavement or concrete grid pavements

Lack of maintenance often limits the effectiveness of storm water structural controls such as detention/retention basins and infiltration devices. Maintenance programs should address measures for catch basins and drainage channels in addition to major structural controls

The proposed program should provide for maintenance logs and identify specific maintenance activities for each class of control, such as removing sediment from retention ponds every five years, cleaning catch basins annually, and removing litter from channels twice a year. If maintenance activities are scheduled infrequently, inspections must be scheduled to ensure that the control is operating adequately. In cases where scheduled maintenance is not appropriate, maintenance should be based on inspections of the control structure or frequency of storm events If maintenance depends on the results of inspections or if it occurs infrequently, the applicant must provide an inspection schedule. The applicant should also identify the municipal department(s) responsible for the maintenance program.

Municipalities should use caution in adopting controls that do not have sufficient history of use for their performance characteristics and maintenance requirements to be adequately evaluated A good example is the oil/grit separator used on small commercial or retail sites Some municipalities have required the use of these technologies, but due to poor performance, municipalities have often rescinded the requirement. In these cases, it is not clear whether the control technology was ineffective or the maintenance program was flawed

Because maintenance is critical to successful program implementation, it must be considered throughout the term of the permit Applicants may wish to develop a matrix that identifies maintenance tasks on a timeline indicating criteria for inspection, repair, and replacement PERT charts, GANT charts, or other critical path analyses (available for personal computers) can help organize a maintenance program and schedule. For a summarized

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listing of appropriate maintenance activities and schedules refer to the matrix in Exhibit 6-3.

6.4.3 Considerations for Planning and Siting Controls

The storm water management program should describe the criteria used to identify that a particular structural control is warranted and the circumstances under which it will be required. The possibilities for new control sites should be evaluated for their storm water quality control potential. Guidelines and performance standards that identify specific structural controls for new development should be proposed in the procedures for new development. From this evaluation, priorities based on the feasibility of implementing a particular control at a given location can be determined.

6.4.3.1 Use of Municipal Lands

Applicants should discuss existing major structural controls and sites that have the potential for new structural controls which could be installed on municipal lands and other major rights-of-way (e g , major roads and highways) Note that existing controls are identified in Part 1 applications [(§122 26(d) (1)(iii)(B)(5)] The location of publicly owned parks, recreational areas, and other open areas are also identified [§122 26(d)(1)(iii)(6)]

To determine what storm water quality controls are necessary for public lands and facilities, current activities and functions that may affect the quality of storm water discharges should be identified Such activities and functions include parks, trails, and other recreational land uses, road maintenance and snow management, and storage and repair yards/shops for municipal vehicles An inventory of public land uses may be necessary to help make determinations of what controls are needed An effective inventory should involve coordination among all of the local departments and agencies that have authority over the use of public lands and facilities

Opportunities for controlling storm water quality problems that are identified through the inventory process can be evaluated on a site-specific basis and included in the proposed management program

There are several benefits to the establishment of structural controls on municipal lands:

- Municipal lands often provide greater retrofit opportunities because they typically do not require additional property purchases;
- Municipal lands ensure opportunities to provide future maintenance and security in preservation of the retrofit control,
- Applicants may be able to adapt existing municipal functions (such as industrial pretreatment program implementation, fire-safety inspections, and flood-control activities) to address storm water quality concerns (Expanding their mission to address storm water concerns may be more cost-effective than initiating entirely new programs.),
- Applicants may be able to adapt functions of development on municipal lands (such as planning, zoning, and construction oversight functions), and
- After considering controls on municipal lands, the applicant will be in a better position to address the private land under its jurisdiction

As a precaution, however, applicants need to consider potential conflicts arising over the multiple use of public lands Criteria other than land ownership (e g , locating controls downstream of developed areas) also should be considered when deciding where to locate storm water runoff controls

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6.4.3.2 Use of Private Lands

A municipality also may incorporate storm water quality controls into its land use plan to indicate controls that may be necessary for new development Some of the best opportunities to prevent pollution and to implement effective storm water quality controls occur during development Local governments typically play a strong role in overseeing new development and have, or can adapt, administrative infrastructure to address storm water quality concerns.

The storm water management process should begin with land use planning and zoning and continue through the development and redevelopment processes. Municipalities generally can obtain commitments from land developers more easily prior to relinquishing jurisdictional leverage over the parcel where the potential control is to be located Leverage can be achieved through plan approval or zoning changes The negotiation process for the dedication, condemnation, or other acquisition of land and the process for getting the land developer to construct or otherwise implement controls will vary dramatically among municipalities, particularly among those in different States

Source and structural controls are most cost-effective when development is planned with storm water quality controls in mind However, it is probably more appropriate for the municipality to propose a flexible plan that specifies a variety of program objectives through the development process rather than identifying a certain priority and rigid schedule Other benefits of early and flexible planning include ecological diversity, wetlands preservation, and the creation of controls that also function as amenities Comprehensive land use plans zoning ordinances, and subdivision ordinances are important mechanisms to implement these controls early in the development process Consideration of storm water quality during pre-development is one of the most effective ways to implement controls This is because the maximum flexibility (and opportunity) to incorporate BMPs exists prior to final land use decisions and construction activities (see Section 6.3 1 1)

6.4.3.3 Siting Considerations

Imperviousness

The degree of imperviousness affects the concentration of pollutants in storm water, which in turn affects the type of structural controls that may be necessary. As the imperviousness of an area increases, the runoff volume and the pollutant loading increase. Studies show that runoff from industrial areas, which generally have a high degree of imperviousness, can have a wider variety and greater concentration of pollutants than runoff from other land uses Recent studies also indicate that the degree of imperviousness can be inferred from the level of degradation in urban receiving streams (For example, see Schueler 1991 and Klien 1979) Population projections will not indicate the degree to which industrial land use will increase unless planning and zoning information is also considered

Soil Conditions

Controls designed to infiltrate storm water will be affected by site specific soil conditions For example, clay content of the soil and the antecedent moisture content (degree of soil saturation at the time of a given storm event) will strongly influence the effectiveness, and therefore the applicability, of infiltration controls for a given location

6.5 PROGRAM AND SCHEDULE TO DETECT AND REMOVE ILLICIT DISCHARGES AND IMPROPER DISPOSAL

NPDES permits for discharges from MS4s require effective detection and removal from the MS4 of illicit or improper discharges and disposal

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§122 26(d)(2)(iv)(B) [The application must include 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 NURP study concluded that the quality of urban runoff can be adversely impacted by illicit connections and illegal dumping. Often, large amounts of wastes, particularly used oils, are improperly disposed of in storm sewers. Elimination of these sources of pollutants would result in a dramatic improvement in the quality of storm water discharges from MS4s. Procedures to eliminate such discharges should be an important part of the proposed management program.

The regulatory requirement cited above is intended to directly implement the mandate of Section 402(p)(3)(B)(ii) of the CWA, which requires permits for MS4s to effectively prohibit non-storm water discharges into storm sewers In certain instances, the most appropriate action will be for the municipality to ensure that illicit discharges become covered by a NPDES permit However, in most cases, elimination of illicit discharges or improper dumping is the appropriate focus of this program component The quality of storm water runoff from inner-city core areas, particularly in older parts of the country, would benefit most from this component

The applicant should propose a schedule for implementing this program component throughout the initial permit term This schedule should reflect the priorities identified by the municipality during the application process and be based on the problems particular to the specific MS4

6.5.1 Prohibiting Illicit Discharges

The proposed management program must include a description of inspection procedures, orders, ordinances, and other legal authorities necessary to prevent illicit discharges to the MS4.

§122.26(d)(2)(iv)(B)(1) [The application must include 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 . . . . *[these sources are listed in the guidance].*

This proposed management program component also should describe how the prohibition on illicit discharges will be implemented and enforced. The description should include a schedule and allocation of staff and resources A direct linkage should exist between this program component and the adequate legal authority requirements for the ordinances and orders to effectively implement the prohibition of illicit discharges

While this program component is required to prohibit all types of illicit discharges, the following categories of non-storm water discharges need only be prohibited by the MS4 when they are identified by the MS4 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

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- Springs
- Water from crawl space pumps
- Footing drains
- Lawn watering
- Individual residential car washing
- Flows from riparian habitats and wetlands
- Dechlorinated swimming pool discharges
- Street wash water

While EPA does not consider these flows to be innocuous, they are only regulated by the storm water program to the extent that they may be identified as significant sources of pollutants to waters of the United States under certain circumstances. If an applicant knows, for example, that landscape irrigation water from a particular site flows through and picks up pesticides or excess nutrients from fertilizer applications, there may be a reasonable potential for a storm water discharge to result in a water quality impact. In such an event, the applicant should contact the NPDES permitting authority to request that the authority order the discharger to the MS4 to obtain a separate NPDES permit (or in this case, the discharge could be controlled through the storm water management program of the MS4)

The applicant should consider the specific land use, age, and stage of development in this program component. For example, one study in an established metropolitan area found that 60 percent of automobile-related businesses had improper storm drain connections. While some of the problems discovered in this study were the result of improper plumbing or illegal connections to storm drains, the majority of the connections were approved by the municipality when they were built

For problem identification and problem-solving, a municipality may elect to implement a follow-up study that traces identified pollution incidents to their source (e.g , up the system) A variety of pollutant-tracing techniques and field screening can be used to identify illicit discharges

6.5.2 Field Screening

Part 1 of the application requires applicants to submit the results of field screening studies to evaluate the possible occurrence of illicit connections and improper dumping [§122 26(d)(1)(iv)(D)]. Dry weather flows that were encountered during the initial field screening were sampled and analyzed. The analysis was intended to provide information about illicit connections and improper dumping.

In Part 2, applicants are required to propose procedures for continued field screening during the term of the permit.

> §122 26(d)(2)(iv)(B)(2) [The application must include 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

Applicants can propose to use procedures similar to those used for field screening required in Part 1 of the application or they can propose alternative procedures and techniques. The Part 1 field screening requirements are found in §122.26(d)(1)(iv)(D) and are explained in the Part 1 guidance manual

The Part 2 proposed field screening program component should describe areas of the system where the continuation of the field screening program will be conducted and the rationale for selecting these areas For example, the rationale for continuing field screening at a given location might be that a wide variation in results was obtained during the initial screens In addition, the applicant should propose field screening for a portion of any recently-identified major outfalls that were not known to the applicant when it prepared its Part 1 application, provided sampling of these outfalls is safe and practicable

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The potential for illicit discharges and improper disposal is generally higher for areas of older development, areas with many automobile-related industries, and areas with significant numbers of heavy industrial facilities Therefore, in most cases applicants should include these areas in the proposed field screening program.

The description of the field screening component should provide a detailed summary of the departmental responsibility for field activities, frequency of inspections, procedures and equipment to be used, and the procedures for documenting field activities, both in the field and in the office. Generally, the Part 2 field screening program should reflect a continuously narrowing process to trace illicit and improper sources.

6.5.3 Investigation of Potential Illicit Discharges

In order to submit a comprehensive proposed management program, applicants are required to describe procedures for investigating portions of the municipal system where field screening or other information indicates a reasonable potential for illicit discharges

> §122 26(d)(2)(iv)(B)(3). [The application must include 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)

Applicants should propose criteria to identify portions of the system where follow-up investigations are appropriate For example, calculating a frequency distribution of dry weather flows at each screening site could aid in establishing criteria to identify where follow-up investigations are appropriate.

Procedures to investigate priority locations for illicit connections include inspection of the storm sewer system, use of remote-control cameras, on-site inspections and dye-testing at priority or suspect facilities, and additional discharge monitoring to pinpoint pollutant sources. In some cases, these investigations may be coordinated with pretreatment program inspections. Such approaches are summarized in Exhibit 6-4. Coordinating inspections can be a very effective use of resources. For example, portions of the sanitary sewer system that need evaluation to detect illicit discharge may already be undergoing inspection by operators of the municipal treatment plant.

A checklist should be developed for inspectors to use to detect illicit connections. The checklist should be structured to ensure a comprehensive evaluation of the problem and stipulate the use of the easiest and least expensive detection methods first

Regardless of the format in which information is compiled (e.g., table, list, text description), EPA suggests that the applicant prepare a map identifying the location of suspected problem areas. The map should be provided as part of the Part 2 application.

The proposed program component description should describe a step-by-step process to investigate, identify, and prohibit illicit discharges If field screening leads to positive tests of fecal coliform, fecal streptococcus, surfactants, residual chlorine, fluorides, or potassium, a municipality should reconsider whether any of the non-storm water discharges described in Section 6.5.1 are the source (see previous section)

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Exhibit 6-4
Sample Illicit Discharge Investigation Procedures Options

Results of Initial Field Screen	Procedures for Detailed Analysis	Comments
Plumbing unidentifiable	Cameras	Effective for identifying deterioration
Uncertain use of facility	On-site inspections	May be combined with other inspections
Several facilities or complex plumbing	Dye-testing	Simple and accurate if system not interconnected
Unusual pollutants	Monitoring	Particularly useful for fingerprinting

6.5.4 Spill Response and Prevention

The proposed management program must describe procedures that the municipality will implement during the term of the permit to prevent contain, and respond to spills that may discharge into the MS4

> §122 26(d)(2)(iv)(B)(4) [The application must include a] description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer

The municipality and the property owners (and/or operators) of sites where spills may occur need to implement procedures to prevent, contain and respond to spills One way to implement these procedures is to modify the land use planning process and ordinance enforcement Such modifications would require notification and emergency preparedness procedures for any land use activity that could lead to leaks and spills Another method is to coordinate with on-going programs in other regulated areas where detection of spills is important, such as pretreatment and hazardous materials management. The goal of a spill-prevention program is to reduce the frequency and extent of spills of hazardous materials, oils, and other materials which can cause water quality impairment. Spill-containment programs may establish minimum chemical storage and handling requirements, require users to submit prevention and control plans, and ensure site inspections The content of the descriptions that should be submitted with the Part 2 application for each of these program elements is discussed in more detail below

Spill-response programs are intended to reduce risk to the public and the environment Although these programs tend to focus on issues of public health and safety, such as exposure to toxic materials, fires, or explosions, spill-response teams should attempt to prevent or minimize contamination of surface water, ground water, and soil. Spill-response programs often require a coordinated response from a number of municipal departments (e.g., fire, police, health, and public works). Municipalities should describe how response procedures within these programs attempt to mitigate potential pollutant discharges to surface waters

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For example, some industrial pretreatment programs specifically require that leaks or spills be routed to the storm sewer rather than the sanitary sewer generally to protect worker health and safety and to protect biological treatment capabilities This issue serves to reinforce the need for coordination between the various municipal programs that are related in some way to storm water.

The proposed program should identify the municipal departments responsible for implementing the program, and also should address employee training, reporting procedures, containment of spills, storage and disposal activities, documentation, and follow-up procedures Generally, the proposed program for spill response and prevention should focus on good housekeeping and materials management practices, which are discussed in more detail below.

One of the initial elements in the development of a successful spill response and prevention program is to assess the potential of various sources at a particular property to contribute pollutants to the storm water discharges from the site This assessment should inventory the land use, types of materials handled, and the location and types of materials management activities. Factors to consider when evaluating the pollution potential of runoff from various portions of a site include those that are likely to lead to the identification of specific structural or nonstructural controls to address problems

Other factors to consider are the toxicity and quantity of any chemicals used, produced, stored, or discharged from the site, the history of any NPDES permit violations from a site, history of significant leaks or spills of toxic or hazardous pollutants, and the designated uses of the receiving waters

This program element should also include a description of storm water management controls that are appropriate for the site that would control or allow for the mitigation of any leak or spill and a proposal to implement such controls. The priorities developed in the implementation proposal should reflect the nature of identified sources of pollutants at the site

The description of spill response and prevention activities should include the steps a municipality will take to prevent, and when necessary, adequately respond to spills discharged to its MS4. The MS4 might identify special training requirements for municipal employees in order to respond to spills of hazardous chemicals from a particular facility into the storm sewer system.

Sources with the greatest potential for spills to occur (or cause the most severe damage) should be identified in the proposed storm water management program If appropriate, specific materials handling procedures and storage requirements should be identified for these sources Requirements for these sources could be modeled after the Spill Prevention, Control, and Countermeasure (SPCC) Plans that are required for certain facilities under Section 311 of the CWA

Under the SPCC program, for example, personnel are trained and given responsibility for inspecting the facility for leaks and spills. These inspections include equipment and materials handling areas, which need to be investigated for evidence of, or the potential for, pollutants entering the drainage system Procedures to ensure the availability of appropriate personnel and equipment for cleaning up spills must be identified A system to ensure that appropriate corrective action has occurred in response to inadequacies identified during the inspection is also established under the program.

Not all of the SPCC program elements may be necessary for municipal applicants However, EPA recommends that the proposed storm water management program describe how the records of inspections will be maintained and made available for investigations of causal factors and program effectiveness Incidents of leaks, spills, and

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improper dumping, along with other information describing the quality and quantity of storm water discharges should be included in the records Inspections and maintenance activities, such as containment berm integrity testing or the cleaning of oil/water separators should be documented and recorded in a maintenance log

6.5.5 Public Awareness and Reporting Program

Applicants must propose a management program component that promotes, publicizes, and facilitates public reporting of illicit discharges or water quality impacts associated with discharges from MS4s

> §122 26(d)(2)(iv)(B)(5) [The application must include a] description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers

Timely reporting by the public of improper disposal and illicit discharges are critical components of programs to control such sources.

To enhance public awareness, programs may include setting up a public information hotline number, educating school students, establishing community and volunteer "watchdog" groups (e g , "Adopt-a-Stream Program"), using inserts into utility bills; and newspaper, television and radio announcements to inform the public about what to look for and how to report incidents The public awareness efforts should clarify to the public that they are the ultimate beneficiaries of a successful storm water management program

6.5.6 Proper Management of Used Oil and Toxics

EPA estimates that annually, 267 million gallons of used oil, including 135 million gallons of used oil from do-it-yourself automobile oil changes, are disposed of improperly An additional 70 million gallons of used oil, most coming from service stations and repair shops, are used for road oiling (55 FR 48056, November 16, 1990). If private individuals find the proper disposal of used oil or toxic materials difficult, incidents of improper disposal increase For example, when a large fraction of service stations do not accept do-it-yourself used oil, improper disposal into the municipal storm sewer rises. Therefore, applicants are required to propose a program component that will facilitate the proper disposal of used oil and toxics from households by establishing municipally operated collection sites, or ensuring that privately-operated collection sites are available.

> §122.26(d)(2)(iv)(B)(6) [The application must include 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

The proposed program should describe outreach plans to handlers of used oil and to the public, and operating plans for oil and household waste collection programs.

Examples of effective public outreach for these types of programs include dedicated municipal phone numbers (e.g , a used oil/toxic materials hotline), pamphlets, and requirements that oil retailers post the location of the nearest used oil collection facility. Programs can also inform the public about alternatives to toxic materials. Catch basin/storm sewer inlet stenciling programs can also be proposed as part of the program to increase public awareness of the connection between storm sewers and local water resources

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6.5.7 Infiltration of Seepage

In order to effectively complete this portion of a proposed management plan, the applicant must describe controls to limit infiltration of seepage from municipal sanitary sewers to MS4s, if necessary.

> §122.26(d)(2)(iv)(B)(7). [The application must include a] description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary.

Raw sewage can seep from sanitary sewage collection systems through leaks and cracks in aging pipes, poorly constructed manholes and joints, and main breaks. Sewage from a leaky sanitary system can flow to storm sewers or contaminate ground water supplies. Interaction between sanitary sewers and separate storm sewers may occur at manholes and where sanitary sewer laterals and storm sewer trenches cross. Separate storm sewers and sanitary sewers may share the same trench, which is generally filled with very porous material such as gravel.

One indication of seepage from a sewage collection system may be infiltration of water. Often, the rate of exfiltration (seepage) from sanitary collection systems is significantly greater than the rate of infiltration into the system. An EPA study on sewer exfiltration found significant ratios of the rate of exfiltration of sewage to the rate of infiltration of ground water or storm water into sanitary sewers. Field and laboratory results found this ratio to vary between 1.5 to 1 and 14 to 1.

In some cases, preventive maintenance surveys or on-going infiltration and inflow (I&I) programs to determine where water is entering a sanitary sewer system may be modified to locate the source and fate of exfiltration from the system

Identifying infiltration of seepage into a MS4 is a good example of the need for various municipal functions to be effectively coordinated. Proposed storm water management programs might discuss how personnel responsible for inspections of the sanitary sewer system could inspect for sources of exfiltration during I&I inspections, and pass any findings to personnel responsible for maintaining the MS4. If seepage is believed to be a problem, a coordinated effort with the maintenance department of the municipal sanitary sewer system is recommended.

The proposed storm water management program also should include provisions to address the discovery of previously unknown problems. There should be procedures to enact a coordinated program between the operators of the storm sewer and sanitary sewer (which in many cases will be within the same municipal agency or department).

EPA recommends that the proposed storm water management program describe controls that will be used to address seepage from malfunctioning septic systems in areas not served by a sewage treatment works. Malfunctioning septic systems may lead to more significant surface runoff pollution problems than ground water problems. A malfunctioning septic system is less likely to cause ground water contamination where an impervious bacterial mat in the soil retards the downward movement of wastewater. (Poorly located septic systems that are operating properly are the greatest threat to ground water).

Surface malfunctions of septic systems are caused by clogged or impermeable soils, or when stopped up or collapsed pipes force untreated wastewater to the surface. Surface malfunctions can vary in degree from occasional damp patches on the surface to constant pooling or runoff of wastewater to a storm sewer. An improper remedy for a surface malfunction is to install a pipe or trench over soil absorption systems to route untreated overflow away from the septic

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system. This results in direct discharges to drainage ditches, empty lots, or surface waters

Proper controls range from prescribing maximum intervals between tank pump-out to the installation of sand filters. Discharge from sand filters to surface waters may require a separate NPDES permit, because such discharge is not storm water.

Additional information about the most appropriate controls for use in correcting malfunctioning septic systems is probably best obtained from local or regional sources. Organizations such as extension services, soil and water conservation districts, and planning agencies may be good sources of information about methods that have been successful (and also those that have failed).

By obtaining this type of information, the applicant can determine what control techniques have been successful in correcting malfunctioning septic systems in similar types of soils The value of this approach is that the applicant will know that a certain control technique has been used to correct a malfunctioning septic system in the same types of soils that occur in the municipality. Where only part of the MS4 drainage area is served by septic systems, proposed programs should address setting and maintenance of septic systems, including draft requirements and implementation procedures.

6.6 SIGNATORY AND CERTIFICATION REQUIREMENTS

Under the Federal NPDES regulations [§122 22(a)], all NPDES permit applications (including municipal storm water permit applications) must be signed by an authorized person, as defined in the regulations Permit applications submitted by a municipality, State, Federal, or other public agency must be signed by either a principal executive officer or ranking elected official [§122 22(a)(3)] To fulfill the signatory requirements, the person signing the municipal application must provide his or her name (printed or typed), title, and date signed In addition, the applicant should provide the name, address, and telephone number of the person signing the application or another point of contact that can answer questions about the application.

In addition, §122.22(d) states that any person signing a permit application must 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 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."

6.7 IMPLEMENTATION OF THE STORM WATER PROGRAM

EPA anticipates that municipal storm water management programs will mature over time to reflect advances in technology, additional data collection, changing conditions, program development, stage of implementation, and improvements in water quality. Therefore, applicants may emphasize different program components to reflect implementation priorities. The proposed management program should clearly identify each of the program components and include a schedule for implementation. Each component of the Part 2 application should be classified as: full implementation, phased implementation, pilot study, or feasibility analysis In annual reports on the progress of storm water management programs, municipalities must report on the status of implementing program provisions [§122 42(c)(1), or Section 7.3 of the guidance].

- **Full Implementation.** Fully implemented components should be proposed when the municipality is

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prepared to begin or continue full implementation after its permit is issued and it expects to continue the component throughout the life of the permit. Full implementation of a program component is generally the preferred way of demonstrating the required level of control.

- **Phased Implementation.** Phased implementation should be proposed when the level of effort to implement the component will vary during the term of the permit. Phased implementation may be appropriate when additional data must be collected or technical guidance, training materials, or appropriate ordinances must be developed prior to full implementation. A schedule that includes milestones should be part of the description.

- **Pilot Studies.** Although the municipality must implement and comply with *each* provision of the municipal storm water permit, the municipality may choose to carry out pilot studies that involve limited experimental implementation of a program component. In some cases, pilot studies may be authorized by the permit. Used to evaluate the effectiveness of a program component, pilot studies may be appropriate when a technology is unproven or when data must be collected to develop operating standards or procedures. A schedule including milestones should be included in the description of a pilot study. This schedule should provide options for phased implementation of the program component, showing alternatives based on various possible results of the pilot study.

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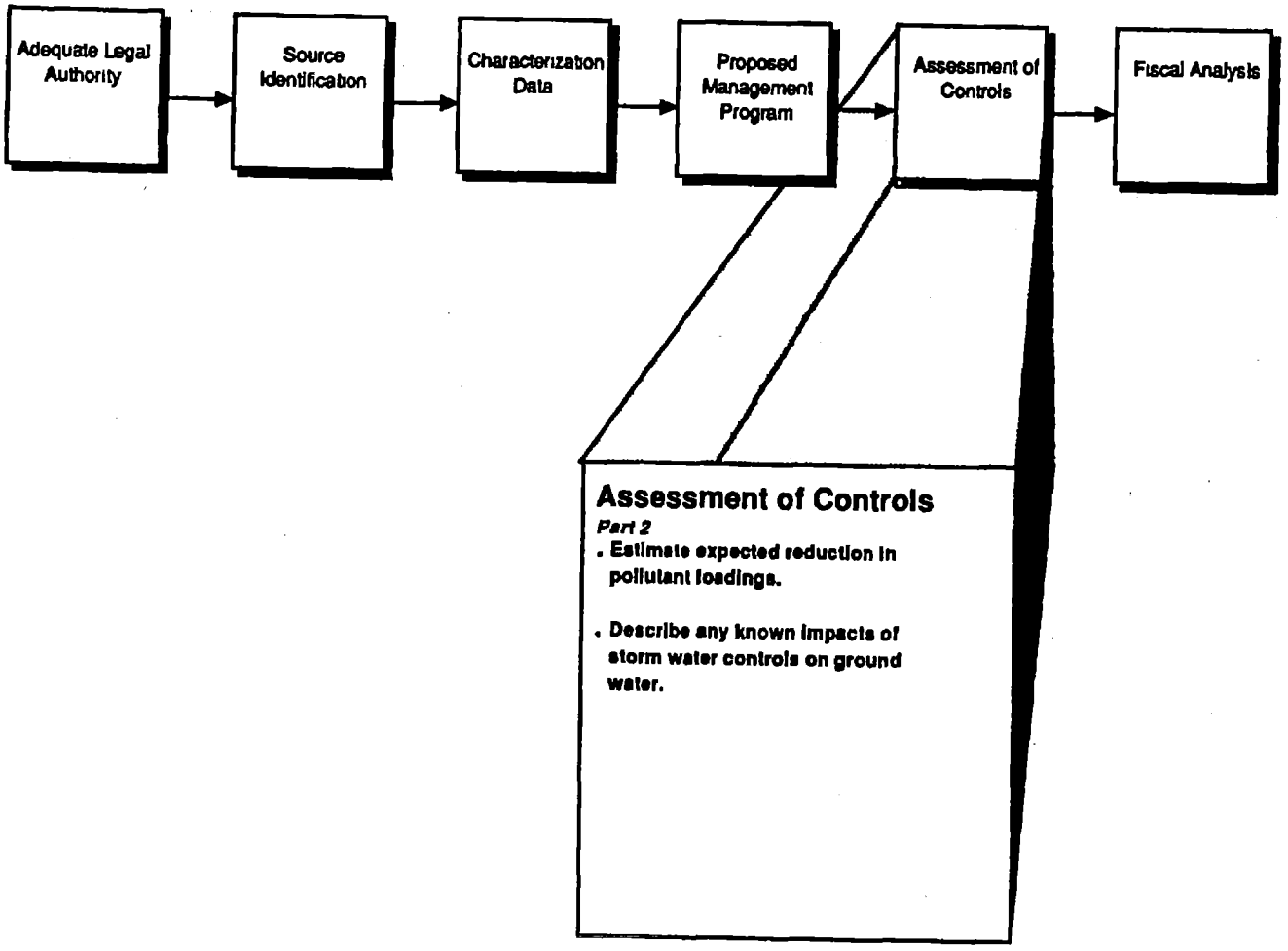
CHAPTER 7
ASSESSMENT OF CONTROLS



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7.0 ASSESSMENT OF CONTROLS

7.1 BACKGROUND

Part 2 applications require that municipalities estimate the effectiveness of their proposed storm water quality management programs The regulations require an initial estimate or assessment because the performance of appropriate management controls is highly dependent on site-specific factors Program effectiveness can be estimated through both direct measurements (such as reductions in annual pollutant loads) and indirect measurements (such as measurements that demonstrate increased public awareness of storm water quality issues) At a minimum, applicants must submit estimated reductions in pollutant loads expected to result from implemented controls and describe known impacts of storm water controls on ground water

> 122 26(d)(2)(iv) *Assessment of controls* [The application must include] estimated reductions in loadings of pollutants for 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

Reductions in pollutant loads due to the implementation and maintenance of structural controls provide direct measurements of the effectiveness of the storm water management program In addition, EPA encourages applicants to go beyond the minimum requirement and assess the effectiveness of their storm water management program through other direct measurements as well as indirect measurements As discussed below, indirect measurements provide surrogate estimates of qualitative factors, such as increased public awareness of storm water quality issues

Estimates of the effectiveness of the storm water management program will assist the municipality and the permit writer in:

- Determining whether the most cost-effective best management practices (BMPs) are included in the storm water management program;
- Ensuring that the storm water management program includes adequate public participation programs and intergovernmental coordination,
- Establishing on-going monitoring inspection and surveillance programs that help refine estimates of program effectiveness, and
- Developing a strategy to evaluate progress toward achieving water quality goals

7.2 ASSESSMENT OF STORM WATER MANAGEMENT PROGRAM

For some components of a proposed storm water management program, such as structural controls (e g , vegetative streambank stabilization, sediment pond or basin, etc.), the effect on pollution in storm water runoff is observable, and pollutant removal efficiencies can be estimated directly For other components, pollutant reductions may be difficult to quantify Applicants may need to use indirect estimates. For example, a program component may address source controls such as changing the behavior of citizens in the community, or improving the municipal control of industrial or commercial runoff For

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components of the proposed management program where pollutant removal efficiency cannot be reasonably estimated, applicants are strongly encouraged to identify some indirect measurement that can be used to evaluate the success of the practice

7.2.1 Direct Measurements of Program Effectiveness

As discussed above, 40 CFR 122.26(d)(2)(v) requires that applicants submit estimates of expected pollutant load reductions with their Part 2 applications To supplement these estimates, applicants could provide estimates of other direct measurements of program effectiveness including

- Removal efficiencies of BMPs that control storm water quality,
- Reductions in the volume of storm water discharged,
- Reductions in event mean concentrations or
- Reductions in seasonal pollutant loadings

Such direct estimates do not have to be verified with quantitative data, but can be based on accepted engineering design practices However the applicant should describe its procedures for estimating the effectiveness of the control Applicants should present estimates of pollutant load reductions or other measurements separately for each component of the proposed management program Applicants should provide estimated reductions on a watershed basis and system-wide basis

Reductions in pollutant loadings can be estimated by first estimating the pollutant loading (based on concentrations and flows) that would result without the control measure The value should then be multiplied by the efficiency of the control expressed in terms of a fraction or percentage. Estimated control efficiencies can be obtained from published sources, such as Schueler (1987) (see bibliography in Appendix A) Note that for most control measures, the pollutant removal efficiency differs for different classes of pollutants

After the municipality's storm water management program is implemented, the municipality can work to refine its initial assessment of the program. For example, the permit will require applicants to submit estimates of event mean concentrations and estimates of annual pollutant loadings for each outfall in the system [§122.26(d)(2)(iii)(C), discussed in Section 5.5 of this guidance]. These estimates can be compared with the applicant's initial estimates

In addition, the estimated removal efficiencies can be refined through the monitoring program required by §122.26(d)(2)(iii)(D) (discussed in Section 5.6 of this guidance) To refine these estimates, the monitoring program should include measurements at the inflow and outflow points of the control Throughout the permit term, the municipality must submit refinements to its assessment or additional direct measurements of program effectiveness in its annual report (Section 7 3)

The applicant should use direct measurements of program effectiveness as it begins to assess its long-term progress in improving water quality through storm water management practices Direct measurements of program effectiveness may not provide meaningful conclusions on trends in water quality improvements for a couple of permit terms. However, applicants are encouraged to use direct measurements of program effectiveness, such as annual pollutant loads, event mean concentrations, and seasonal pollutant loadings, to begin to estimate long-term trends Several statistical methods that rely on linear regression have been developed

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to model these measurements to determine if trends exist

7.2.2 Indirect Measurements of Program Effectiveness

When pollutant reductions cannot be estimated through direct measurement, appropriate indirect measurements may be used. These may include the estimated level of increased enforcement activity, increased public awareness, or reduction in number of illegal dumping incidents For example, a field screening program to identify illicit connections and improper dumping in Fort Worth, Texas, used reductions in observations of indicator pollutants as a measure of the success of the program (Fort Worth, 1988).

Other possible indirect measurements include.

- Gallons of used oil recycled,
- Amount of household hazardous waste collected,
- Number of educational brochures on storm water quality distributed;
- Number of public hearings on storm water and attendance at these hearings,
- Circulation of an annual report or periodic newsletters on progress in meeting storm water quality goals,
- Number of reports of illicit discharges or illegal dumping
- Number of spill clean-ups,
- Number of sewer inlets stenciled,
- Acres of open space,
- Number of construction and erosion and sediment control plans submitted and approved

Many of these indirect measurements will help to indicate whether the storm water management program includes adequate public participation and intergovernmental coordination.

7.2.3 Impacts of Storm Water Controls on Ground Water

Structural BMPs may have an impact on other media. Therefore, the Part 2 application requires that applicants discuss known impacts of storm water controls on ground water. Impacts should be identified separately for each component of the proposed management program. These controls may increase the quantity of ground water (such as infiltration leading to recharge), but degrade the quality of the ground water For example, in arid parts of the Southwest, imported water is often used for irrigation. This increases the quantity of ground water, but, because of high levels of nutrients and total suspended and dissolved solids in the irrigation water, also results in impacts on ground water quality

In addition, the applicant should evaluate whether structural controls for storm water impact other media, such as wetlands

7.3. ANNUAL REPORTS ON THE EFFECTIVENESS OF THE STORM WATER MANAGEMENT PROGRAM

Under §122.42(c), applicants must provide annual reports on the progress of their storm water management programs. These reports, which are due on the anniversaries of permit issuance, must include

- The status of implementing the components of the storm water management program that are required by the permit,
- Proposed changes to the storm water management programs that are established as permit conditions,

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- Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application;

- Summary of data, including monitoring data, that are accumulated throughout the reporting year,

- Projected annual expenditures and budget for the year following each annual report;

- A summary describing the number and nature of enforcement actions, inspections, and public education programs; and

- Identification of water quality improvements or degradation

Applicants should refer to the specific regulatory language in §122 42(c) for a more complete discussion of annual reporting requirements

Although the Part 2 application requirements do not specifically address annual reporting requirements, applicants should consider their strategy for preparing annual reports when they complete their Part 2 applications. A municipality may develop a strategy to assess the progress of its storm water management program throughout the term of the permit in addition to providing a baseline assessment of its program. To develop the strategy, applicants should

- Identify the direct or indirect measurements that will be used to track the long-term progress of the applicant's program towards achieving improvements in storm water quality (the results of this assessment would appear in the municipality's annual report);

- Discuss the role of monitoring data in substantiating or refining their assessment of the progress of their program towards established objectives and goals; and

- Discuss how future additions or revisions to the assessment measurements or strategy will be implemented by the municipality (e.g , what roles and responsibilities will participating municipal agencies and/or organizations have in this area)

It is anticipated that many municipalities will use the same criteria or measurements that were used in the baseline assessment to develop their long-term assessment strategy. This is an acceptable approach provided that the municipality delineates how their program provides for a longer term assessment of the progress of their storm water management program The municipality is encouraged to consider in advance the information requirements for annual reporting that are identified above when developing their long-term assessment strategy

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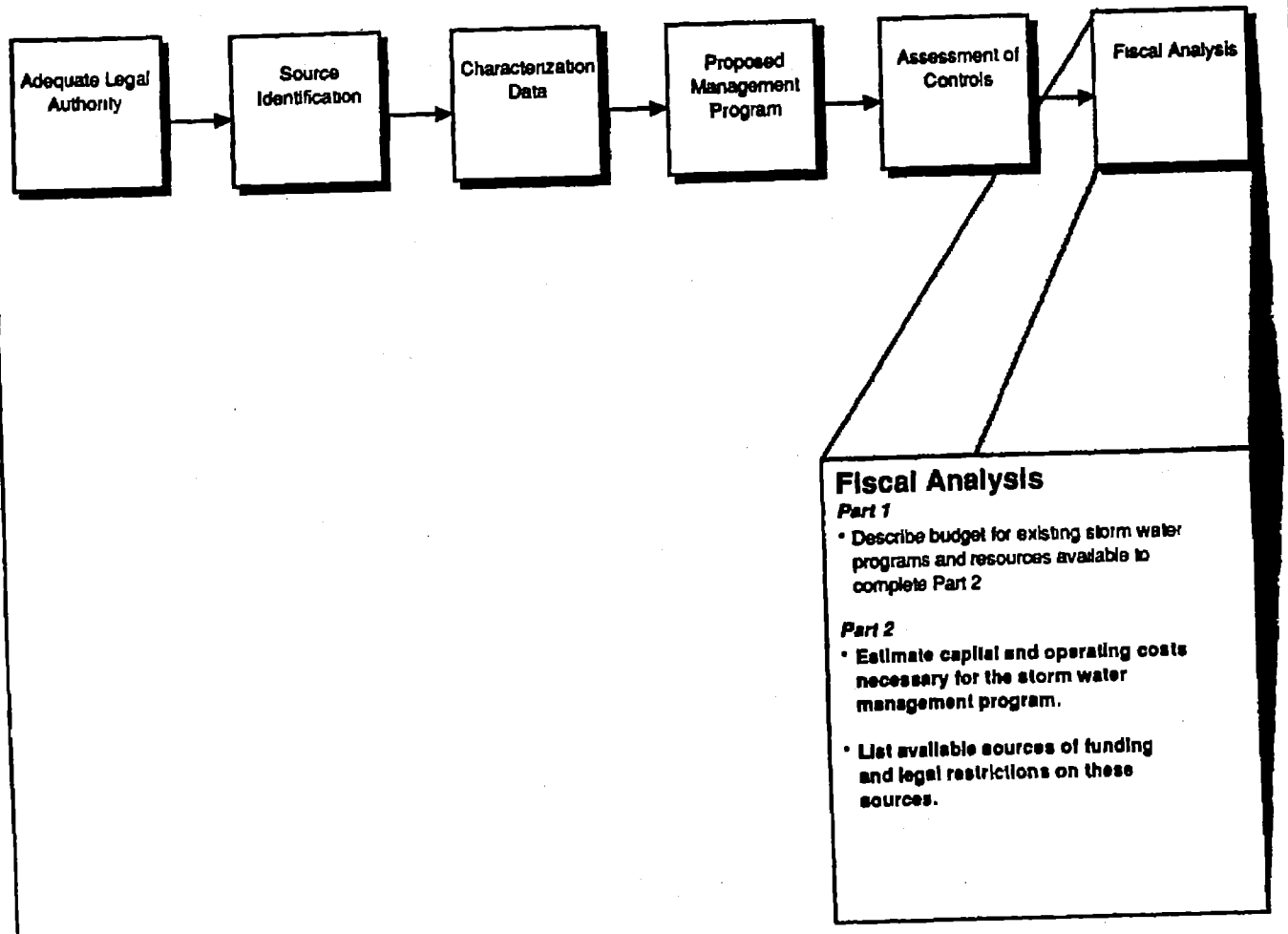
CHAPTER 8
FISCAL ANALYSIS



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8.0 FISCAL ANALYSIS

8.1 BACKGROUND

NPDES permits for discharges from MS4s will require municipal permittees to implement management programs, conduct long term storm water monitoring, and provide other information Because these activities will result in expense to the municipality, a fiscal analysis is required in the Part 2 application

Applicants must provide yearly cost estimates for these programs. Applicants also must provide a schedule indicating when funds will be available Examining the levels of proposed spending and funding allows the permitting authority to gauge the ability of the applicant to implement the program and predict its effectiveness The fiscal analysis also will help the permit writer determine whether the applicant has met the statutory requirement of reducing the discharge of pollutant to the MS4 to the maximum extent practicable Finally, the estimates help the applicant evaluate the feasibility and cost-effectiveness of its program A municipality must update its fiscal analysis each year for the annual report on the progress in implementing their storm water management program [40 CFR 122 42(c)(3) and (5), discussed in Section 7.3 of this guidance]

8.2 PROCEDURE FOR CONDUCTING A FISCAL ANALYSIS

Under §122 26(d)(2)(vi), each applicant must demonstrate sufficient financial resources to implement the conditions of the permit

Adequate resources may be demonstrated by performing a fiscal analysis of the estimated capital and operation and maintenance expenditures required to complete the activities required by the regulations This fiscal analysis must be performed for each fiscal year to be

> **§122.26(d)(2)(vi)** [The application must include] 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

covered by the permit (5 years, in most cases). The analysis must describe the source of the funds used to meet the necessary expenditures, including any legal restrictions on the appropriated funds

The following procedure is an example of a method of conducting the necessary fiscal analysis

Step 1. Identify the major tasks for each component covered by this application requirement, including

- Elements of the proposed management program,
- Estimates of seasonal loads and event mean concentrations for each major outfall covered by the permit, and
- Proposed monitoring program.

Step 2. Develop a schedule outlining when each of the tasks identified in Step 1 will be undertaken Some tasks may be performed just once, others may be on-going For example, the schedule should include, among other things·

- The installation of any new control measures identified in the proposed

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management program [§122 26(d)(2)(iv), discussed in Section 6 4],

- A maintenance schedule for structural best management practices (BMPs) [§122 26(d)(2)(iv)(A)(1), discussed in Section 6 4.3];

- Development of seasonal pollutant loadings and event mean concentrations of a representative storm [§122.26(d)(2)(iii)(C), discussed in Section 5.5];

- Monitoring program for representative data collection for the term of the permit [§122.26(d)(2)(iii)(D), discussed in Section 5 6],

- Monitoring program for industrial facilities [§122 26(d)(2)(iv)(C)(2), discussed in Section 6.3.3];

- On-going field screening program for illicit discharges [§122.26(d)(2)(iv)(B), discussed in Section 6 5],

- Development of certification programs for construction workers or pesticide applicators, if appropriate [§122 26(d)(2)(iv), discussed in Sections 6.3.1 and 6 3 2], and

- Implementation schedules for other components of the storm water application that have not been fully implemented at the time of application, such as additional legal authority or comprehensive development plans

Step 3. Estimate the capital expenses necessary to accomplish the tasks identified in Step 1 and determine a schedule for purchase Applicants may elect to define categories of capital expenditures such as "monitoring equipment," "miscellaneous monitoring supplies," "personal protective equipment," etc

Step 4. Estimate other non-capital costs to implement the tasks identified in Step 1. Use the schedule developed in Step 2 to spread costs over the term of the permit Costs should be presented as a total annual cost for each proposed program component In addition, estimates of the total annual costs and annual per capita costs should be provided. Per capita costs can be compared with the per capita costs of other programs, such as sewage treatment programs.

These costs may include items such as :

- Newspaper ads announcing new programs or recycling centers;

- Holding public meetings or hearings, and

- Labor for department personnel to speak to citizens groups

Step 5. Identify funding to be applied. Applicants must describe the sources of funding and any legal restrictions on that funding Sources may include general revenues, storm water utilities, plan review fees, permit fees, industrial/commercial user fees, special assessment district funds, and revenue bonds Some funding sources, such as general revenues based on property taxes, are generally unrestricted, but can be allocated by local officials annually In a few cases, a local property tax may be dedicated to finance a storm water management program For example, one county finances its storm water management program through a dedicated property tax of $0.135 per $100 assessed valuation Other municipalities add special assessments to property tax bills.

A storm water utility is another source of funding dedicated to financing storm water management activities The storm water utility offers the advantage of a stable and predictable source of funds. Other advantages of storm water utilities over general revenues are that utility charges can be more equitably based on

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the user's contribution to local storm water problems, and a utility provides a mechanism to incorporate incentives for on-site storm water management

In many cases, municipalities will evaluate sources of funds that are not currently available, such as a new storm water utility. In these cases, applicants must include a schedule of when funds will be available. For example, it usually takes a municipality 18 to 24 months of planning before local elected officials authorize a storm water utility, and another 6 to 12 months to implement the utility (Lindsey, 1988) Key milestones for planning and implementing the funding mechanism must be identified in the schedule The following components have been found to be important in establishing storm water utilities

- Determining the most appropriate administrative structure for implementing a storm water management program,
- Adopting a storm water utility ordinance,
- Estimating revenue needs and planning for cost recovery,
- Establishing a utility rate structure and billing system,
- Establishing a system for developer contributions, and
- Implementing a public information program

Step 6. Compare the funding sources with the funding needs. As a last step in this process, the municipality must ensure that adequate funding is available to cover the cost of implementing the storm water management program If adequate funding is not available, the municipality must consider alternate sources of funding such as a storm water utility

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APPENDIX A:
BIBLIOGRAPHY

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* For additional sources of information, applicants may wish to consult the documents listed in the bibliography of Urban Drainage & Flood Control District, *Urban Storm Drainage Criteria Manual, Vol III*, Urban Drainage and Flood Control District, Denver CO September 1, 1992

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APPENDIX B:
PART 2 APPLICATION REQUIREMENTS

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certify, pursuant to 5 U S.C 605(b) that these amendments do not, have a significant impact on a substantial number of small entities.

List of Subjects in 40 CFR Parts 122, 123, and 124

Administrative practice and procedure Environmental protection. Reporting and recordkeeping requirements, Water pollution control

Authority: Clean Water Act, 33 U S C 1251 *et seq*

Dated October 31, 1990

William K. Reilly,

Administrator

For the reasons stated in the preamble, parts 122, 123, and 124 of title 40 of the Code of Federal Regulations are amended as follows

PART 122—EPA ADMINISTERED PERMIT PROGRAMS; THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

Subpart B—Permit Application and Special NPDES Program Requirements

1 The authority citation for part 122 continues to read as follows

Authority Clean Water Act 33 U S C 1251 *et seq*

2 Section 122 1 is amended by revising paragraph (b)(2)(iv) to read as follows

§ 122.1 Purpose and scope

* * * * *

(b) * * *

(2) * * *

(iv) Discharges of storm water as set forth in § 122 26, and

* * * * *

3 Section 122 21 is amended by revising paragraph (c)(1) by removing the last sentence of paragraph (f)(7), by removing paragraph (f)(9) by adding two sentences at the end of paragraph (g)(3) by revising paragraph (g)(7) introductory text by removing and reserving paragraph (g)(10) and by revising the introductory text of paragraph (k) to read as follows

§ 122 21 Application for a permit (applicable to State programs, see § 123 25)

* * * * *

(c) *Time to apply* (1) Any person proposing a new discharge, shall submit an application at least 180 days before the date on which the discharge is to commence unless permission for a later date has been granted by the Director Facilities proposing a new discharge of storm water associated with industrial activity shall submit an application 180 days before that facility commences industrial activity which may result in a discharge of storm water associated with that industrial activity Facilities described under § 122.26(b)(14)(x) shall submit applications at least 90 days before the date on which construction is to commence. Different submittal dates may be required under the terms of applicable general permits Persons proposing a new discharge are encouraged to submit their applications well in advance of the 90 or 180 day requirements to avoid delay. See also paragraph (k) of this section and § 122.26 (c)(1)(i)(G) and (c)(1)(ii).

* * * * *

(g) * * *

(3) * * * The average flow of point sources composed of storm water may be estimated. The basis for the rainfall event and the method of estimation must be indicated.

* * * * *

(7) *Effluent characteristics.* Information on the discharge of pollutants specified in this paragraph (except information on storm water discharges which is to be provided as specified in § 122 26) When "quantitative data" for a pollutant are required, the applicant must collect a sample of effluent and analyze it for the pollutant in accordance with analytical methods approved under 40 CFR part 136 When no analytical method is approved the applicant may use any suitable method but must provide a description of the method When an applicant has two or more outfalls with substantially identical effluents the Director may allow the applicant to test only one outfall and report that the quantitative data also apply to the substantially identical outfalls The requirements in paragraphs (g)(7) (iii) and (iv) of this section that an applicant must provide quantitative data for certain pollutants known or believed to be present do not apply to pollutants present in a discharge solely as the result of their presence in intake water, however, an applicant must report such pollutants as present Grab samples must be used for pH, temperature, cyanide total phenols, residual chlorine, oil and grease, fecal coliform and fecal streptococcus For all other pollutants 24-hour composite samples must be used However, a minimum of one grab sample may be taken for effluents from holding ponds or other impoundments with a retention period greater than 24 hours In addition, for discharges other than storm water discharges, the Director may waive composite sampling for any outfall for which the applicant demonstrates that the use of an automatic sampler is infeasible and that the minimum of four (4) grab samples will be a representative sample of the effluent being discharged For storm water discharges, all samples shall be collected from the discharge resulting from a storm event that is greater than 0 1 inch and at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event Where feasible, the variance in the duration of the event and the total rainfall of the event should not exceed 50 percent from the average or median rainfall event in that area For all applicants, a flow-weighted composite shall be taken for either the entire discharge or for the first three hours of the discharge. The flow-weighted composite sample for a storm water discharge may be taken with a continuous sampler or as a combination of a minimum of three sample aliquots taken in each hour of discharge for the entire discharge or for the first three hours of the discharge, with each aliquot being separated by a minimum period of fifteen minutes (applicants submitting permit applications for storm water discharges under § 122 26(d) may collect flow weighted composite samples using different protocols with respect to the time duration between the collection of sample aliquots, subject to the approval of the Director) However, a minimum of one grab sample may be taken for storm water discharges from holding ponds or other impoundments with a retention period greater than 24 hours For a flow-weighted composite sample, only one analysis of the composite of aliquots is required For storm water discharge samples taken from discharges associated with industrial activities, quantitative data must be reported for the grab sample taken during the first thirty minutes (or as soon thereafter as practicable) of the discharge for all pollutants specified in § 122 26(c)(1) For all storm water permit applicants taking flow-weighted composites quantitative data must be reported for all pollutants specified in § 122 26 except pH temperature, cyanide total phenols residual chlorine, oil and grease fecal coliform, and fecal streptococcus, The Director may allow or establish appropriate site-specific sampling procedures or requirements including sampling locations, the season in which the sampling takes place the minimum duration between the previous measurable storm event and the storm event sampled the minimum or maximum level of precipitation required for an appropriate storm event, the form of precipitation sampled (snow melt or rain fall) protocols for collecting samples under 40 CFR part 136 and additional time for submitting data on a

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case-by-case basis. An applicant is expected to "know or have reason to believe" that a pollutant is present in an effluent based on an evaluation of the expected use, production, or storage of the pollutant, or on any previous analyses for the pollutant. (For example, any pesticide manufactured by a facility may be expected to be present in contaminated storm water runoff from the facility.)

• • • • •

(k) *Application requirements for new sources and new discharges.* New manufacturing, commercial, mining and silvicultural dischargers applying for NPDES permits (except for new discharges of facilities subject to the requirements of paragraph (h) of this section or new discharges of storm water associated with industrial activity which are subject to the requirements of § 122.26(c)(1) and this section (except as provided by § 122.26(c)(1)(ii)) shall provide the following information to the Director, using the application forms provided by the Director:

• • • • •

4 Section 122 22(b) introductory text is revised to read as follows

§ 122.22 Signatories to permit applications and reports (applicable to State programs, see § 123.25).

• • • • •

(b) All reports required by permits, and other information requested by the Director shall be signed by a person described in paragraph (a) of this section, or by a duly authorized representative of that person A person is a duly authorized representative only if

• • • • •

5 Section 122.26 is revised to read as follows

§ 122 26 Storm water discharges (applicable to State NPDES programs, see § 123.25)

(a) *Permit requirement* (1) Prior to October 1, 1992, 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 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 that has not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.

(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 ab lity 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 medium 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

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(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.].

(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 latest Decennial Census by the Bureau of Census (appendix F); 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 th 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 discharge 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 latest Decennial Census by the Bureau of Census (appendix G), 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)(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) o- (ii) of this section In making this determination the Director may cons the following factors

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(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 which is used for collecting and conveying storm water and which 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 40 CFR part 122. For the categories of industries identified in paragraphs (b)(14) (i) through (x) of 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 40 CFR part 401); 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 finished products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water For the categories of industries identified in paragraph (b)(14)(xi) of this section, the term includes only storm water discharges from all the areas (except access roads and rail lines) that are listed in the previous sentence where material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery are exposed to storm water. For the purposes of this paragraph, material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, finished 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 this paragraph (b)(14)(i)–(xi) of this section) include those facilities designated under the provisions of paragraph (a)(1)(v) of this section. The following categories of facilities are considered to be engaging in "industrial activity" for purposes of this subsection.

(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

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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 activities except operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale.

(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, 4221–25, (and which are not otherwise included within categories (ii)–(x)).

(c) *Application requirements for storm water discharges associated with industrial activity*—(1) *Individual application.* Dischargers of storm water associated with industrial activity are required to apply for an individual permit, apply for a permit through a group application, 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* 40 CFR 124.52(c)) under paragraph (a)(1)(v) of this section and is not a municipal separate storm sewer, and which is not part of a group application described under paragraph (c)(2) of this section, shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of the remainder of this paragraph. Applicants for discharges composed entirely of storm water shall submit Form 1 and Form 2F. Applicants for discharges composed of storm water and non-storm water shall submit Form 1, Form 2C, and Form 2F. Applicants for new sources or new discharges (as defined in § 122.2 of this part) composed of storm water and non-storm water shall submit Form 1, Form 2D, and Form 2F.

(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 non-structural 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 discharges required under paragraph § 122.21(g)(7)(iii) and (iv) of this part;

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(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)(i), (g)(7)(ii), and (g)(7)(v); 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) The operator of an existing or new storm water discharge that is associated with industrial activity solely under paragraph (b)(14)(x) 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 ope ations have been completed, incl ding 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)(iii) of this section to comply with paragraph (c)(1)(i) of this section

(2) *Group application for discharges associated with industrial activity* In lieu of individual applications or notice of intent to be covered by a general permit for storm water discharges associated with industrial activity, a group application may be filed by an entity representing a group of applicants (except facilities that have existing individual NPDES permits for storm water) that are part of the same subcategory (*see* 40 CFR subchapter N, part 405 to 471) or, where such grouping is inapplicable, are sufficiently similar as to be appropriate for general permit coverage under § 122 28 of this part The part 1 application shall be submitted to the Office of Water Enforcement and Permits, U.S EPA, 401 M Street, SW., Washington, DC 20460 (EN-336) for approval Once a part 1 application is approved, group applicants are to submit Part 2 of the group application to the Office of Water Enforcement and Permits. A group application shall consist of·

(i) *Part 1* Part 1 of a group application shall:

(A) Identify the participants in the group application by name and location. Facilities participating in the group application shall be listed in nine subdivisions, based on the facility location relative to the nine precipitation zones indicated in appendix E to this part.

(B) Include a narrative description summarizing the industrial activities of participants of the group application and explaining why the participants, as a whole, are sufficiently similar to be a covered by a general permit

(C) Include a list of significant materials stored exposed to precipitation by participants in the group application and materials management practices employed to diminish contact by these materials with precipitation and storm water runoff,

(D) Identify ten percent of the dischargers participating in the group application (with a minimum of 10 dischargers, and either a minimum of two dischargers from each precipitation zone indicated in appendix E of this part in which ten or more members of the group are located, or one discharger from each precipitation zone indicated in appendix E of this part in which nine or fewer members of the group are located) from which quantitative data will be submitted in part 2. If more than 1,000 facilities are identified in a group application, no more than 100 dischargers must submit quantitative data in Part 2 Groups of between four and ten dischargers may be formed However, in groups of between four and ten, at least half the facilities must submit quantitative data and at least one facility in each precipitation zone in which members of the group are located must submit data A description of why the facilities selected to perform sampling and analysis are representative of the group as a whole in terms of the information provided in paragraph (c)(1) (i)(B) and (i)(C) of this section, shall accompany this section Different factors impacting the nature of the storm water discharges such as processes used and material management shall be represented to the extent feasible in a manner roughly equivalent to their proportion in the group

(ii) *Part 2* Part 2 of a group application shall contain quantitative

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data (NPDES Form 2F), as modified by paragraph (c)(1) of this section, so that when part 1 and part 2 of the group application are taken together, a complete NPDES application (Form 1, Form 2C, and Form 2F) can be evaluated for each discharger identified in paragraph (c)(2)(i)(D) of this section.

(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 sewer 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 fie screening analysis for illicit connect and illegal dumping for either selecte 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 surfactants) 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 t Field screening points shall be either major outfalls or other outfall points (or

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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 ¼ mile apart shall be overlayed 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 ¼ 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 undertaken 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)(a)(ii)(A)(*3*) of this paragraph, the applicant must collect a sample of effluent in accordance with 40 CFR 122.21(g)(7) and analyze it for the pollutant in accordance with analytical methods approved under 40 CFR part 136. 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

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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 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.

(*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

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(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-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 40 CFR 122.21(g)(7) (iii) and (iv)

(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 nonstructural 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 requirements. 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 paragraph (a)(1) of this section that does not have an effective NPDES permit covering its storm water outfalls shall submit an application in accordance with the following deadlines

(1) For any storm water discharge associated with industrial activity identified in paragraph (b)(14) (i)–(xi) of this section, that is not part of a group application as described in paragraph (c)(2) of this section or which is not covered under a promulgated storm water general permit, a permit application made pursuant to paragraph (c) of this section shall be submitted to the Director by November 18, 1991.

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(2) For any group application submitted in accordance with paragraph (c)(2) of this section:

(i) Part 1 of the application shall be submitted to the Director, Office of Water Enforcement and Permits by March 18, 1991;

(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 of the application shall be submitted to the Director, Office of Water Enforcement and Permits no later than 12 months after the date of approval of the part 1 application.

(iv) Facilities that are rejected as members of a group by the permitting authority shall have 12 months to file an individual permit application from the date they receive notification of their rejection

(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 60 days of notice, unless permission for a later date is granted by the Director (*see* 40 CFR 124.52(c)), for:

(i) A storm water discharge which 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 paragraph (a)(1)(v) 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. New applications shall be submitted in accordance with the requirements of 40 CFR 122.21 and 40 CFR 122.26(c) 180 days before the expiration of such permits. Facilities with expired permits or permits due to expire before May 18, 1992, shall submit applications in accordance with the deadline set forth under paragraph (c)(1) of this section.

(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 violation 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 or medium municipal separate storm sewer system as defined by paragraphs (b)(4)(iv) or (b)(7)(iv) 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.

6. Section 122.28(b)(2)(i) is revised to read as follows:

§ 122.28 General permits (applicable to State NPDES programs, see § 123.25).

* * * * *

(b) * * *

(2) *Requiring an individual permit.* (i) The Director may require any discharger authorized by a general permit to apply for and obtain an individual NPDES permit. Any interested person may petition the Director to take action under this paragraph. Cases where an individual NPDES permit may be required include the following:

(A) The discharger or "treatment works treating domestic sewage" is not in compliance with the conditions of the general NPDES permit,

(B) A change has occurred in the availability of demonstrated techno or practices for the control or abate of pollutants applicable to the point source or treatment works treating domestic sewage.

(C) Effluent limitation guidelines are promulgated for point sources covered by the general NPDES permit,

(D) A Water Quality Management plan containing requirements applicable to such point sources is approved,

(E) Circumstances have changed since the time of the request to be covered so that the discharger is no longer appropriately controlled under the general permit, or either a temporary or permanent reduction or elimination of the authorized discharge is necessary;

(F) Standards for sewage sludge use or disposal have been promulgated for the sludge use and disposal practice covered by the general NPDES permit, or

(G) The discharge(s) is a significant contributor of pollutants. In making this determination, the Director may consider the following factors:

(*1*) The location of the discharge with respect to waters of the United States,

(*2*) The size of the discharge;

(*3*) The quantity and nature of the pollutants discharged to waters of the United States, and

(*4*) Other relevant factors.

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7. Section 122.42 is amended by adding paragraph (c) to read as follows.

§ 122.42 Additional conditions applicable to specified categories of NPDES permits (applicable to State NPDES programs, see § 123.25).

* * * * *

(c) *Municipal separate storm sewer systems.* The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director under § 122.26(a)(1)(v) of this part must submit an annual report by the 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;

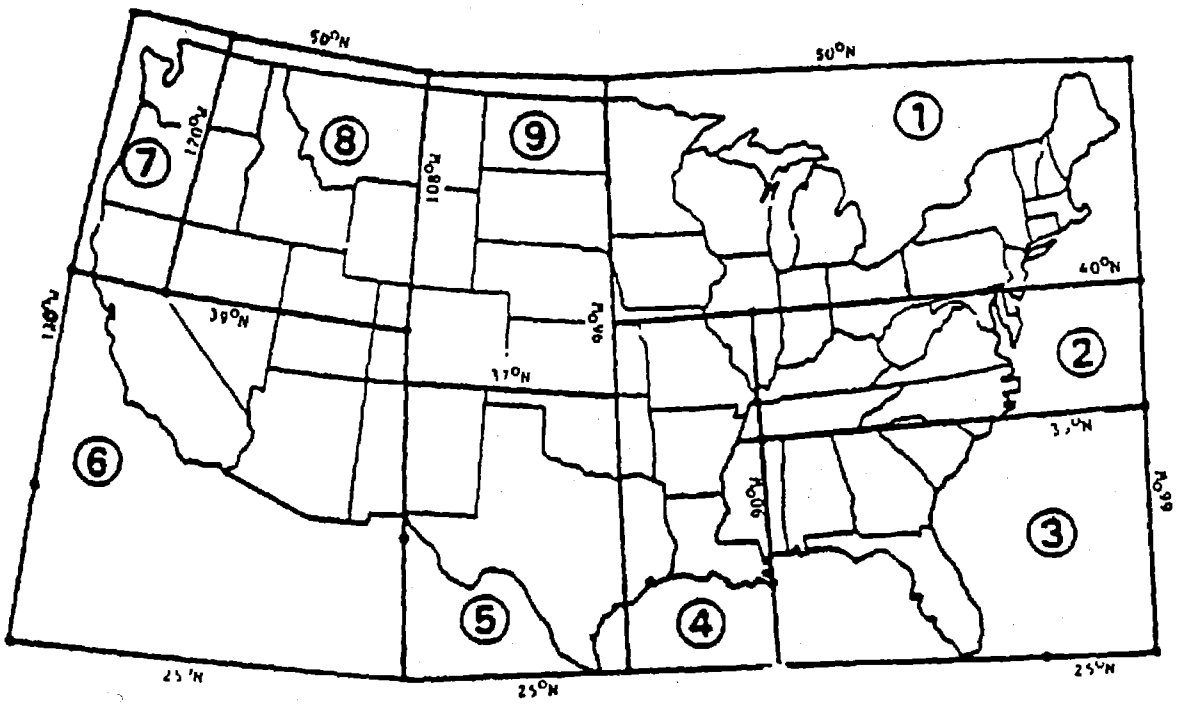
(5) Annual expenditures and budget for year following each annual report;

(6) A summary describing the number and nature of enforcement actions, inspections, and public education programs;

(7) Identification of water quality improvements or degradation;

7a. Part 122 is amended by adding appendices E through I as follows:

Appendix E to Part 122—Rainfall Zones of the United States



Not Shown: Alaska (Zone 7), Hawaii (Zone 7), Northern Mariana Islands (Zone 7), Guam (Zone 7), American Samoa (Zone 7), Trust Territory of the Pacific Islands (Zone 7), Puerto Rico (Zone 3), Virgin Islands (Zone 3).

Source: Methodology for Analysis of Detention Basins for Control of Urban Runoff Quality, prepared for U.S. Environmental Protection Agency, Office of Water, Nonpoint Source Division, Washington, DC, 1986.

Appendix F to Part 122—Incorporated Places With Populations Greater Than 250,000 According to Latest Decennial Census by Bureau of Census.

State	Incorporated place
Alabama	Birmingham.
Arizona	Phoenix.
	Tucson.
California	Long Beach.
	Los Angeles.
	Oakland.
	Sacramento.
	San Diego.
	San Francisco.
	San Jose.
Colorado	Denver.
District of Columbia	
Florida	Jacksonville.
	Miami.
	Tampa.
Georgia	Atlanta.
Illinois	Chicago.
Indiana	Indianapolis.
Kansas	Wichita.
Kentucky	Louisville.
Louisiana	New Orleans.
Maryland	Baltimore.
Massachusetts	Boston.
Michigan	Detroit.
Minnesota	Minneapolis.
	St. Paul.

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State	Incorporated place
Missouri	Kansas City
	St. Louis.
Nebraska	Omaha.
New Jersey	Newark.
New Mexico	Albuquerque
New York	Buffalo.
	Bronx Borough.
	Brooklyn Borough.
	Manhattan Borough.
	Queens Borough.
	Staten Island Borough
North Carolina	Charlotte
Ohio	Cincinnati
	Cleveland.
	Columbus.
	Toledo
Oklahoma	Oklahoma City
	Tulsa.
Oregon	Portland.
Pennsylvania	Philadelphia
	Pittsburgh
Tennessee	Memphis.
	Nashville/Davidson.
Texas	Austin.
	Dallas
	El Paso
	Fort Worth
	Houston.
	San Antonio
Virginia	Norfolk.
	Virginia Beach
Washington	Seattle.
Wisconsin	Milwaukee

Appendix G to Part 122—Incorporated Places With Populations Greater Than 100,000 and Less Than 250,000 According to Latest Decennial Census by Bureau of Census

State	Incorporated place
Alabama	Huntsville
	Mobile
	Montgomery
Alaska	Anchorage
Arizona	Mesa
	Tempe
Arkansas	Little Rock
California	Anaheim
	Bakersfield
	Berkeley
	Concord
	Fremont
	Fresno
	Fullerton
	Garden Grove
	Glendale
	Huntington Beach
	Modesto
	Oxnard
	Pasadena
	Riverside
	San Bernadino
	Santa Ana
	Stockton
	Sunnyvale
	Torrance
Colorado	Aurora
	Colorado Springs
	Lakewood
	Pueblo
Connecticut	Bridgeport
	Hartford
	New Haven
	Stamford
	Waterbury
Florida	Fort Lauderdale
	Hialeah
	Hollywood
	Orlando
	St. Petersburg
Georgia	Columbus
	Macon
	Savannah
Idaho	Boise City
Illinois	Peoria
	Rockford
Indiana	Evansville
	Fort Wayne
	Gary
	South Bend
Iowa	Cedar Rapids
	Davenport
	Des Moines
Kansas	Kansas City
	Topeka
Kentucky	Lexington-Fayette
Louisiana	Baton Rouge
	Shreveport
Massachusetts	Springfield
	Worcester
Michigan	Ann Arbor
	Flint
	Grand Rapids
	Lansing
	Livonia
	Sterling Heights
	Warren
Mississippi	Jackson
Missouri	Independence
	Springfield
Nebraska	Lincoln
Nevada	Las Vegas
	Reno
New Jersey	Elizabeth
	Jersey City
	Paterson
New York	Albany
	Rochester
	Syracuse
	Yonkers
North Carolina	Durham
	Greensboro
	Raleigh
	Winston-Salem
Ohio	Akron
	Dayton
	Youngstown
Oregon	Eugene
Pennsylvania	Allentown
	Erie
Rhode Island	Providence
South Carolina	Columbia
Tennessee	Chattanooga
	Knoxville
Texas	Amarillo
	Arlington
	Beaumont
	Corpus Christi
	Garland
	Irving
	Lubbock
	Pasadena
	Waco
Utah	Salt Lake City
Virginia	Alexandria
	Chesapeake
	Hampton
	Newport News
	Portsmouth
	Richmond
	Roanoke
Washington	Spokane
	Tacoma
Wisconsin	Madison

Appendix H to Part 122—Counties with Unincorporated Urbanized Areas With a *Population of 250,000 or More According* to the Latest Decennial Census by the Bureau of Census

State	County	Unincorporated urbanized population
California	Los Angeles	812,884
	Sacramento	449,856
	San Diego	304,758
Delaware	New Castle	257,184
Florida	Dade	781,949
Georgia	DeKalb	386,379
Hawaii	Honolulu	688,178
Maryland	Anne Arundel	271,458
	Baltimore	801,308
	Montgomery	447,993
	Prince George's	450,188
Texas	Harris	409,801
Utah	Salt Lake	304,832
Virginia	Fairfax	527,178
Washington	King	336,800

Appendix I to Part 122—Counties With Unincorporated Urbanized Areas Greater Than 100,000, But Less Than 250,000 According to the Latest Decennial Census by the Bureau of Census

State	County	Unincorporated urbanized population
Alabama	Jefferson	102,917
Arizona	Pima	111,479
California	Alameda	167,474
	Contra Costa	158,452
	Kern	117,231
	Orange	210,693
	Riverside	115,719
	San Bernardino	148,644
Florida	Broward	150,370
	Escambia	147,892
	Hillsborough	238,292
	Orange	245,325
	Palm Beach	167,089
	Pinellas	194,389
	Polk	104,150
	Sarasota	110,009
Georgia	Clayton	100,742
	Cobb	204,121
	Richmond	118,529
Kentucky	Jefferson	224,958
Louisiana	Jefferson	140,836
North Carolina	Cumberland	142,727
Nevada	Clark	201,775
Oregon	Multnomah	141,100
	Washington	109,348
South Carolina	Greenville	135,396
	Richland	124,684
Virginia	Arlington	152,599
	Henrico	161,204
	Chesterfield	108,348
Washington	Snohomish	103,493
	Pierce	186,113

PART 123—STATE PROGRAM REQUIREMENTS

8 The authority citation for part 123 continues to read as follows

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Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

9. Section 123.25 is amended by revising paragraph (a)(9) to read as follows:

§ 123.25 Requirements for permitting.

(a) * * *

(9) § 122.26—(Storm water discharges);

* * * * * *

PART 124—PROCEDURES FOR DECISIONMAKING

10. The authority citation for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*, Clean Water Act, 33 U.S.C. 1251 *et seq.*; and Clean Air Act, 42 U.S.C. 1857 *et seq.*

11. Section 124.52 is revised to read as follows.

§ 124.52 Permits required on a case-by-case basis.

(a) Various sections of part 122, subpart B allow the Director to determine, on a case-by-case basis, that certain concentrated animal feeding operations (§ 122.23), concentrated aquatic animal production facilities (§ 122.24), storm water discharges (§ 122.26), and certain other facilities covered by general permits (§ 122.28) that do not generally require an individual permit may be required to obtain an individual permit because of their contributions to water pollution.

(b) Whenever the Regional Administrator decides that an individual permit is required under this section, except as provided in paragraph (c) of this section, the Regional Administrator shall notify the discharger in writing of that decision and the reasons for it, and shall send an application form with the notice. The discharger must apply for a permit under § 122.21 within 60 days of notice, unless permission for a later date is granted by the Regional Administrator. The question whether the designation was proper will remain open for consideration during the public comment period under § 124.11 or § 124.118 and in any subsequent hearing

(c) Prior to a case-by-case determination that an individual permit is required for a storm water discharge under this section (*see* 40 CFR 122.26 (a)(1)(v) and (c)(1)(v)), the Regional Administrator may require the discharger to submit a permit application or other information regarding the discharge under section 308 of the CWA. In requiring such information, the Regional Administrator shall notify the discharger in writing and shall send an application form with the notice. The discharger must apply for a permit under § 122.26 within 60 days of notice, unless permission for a later date is granted by the Regional Administrator. The question whether the initial designation was proper will remain open for consideration during the public comment period under § 124.11 or § 124.118 and in any subsequent hearing

Note: The following form will not appear in the Code of Federal Regulations

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APPENDIX C: ADEQUATE LEGAL AUTHORITY

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contrivance for the elumination or destruction of human waste, within those portions of the watershed of the city contiguous to the intake of the city's water supply, as hereinafter described, or by placing any foul or putrescible substance, whether solid or liquid, and whether the same be buried or not, within the limits of the portion of the watershed so described.

Sec. 49-6. Application for permit.

(a) Any person who desires to use or develop any vegetated wetland and on and after January 1, 1983, any nonvegetated wetland, within this city, other than for those activities specified in section 49-3 above, shall first file an application for a permit with the wetlands board.

Sec. 49-22. Application for permit.

(a) Any person who desires to use or alter any coastal primary sand dune within this city, other than for those activities specified in section 49-20 above, shall first file an application for a permit with the wetlands board.

1.6 Authority to Meet Part 2 Permit Requirements

The NPDES stormwater permit application regulations require an assessment of whether existing legal authority is sufficient to meet the criteria for Part 2 of the permit application provided in *40 CFR 122.26(d)(2)(i)* as follows:

40 CFR 122.26(d)(2)(i)

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 system 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;

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(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 order; 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.

The City Code sections identified above are referenced in an assessment of the individual Part 2 legal authority criteria.

(A) Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer system by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity. Section 39.1-19 of the City Code prohibits the discharge of sanitary sewer flow to the storm sewer system. Section 39.2-5 of the City Code prohibits the discharge of any sewage from a private sewage disposal facility on any public or private property in the City. Section 41.1-4 of the City Code prohibits pollutants to be discharged to the storm sewer system including the discharge of industrial process water, wash water, or other unpermitted industrial discharges in Section 41.1-4(c). Section 41.1-5 of the City Code provides the City with authority to order the correction of drainage problems on any site in the City. Sections 9-10, 30-69, 41-16, and 41-17 of the City Code prohibit pollution of waters of the City and littering. Sections 42-20.1 and 42-20.2 of the City Code prohibit the obstruction of drains or drainage areas. Sections 42-24, 42-25, and 42-46 of the City Code establish regulations for protecting the City from spills or deposits of liquid wastes. Section 46-28 of the City Code prohibits pollution of the City's water supply.

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For development or redevelopment of industrial sites, the City's Zoning Ordinance establishes lot size, yard size, and maximum lot coverage requirements for industrial activity. Chapter 15 of the City Code establishes erosion and sedimentation control regulations If development or redevelopment of industrial sites occurs within a Chesapeake Bay Preservation Area, Section 494 of the City's Zoning Ordinance and Chapter 32.2 of the City Code establish stringent criteria for stormwater management, protection of water quality, and use of Best Management Practices. Chapter 49 of the City Code protects development within wetlands or coastal primary sand dunes by requiring a permit application with the wetlands board.

Enforcement provisions and penalties for violations of the referenced sections of City Code are also provided in specific chapters. Chapter 27 of the City Code provides additional authority for the abatement of nuisances.

(B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer. Section 39.1-19 of the City Code prohibits the discharge of sanitary sewer flow to the storm sewer system. Section 39.2-5 of the City Code prohibits the discharge of any sewage from a private sewage disposal facility on any public or private property in the City. Section 41.1-4 of the City Code prohibits pollutants to be discharged to the storm sewer system. Section 41.1-5 of the City Code provides the City with authority to order the correction of drainage problems on any site in the City. Sections 9-10, 30-69, 41-16, and 41-17 of the City Code prohibit pollution of waters of the City and littering. Sections 42-20.1 and 42-20.2 of the City Code prohibit the obstruction of drains or drainage areas. Sections 42-24, 42-25, and 42-46 of the City Code establish regulations for protecting the City from spills or deposits of liquid wastes. Section 46-28 of the City Code prohibits pollution of the City's water supply.

Enforcement provisions and penalties for violations of the referenced sections of City Code are also provided in specific chapters. Chapter 27 of the City Code provides additional authority for the abatement of nuisances.

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(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. Section 39.1-19 of the City Code prohibits the discharge of sanitary sewer flow to the storm sewer system. Section 39.2-5 of the City Code prohibits the discharge of any sewage from a private sewage disposal facility on any public or private property in the City. Section 41.1-4 of the City Code prohibits pollutants to be discharged to the storm sewer system. Sections 9-10, 30-69, 41-16, and 41-17 of the City Code prohibit pollution of waters of the City and littering. Sections 42-24, 42-25, and 42-46 of the City Code establish regulations for protecting the City from spills or deposits of liquid wastes. Section 46-28 of the City Code prohibits pollution of the City's water supply.

Enforcement provisions and penalties for violations of the referenced sections of City Code are also provided in specific chapters. Chapter 27 of the City Code provides additional authority for the abatement of nuisances.

(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. The City of Norfolk owns the entire separate storm water system and is an individual NPDES permit applicant.

The City of Norfolk relies on its In-Town Reservoir System as a vital part of the water supply system. To protect water quality within the In-Town Reservoir System, the City of Norfolk will seek an intermunicipal agreement with the City of Virginia Beach to control nonpoint source pollution for the areas of the In-Town Reservoir System bordering and located within the jurisdiction of the City of Virginia Beach. After approval of Part 1 of the application by the EPA, the City of Norfolk will meet with the City of Virginia Beach to discuss the development of an agreement before submittal of Part 2 of the application on November 16, 1992.

(E) Require compliance with conditions in ordinances, permits, contracts or order. Enforcement provisions and penalties for violations of the referenced sections of City Code are provided in specific chapters. Chapter 27 of the City Codes provides additional authority for the abatement of nuisances.

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(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. Chapter 41.1, entitled "Storm Water Management", provides authority for the City's Director of Public Works to establish procedures and enforce regulations pertaining to the storm water system in Section 41.1-3. Authority to prohibit and inspect for illicit connections to the storm sewer system is provided to the Department of City Planning and Codes Administration in Section 39.1-19. Authority to enforce violations of private sewage disposal regulations is provided to the Department of Health in Section 39.2-1 of the City Code. For development and redevelopment, the Department of City Planning and Codes Administration has authority over erosion and sediment control plans, the site review process, and stormwater management regulations required for activity within the Chesapeake Bay Preservation Area. Additional authority for enforcement of erosion and sediment control regulations and stormwater management is being established for the Department of Public Works in an ordinance currently under review by the state. Authority to enforce regulations and permits of the City's Tree Ordinance is provided in Section 30-23 of the City Code

1.7 Legal Authority Overview

Overall, the City of Norfolk has the existing legal authority, or is in the process of modifying existing City Code with ordinances, to control discharges to the municipal storm sewer system and meet the legal authority requirements of *40 CFR 122 26(d)(2)(i)*.

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EXHIBIT "2"

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of CITIZENS FOR A BETTER ENVIRONMENT, SAVE SAN FRANCISCO BAY ASSOCIATION, AND SANTA CLARA VALLEY AUDUBON SOCIETY For Review of Waste Discharge Requirements Order No. 90-094 of the California Regional Water Quality Control Board, San Francisco Bay Region. Our File No. A-695.	**ORDER NO. WQ 91-03**

BY THE BOARD:

On July 23, 1990, the State Water Resources Control Board (State Board) received a petition from Citizens for a Better Environment, Save San Francisco Bay Association and Santa Clara Valley Audubon Society (petitioners). The petition sought review of waste discharge requirements adopted by the Regional Water Quality Control Board, San Francisco Bay Region (Regional Board) in Order No. 90-094, regulating discharges of storm water[1] from municipal separate storm sewers throughout the Santa Clara Valley. The storm drains discharge to creeks and streams which are tributary to South San Francisco Bay (South Bay).

The issues raised in the petition are complex, and concern two major federal regulatory programs--storm water

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1 There are variant spellings of "storm water" and "stormwater" found in the relevant statutes, regulations, and case law. We will adopt "storm water", but quoted materials using "stormwater" will also appear in this Order.

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regulation and regulation of water bodies which do not attain water quality standards. Given the complexity of these issues, we will review the background and requirements of these programs, and the application of these programs to municipal storm water discharges throughout the Santa Clara Valley.

We note that the Regional Water Quality Control Board, Los Angeles Region, issued a separate permit regulating storm water discharges from municipalities in the Los Angeles area, which we have also reviewed. Order No. WQ 91-04, which is also being issued today, explores many of the same issues as this Order. In preparing this Order, we have reviewed the documents submitted by persons interested in the Los Angeles petition.

I. BACKGROUND

A. The Need for a Storm Water Regulatory Program

Through the natural hydrologic cycle, precipitation condenses from clouds and falls on land surfaces where it disperses in several ways. Water may be temporarily captured in the soil so plants may use and then transpire it. Rain or snowfall may also quickly evaporate or may infiltrate the surface soil to replenish ground water. Rain water and snow melt flow over land areas and replenish creeks, streams, rivers and lakes. But this runoff accumulates a variety of pollutants including minerals, nutrients, bacteria, suspended material, heavy metals and debris as it flows through the natural environment. Surface runoff also becomes degraded as plants and animals use it. Though gravitational flow eventually returns water to the ocean

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and evaporation again transforms this water on a broad scale, the accumulation of pollutants in runoff water may substantially diminish water quality in a microcosm and thereby alter the balance of important natural cycles.

In addition to the pollutants which accumulate in storm water runoff, pollutants also enter surface waters during dry weather through storm drain systems. Pollutants may be transported by wet weather flows or even by direct discharge to the storm drains, and later released to surface waters, even during times when there is no rainfall or snow melt. Examples of these dry-weather pollutant discharges include water line flushing, landscape irrigation, diverted stream flows, rising ground waters, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, and individual residential car washing.

While there is some confusion in the terminology which is used in the regulatory documents, the former type of discharge, which occurs as a direct result of storm events, is usually referred to as "storm water discharge," while the latter form of dry weather discharge is referred to as "urban runoff." Together, we shall most commonly refer to the phenomenon as "storm water discharge."[2] Storm water discharges may be significant contributors of pollutants to surface waters.

2 In regulations, the Environmental Protection Agency (EPA) adopted recently, "storm water" is defined as "storm water runoff, snow melt runoff, and surface runoff and drainage". 40 CFR Section 122.26(a)(13). While "storm water" thus includes urban runoff, it must be noted that discharges which are not composed of "storm water" (such as illicit discharges to the municipal system from industrial facilities) are prohibited by the regulations. Thus, many forms of urban runoff may in fact be prohibited.

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B. Municipal Separate Storm Sewer Systems

Municipal separate storm sewer systems essentially act as conduits for pollutants from diffuse sources throughout the urban environment and from discrete point sources associated with industrial activities. The systems to which we shall refer in this Order are owned or operated by public agencies, are designed or used for collecting or conveying storm water, and are not a combined sewer.[3] While separate storm sewer systems are legally characterized as point sources within the meaning of the Clean Water Act, as discussed hereinafter, the waste which they discharge mostly originates as nonpoint, diffuse waste flows from urban development and activities (including residences, streets and commercial establishments). Municipal separate storm sewer systems are somewhat analogous to municipal sanitary sewer systems where those systems convey industrial wastewaters along with domestic sewage. The sanitary sewers simply transport industrial wastes to the treatment facility and then to the receiving water. However, storm water discharges, and the pollutants therein, are also highly variable, being affected greatly by such factors as storm events, land uses and receiving water conditions, and thus present even greater challenges for their regulation and control.

3 *40 CFR Section 122.26(b)(8).*

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C. Early Attempts to Regulate Storm Water Discharges

In 1972, Congress adopted the Federal Water Pollution Control Act Amendments of 1972,[4] which created a comprehensive program to protect surface waters. The Clean Water Act emphasizes the control, treatment and elimination of all pollutant sources in order to protect vital uses of the nation's waters. Because scant information about runoff existed in 1972, the Clean Water Act mandated further assessment of runoff, its constituent pollutants, the consequent water quality effects, and applicable control measures. Section 105 of the Act specified that the development and application of "waste management methods" to prevent, reduce, or eliminate pollutants from storm water runoff would be a national priority.[5]

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4 Public Law 92-500 (86 Stat. 816, enacted October 18, 1972); 33 USC Section 1151 et seq. Although characterized in the official title as "amendments", the 1972 FWPCA essentially rewrote the pre-1972 Federal Water Pollution Control Act. The 1972 amendments are commonly referred to as the Clean Water Act, and we will follow that practice. We shall use the enumeration of Clean Water Act sections, rather than the comparable United States Code designations.

5 The pertinent portions of Section 105 state:

> *"(a) The Administrator [of the Environmental Protection Agency] is authorized to conduct in the Environmental Protection Agency and to make grants to any state, municipality, or intermunicipal or interstate agency for the purpose of assisting in the development of (1) any project which will demonstrate a new or improved method of preventing, reducing, and eliminating the discharge into any waters of pollutants from sewers which carry storm water or both storm water and pollutants...."*
>
> * * *
>
> *(d) In carrying out the provisions of this section, the Administrator shall conduct, on a priority basis, an accelerated effort to develop, refine, and achieve practical application of:*
> *(1) waste management methods applicable to point and nonpoint sources of pollutants to eliminate the discharge of pollutants, including, but not limited to, elimination of runoff of pollutants and the effects of pollutants from inplace or accumulated sources...."*

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The Clean Water Act also included a major new regulatory program intended to implement the Act's stated goal of eliminating the discharge of pollutants into surface waters by 1985. Section 301 of the Act prohibits the discharge of any pollutant to navigable waters from a "point source"[6] unless the discharge is authorized by a national pollutant discharge elimination system (NPDES) permit. The provisions for adoption of NPDES permits are contained in Section 402 of the Clean Water Act.[7]

In 1973, EPA issued regulations which exempted certain categories of point sources of pollution from the permit requirements of Section 402.[8] One of the categories of discharges exempted by the 1973 regulations was separate storm sewers containing only storm runoff uncontaminated by any industrial or commercial activity. In Natural Resources Defense Council v. Costle (D.C.Cir. 1977) 568 F.2d 1369, the court held

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6 A "point source" is defined in Section 502(14) as "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." It is important to note that, while the discharge of storm water to surface waters is a discharge from a point source from a legal standpoint, these discharges have often been referred to in official documents as "nonpoint" discharges, in recognition of the manner in which they travel over land to the point of discharge.

7 Section 402 authorizes states to administer the NPDES program within their boundaries. EPA has approved California's NPDES program. Pursuant to the provisions of the Porter-Cologne Water Quality Control Act (California Water Code Section 13000 et seq.), NPDES permits are issued by the Regional Water Quality Control Boards in California.

8 See 38 Fed. Reg. 18000 (1973).

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that the Clean Water Act required NPDES permits for all discharges of pollutants from point sources, specifically including the discharge of storm water. In that opinion, the court encouraged the use of general permits and "alternative" permit conditions for storm water permits. It was not until 1990, after several aborted attempts, that EPA finally issued regulations for the issuance of storm water permits.[9]

D. Basin Planning Activities by the Regional Board

In 1975, the Regional Board adopted its Water Quality Control Plan for the San Francisco Bay Region (1975 Basin Plan).[10] The 1975 Basin Plan broadly characterized suspected constituents in runoff and roughly estimated pollutant mass loadings from runoff throughout the region. These estimates were derived from several earlier, but limited runoff emission studies. In the 1975 Basin Plan, the Regional Board acknowledged the necessity to obtain further knowledge about storm water runoff and to undertake regulatory actions. Four fundamental control strategies were described for urban runoff: (1) Prevent contaminants from reaching urban land surfaces; (2) Improve street cleaning and cleansing of other public areas;

9 40 CFR Parts 122, 123, and 124. See 55 Fed. Reg. 47990 (November 16, 1990).

10 The 1975 Basin Plan was approved by the State Board in Resolution No. 75-28.

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(3) Treat runoff prior to discharge to receiving waters; and (4) New controls on land use and development.[11]

The 1975 Basin Plan concluded that until more definitive research and study about runoff control strategies was conducted, the prudent regulatory path was to adopt and maintain reasonable source control measures and comprehensive monitoring programs. In approving the 1975 Basin Plan, the State Board stipulated that various actions in the Plan, including the urban runoff strategies, constituted recommendations which the State Board, the Regional Board and other agencies should consider further.[12]

The 1975 Basin Plan identified beneficial uses for specified water bodies and listed water quality objectives to protect such uses. Among the water quality objectives listed in the 1975 Basin Plan was a narrative toxicity objective.[13] Compliance with the narrative toxicity objective was to be determined by bioassays. The Basin Plan further specified "limiting concentrations" for inorganic chemical constituents (primarily heavy metals) in waters used as domestic and municipal supply.[14]

The 1975 Basin Plan did not specify numeric water quality objectives for the South Bay. It instead prohibited

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11 1975 Basin Plan, Chapter 5, "Nonpoint Source Measures", pages 5-39 through 5-41.

12 State Board Resolution No. 75-28.

13 The objective requires that all waters be maintained free of toxic substances in toxic amounts. 1975 Basin Plan, page 4-11.

14 1975 Basin Plan, at page 4-18.

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continued wastewater discharges to the South Bay, with specified exceptions to this prohibition.[15] The Basin Plan also referred to various plans and policies of the State Board, including the "Water Quality Control Policy for the Enclosed Bays and Estuaries of California."[16] However, the 1975 Basin Plan explicitly stated that this policy does not apply to wastes from "land runoff".[17]

After approval of the Basin Plan by the State Board, the beneficial uses and water quality objectives contained therein were approved by EPA as water quality standards within the meaning of the Clean Water Act. Thus, in 1976 there were no numeric water quality objectives for the South Bay, and there was a general prohibition against discharges thereto, which did not apply to storm water discharges.

In 1986, the Regional Board made substantial revisions to the Basin Plan.[18] The 1986 Basin Plan included numeric objectives for specific toxic pollutants (primarily heavy metals) in some of the surface waters in the Region. For surface waters

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15 1975 Basin Plan, pages 5-6 through 5-12 and 5-47.

16 The "Bays and Estuaries Policy", as this document is commonly known, was adopted on May 16, 1974.

17 1975 Basin Plan, "Bays and Estuaries Policy", section at page 4-11. In the Bays and Estuaries Policy, the State Board had prohibited continued wstewater discharges to the South Bay, based on limited assimilative capacity, generally shallow depth and hydrodynamic circumstances restricting free movement and wide dispersion.

18 The Regional Board amended the Basin Plan in Resolution No. 86-14, on December 17, 1986. This document will be referred to as "1986 Basin Plan". The State Board approved the revisions on May 21, 1987.

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downstream from Carquinez Straits, the Regional Board adopted water quality objectives in Table III-2A, which were to be included in NPDES permits.

The 1986 Basin Plan reiterated the necessity of site-specific, numeric water quality objectives for the South Bay, and did not apply the Table III-2A objectives there. The 1986 Basin Plan explained:

> "The South Bay below the Dumbarton Bridge is a unique, water quality limited, hydrodynamic and biological environment which merits continued special attention by the Board. Site specific water quality objectives are absolutely necessary in this area for two reasons. First, its unique hydrodynamic environment dramatically affects the environmental fate of pollutants. Second, potentially costly nonpoint source pollution control measures must be implemented to attain any objectives in this area. The costs of those measures must be factored into economic impact considerations by the Board in adopting any objectives for this area. Nowhere else in the Region will nonpoint source economic considerations have such an impact on the attainability of objectives. Therefore, for this area, the objectives contained in Tables III-2A and III-2B will be considered guidance only, and should be used as part of the basis for site specific objectives. Programs described in Chapter IV will be used to develop site specific objectives for it. Ambient conditions shall be maintained until site specific objectives are developed."[19]

The 1986 Basin Plan identified existing and potential beneficial uses for the South Bay and its tributary surface waters. Uses for the South Bay include industrial service supply, navigation, body contact and non-contact recreation, commercial and sport fishing, wildlife and rare and endangered species habitat, fish migration and spawning, shellfish

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19 1986 Basin Plan, page III-5.

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harvesting and estuarine habitat.[20] For the numerous surface water bodies tributary to the South Bay, the beneficial uses typically include municipal supply, agricultural supply, ground water recharge, body contact and non-contract recreation, cold and warm freshwater habitat, wildlife habitat, and fish migration and spawning.

In order to protect beneficial uses, the 1986 Basin Plan contained a four-part implementation plan. The plan included point source control measures, nonpoint source control measures, estuarine management actions, and continued planning actions. While the plan for point sources included either specific effluent limitations to be included in NPDES permits or alternative limits based on site-specific water quality objectives, the plan for nonpoint sources did not contain such specific controls. It was noted in the 1986 Basin Plan that wastes from diffuse sources such as agricultural operations, onsite treatment and disposal systems, construction activities, urban runoff, spills and dredging had not been thoroughly investigated.[21]

While the 1986 Basin Plan did not call for the immediate regulation of storm water runoff, the Plan did

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20 1986 Basin Plan, Table 2-1.

21 As was noted earlier, while storm water runoff is legally a point source and must be regulated as such, many historical documents describe such discharges as nonpoint sources. Regardless of the nomenclature, such documents must be read in context. Where, as here, the Regional Board distinguished between point sources and nonpoint sources including storm water or urban runoff, we must interpret its intent to exclude storm water runoff from the rules for other point sources. In the Basin Plan, it is obvious that the Regional Board considered both storm water and urban runoff as nonpoint sources.

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summarize the findings of several local and national studies concerning urban and storm water runoff.[22] Collectively, these studies indicated that runoff varies considerably, but likely contributes significant quantities of pollutants, especially heavy metals, to the surface waters. The 1986 Basin Plan instituted actions to identify more thoroughly local runoff problems, to evaluate existing control measures, and to develop specific additional measures. Local governmental agencies and owners or operators of storm drain systems in the South Bay were required to submit detailed information and to identify and implement runoff control measures.

E. Preliminary Control Activities in the Santa Clara Valley Storm Water System

The information required by the 1986 Basin Plan provided some data regarding operation of the municipal separate storm sewer system in the Santa Clara Valley. Throughout the Valley, a relatively flat region spanning approximately 700 square miles between the Santa Cruz Mountains and the Diablo Range, a complex network of storm sewers and natural drainage courses collect and transport intermittent urban runoff and storm waters from urban, industrial, residential and undeveloped areas. The County of Santa Clara, the Santa Clara Valley Water District, and 13 cities[23] own, operate, or maintain the municipal separate

22 1986 Basin Plan, pages IV-39 through IV-41.

23 The cities and towns are Campbell, Cupertino, Los Altos, Los Altos Hills, Los Gatos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga and Sunnyvale. They are sometimes referred to in the record as "Santa Clara Valley Nonpoint Source Agencies".

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storm sewers within the system. The collected flows are conveyed and discharged into numerous creeks, streams, rivers and other surface water bodies which comprise the Santa Clara hydrologic unit of the San Francisco hydrologic basin, and which are ultimately tributary to the South Bay.[24]

In response to the 1986 Basin Plan requirements, the local agencies which discharge storm water runoff from their storm drain systems into Santa Clara Valley drainage courses developed an action plan to initiate a storm water runoff control program.[25] The program consisted of three principal phases: (1) Dry- and wet-weather investigation and monitoring of pollutants in runoff flows and in receiving waters; (2) Identification and evaluation of alternative pollutant control measures; and (3) Development of an implementation plan. The local agencies and their consultants prepared and submitted reports when they completed each phase of the program. The "Implementation Program", the final phase, was completed in March 1990. This report described numerous individual and jurisdiction-wide runoff pollutant control measures and the institutional arrangement to implement them.

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24 The eleven principal drainages or "watersheds" of the Santa Clara Valleys include: Calabazas Creek, Coyote Creek and its tributaries, Guadalupe River and its tributaries, San Tomas Aquinos Creek, Saratoga Creek, Sunnyvale East drainage, Sunnyvale West drainage, Stevens Creek, Permanente Creek, San Francisquito Creek, and Adobe, Matadro, and Barron Creeks.

25 Santa Clara Valley Nonpoint Source Discharge Evaluation Action Plan (July 1987).

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F. Water Quality Act of 1987

1. Storm Water Provisions

In 1987, the federal Clean Water Act was amended[26] to add provisions specifically requiring a regulatory program for storm water discharges. Section 402 of the Clean Water Act was amended to add subsection 402(p), which establishes NPDES permit application requirements for municipal storm water discharges and for storm water discharges associated with industrial activities.[27]

Section 402(p)(1) provides that prior to October 1, 1992, NPDES permits shall not be required for discharges composed entirely of storm water. Exceptions to this prohibition include discharges from municipal separate storm sewer systems serving a population of 250,000 or more (Section 402(p)(2)(C)) and where 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". Section 204(p)(2)(E). Regarding municipal discharges, Section 402(p)(3)(B) provides:

> "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

26 The amendments are entitled Water Quality Act of 1987, Public Law 100-4 (February 4, 1987).

27 Section 405(p) of the Water Quality Act of 1987.

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> engineering methods, and such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants." (Emphasis added.)

The issues raised in this petition concern the portions of Section 402(p) addressing municipal discharges, especially the meaning of the requirement that municipalities must control and reduce pollutant discharges to the "maximum extent practicable". These issues will be discussed in detail hereafter.

On December 7, 1988, EPA issued draft regulations intended to implement Section 402(p). However, despite the statutory requirement that EPA promulgate regulations by February 4, 1989, the final regulations were not promulgated until November 16, 1990,[28] after the Regional Board had issued the permit which we are reviewing.

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28 55 Fed. Reg. 47990.

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2. Section 304(l)

The Water Quality Act of 1987 also added Subsection 304(l) to the Clean Water Act.[29] Section 304(l) generally requires states to identify those surface waters which are adversely affected by toxic, conventional, and nonconventional pollutants. The surface waters may be included on any of three lists which must be prepared. The list which we shall discuss herein includes waters which are not expected to meet applicable standards, "due entirely or substantially to discharges from

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29 Section 308(a) of the Water Quality Act of 1987 added Section 304(l)(1), which states:

"Not later than 2 years after February 4, 1987, each State shall submit to the Administrator for review, approval, and implementation under this subsection--

(A) a list of those waters within the State which after the application of effluent limitations required under section 1311(b)(2) of this title cannot reasonably be anticipated to attain or maintain (i) water quality standards for such waters reviewed, revised, or adopted in accordance with section 1313(c)(2)(b) of the title, due to toxic pollutants, or (ii) that water quality which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water,

(B) a list of all navigable waters in such State for which the State does not expect the applicable standard under section 1313 of this title will be achieved after the requirements of sections 1311(b), 1316, and 1317(b) of this title are met, due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to section 1317(a) of this title;

(C) for each segment of the navigable waters included on such lists, a determination of the specific point sources discharging any such toxic pollutant which is believed to be preventing or impairing such water quality and the amount of each such toxic pollutant discharged by each such source; and;

(D) for each such segment, an individual control strategy which the State determines will produce a reduction in the discharge of toxic pollutants from point sources identified by the State under this paragraph through the establishment of effluent limitations under section 1342 of this title and water quality standards under section 1313(c)(2)(B) of this title, which reduction is sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve the applicable water quality standard as soon as possible, but not later than 3 years after the date of the establishment of such strategy."

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point sources". Section 304(l)(1)(B). The list is commonly known as the "B list".

Section 304(l) also requires states to prepare "individual control strategies" ("ICS") to control toxic pollutant discharges. To implement Section 304(l), EPA promulgated regulations on June 2, 1989.[30] The regulations interpret an "individual control strategy" to mean "a final NPDES permit with supporting documentation showing that effluent limits are consistent with an approved wasteload allocation, or other documentation which shows that the applicable water quality standards will be met not later than three years after an individual control strategy is established."[31]

The ICS or permit must reduce toxic pollutant discharges from identified point sources "in combination with existing controls on point and nonpoint sources of pollutants".[32] The regulations require ICS's for surface waters on the B list, i.e. for waters which do not or are not expected to achieve applicable water quality standards "due

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30 54 Fed. Reg. 23896.

31 40 CFR Section 123.46(c).

32 40 CFR Section 123.46(a).

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entirely or substantially to discharges from point sources" of toxic pollutants.[33]

On February 3, 1989, the State Board sent EPA its B list of impaired waters and contributing point sources. The South Bay was included on this list because conditions violated the narrative receiving water quality objective for toxicity. Point sources which were identified as contributing to the violation of standards included three municipal wastewater treatment plants,[34] and "stormdrains." The list identified seven toxic pollutants (cadmium, copper, lead, mercury, nickel, selenium and silver) as causing the impairment.

G. Adoption of the Permit

In an attempt to fulfill the numerous requirements of the 1986 Basin Plan amendments, the provisions of state law regarding adoption of waste discharge requirements,[35] the Clean Water Act provisions regarding storm water permits and

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33 40 CFR Section 130.10(d). The regulations only require ICS's for those surface waters identified on the B list. 40 CFR Section 123.46(a). In a recent court decision, it was held that this interpretation was too narrow, and the regulations were remanded to EPA for reconsideration. Natural Resources Defenses Council v. Environmental Protection Agency (9th Cir. 1990) 915 F.2d 1314. The other lists required under Section 304(l) are the "A(i) list" of surface waters not expected to attain water quality standards due to toxic pollutants (Section 304(l)(1)(A)(i)) and the "A(ii) list" of surface waters which will not attain water quality which "assure[s] protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recretional activities in and on the water". Section 304(l)(1)(ii).

34 See our earlier order regarding these plants, Order No. WQ 90-5.

35 California Water Code Section 13000 et seq.

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Section 304(l), and the federal regulations regarding Section 304(l), the Regional Board issued a draft NPDES permit for the Santa Clara Valley Nonpoint Sources Agencies' (the dischargers) storm water discharges throughout Santa Clara Valley. Public hearings were held by the Regional Board on May 16 and on June 20, 1990, and on the latter date the Regional Board adopted the NPDES permit (NPDES permit CA0029718; Regional Board Order No. 90-094). Subsequently, the petitioners filed a timely petition for review of the NPDES permit. On September 28, 1990, EPA approved the permit as an ICS.[36]

II. CONTENTIONS AND FINDINGS

The petition raises a number of contentions which all address whether the permit must include numeric, water quality-based effluent limitations. The petitioners argue that, both as an NPDES permit regulating storm water discharges and as an ICS, the permit must prescribe numeric effluent limitations for toxic pollutants (specifically cadmium, copper, lead, mercury, nickel, selenium, silver and "toxic organic pollutants") in regulated storm water discharges.

The petitioners' arguments contend that numeric effluent limitations are required both pursuant to the legal

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36 The document transmitting EPA's approval constituted EPA's final agency action and is entitled, "Decision of the United States Environmental Protection Agency on Listings under Section 304(l) of the Clean Water Act Regarding the State of California." This Decision will be referred to as "304(l) Decision." On page 20, EPA states: "EPA approves NPDES permit CA0029718 as the individual control strategy for the South San Francisco Bay Stormdrains. The permit requires attainment of water quality standards in South San Francisco Bay."

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requirements for NPDES permits generally and for ICS's specifically. The petitioners generally contend that the dischargers are causing pollutants to enter the South Bay and to violate water quality standards there, and that the only acceptable means to control this impact is to place numeric limitations on the dischargers' effluent. The petitioners also contend that the permit does not comply with statutory deadlines in the Clean Water Act. Finally, the petitioners seek inclusion of specified measures to reduce pollutants from transportation facilities and practices.

In order to address the various arguments made by the petitioners, we must discuss some of the factual assumptions which the petitioners have made, along with the legal contentions. Our order of presentation varies somewhat from the petitioners', but all of the major points are covered.[37]

A. Location of the Storm Water Discharges in the Santa Clara Valley

The petitioners' arguments are based on the premise that the dischargers' municipal separate storm sewer system discharges pollutants to the South Bay and that these discharges are significantly impairing its beneficial uses. The petitioners contend that these beneficial uses are jeopardized by the failure of the permit to contain numeric effluent limitations. As we shall explain, the petitioners' broad assertions vastly oversimplify the complex nature of the dischargers' flood control

37 Any issue not specifically discussed herein is dismissed for failure to raise substantial issues appropriate for review. 23 Calif. Code of Regulations, Section 2052(a)(1).

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and drainage facilities, imply that the storm sewer system discharges only into the South Bay, and misconstrue ambient water quality criteria, receiving water quality standards and effluent limitations.

The storm drains are generally point sources,[38] which discharge upstream from the South Bay.[39] While pollutants may be transported from the storm drains to the South Bay, the process of this transportation and the amounts of pollutants reaching the South Bay are unknown.

The documents and reports required by the 1986 Basin Plan, and which accompanied the permit application, describe the dischargers' municipal separate storm sewer system. This system, a vast network of catchments, street gutters, conduits, pipes and channels, collects urban runoff flows and storm water flows from eleven distinct watersheds and a land area greater than 700 square miles. Numerous outfalls (point sources) exist throughout the entire Santa Clara Valley, which discharge urban runoff and storm water flows into nearby natural surface waters. The permit

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38 The term "point source" is defined in the Clean Water Act as:

> *"...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..." Section 502(14).*

39 The documents prepared by the State Board and EPA pursuant to Section 304(l) speak only vaguely of "stormdrains" and do not specify to which specific stormdrains they refer. We do acknowledge that the petitioners may have read these documents to mean that a determination had been made that storm water discharges are known to contribute significant pollutants directly to the South Bay. However, as we will explain infra, the decision to list "stormdrains" as a point source on the B list was based on minimal information and a reading of Section 304(l) requiring listing under the circumstances.

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covers the dischargers' entire jurisdiction. Many of the surface waters are separately identified in the Basin Plan, and water quality standards are established, as described above. The surface waters then flow into the South Bay.

While the precise location of each outfall is not apparent in the record (and may not be known at this time), the dischargers' storm sewers generally convey waste to specific, identified receiving waters other than the South Bay. The permit contains a finding regarding the point of discharge:

> "Discharge consists of the surface runoff generated from various land uses in all the hydrologic subbasins in the basin which discharge into watercourses which in turn flow into South San Francisco Bay."[40]

The natural water courses to which the storm sewers discharge are not in themselves part of the dischargers' municipal separate storm sewer system. The EPA regulations define the term "municipal separate storm sewer" as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains)...."[41] In the Santa Clara Valley, the storm sewer outfalls discharge to the water courses upstream

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40 Permit, Finding Number 3.

41 40 CFR Section 122.26(b)(8).

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from the South Bay These water courses are themselves waters of the United States.[42]

Storm water discharge, which originates as a diffuse, nonpoint source flow, becomes a "point source" addition of pollutants at the discrete intersection of the conveyance (outfall) and waters of the United States. While there may be cases where it is difficult to distinguish waters of the United States from the dischargers' conveyance systems, where the outfall leads to a natural stream with designated beneficial uses and water quality objectives, the outfall is the point source. The mouth of the river or creek at the South Bay is not a point source. The dischargers' storm sewer system conveys waste, though numerous point source outfalls, to Santa Clara Valley's creeks, streams and rivers. Few storm sewers discharge directly into South San Francisco Bay.

B. Conditions of the Receiving Waters

Both the South Bay and the water courses which receive the storm water discharges have beneficial uses. However, the uses of the streams, creeks, and rivers in the Santa Clara Valley are not the same as the uses of the South Bay. (This point is obvious since the upstream waters are fresh and the Bay is

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42 The EPA regulations provide:

> *"'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." 40 CFR Section 122.26(b)(9).*

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estuarine.) The Valley surface waters are chiefly used for municipal supply, agricultural supply, ground water recharge, body contact and non-contact recreation, cold and warm freshwater habitat, wildlife habitat, and fish migration and spawning, and, in some cases, for freshwater replenishment, navigation, and rare and endangered species habitat.[43]

As described above, the objectives contained in Table III-2A of the 1986 Basin Plan are not applicable to the South Bay.[44] Even though the Basin Plan appears to state that these objectives may apply to the Santa Clara Valley surface waters, the marine water criteria which are enumerated in Table III-2A clearly do not. Criteria intended to protect marine or estuarine water uses, especially aquatic habitat, cannot simply be interpolated for freshwater uses such as drinking water supply, since the bases for the criteria are different.

A better reading of the 1986 Basin Plan is that EPA's ambient fresh water criteria, which are also the water quality objectives in Table III-2B, apply to the upstream water courses. Table III-2A states that EPA fresh water criteria[45] "can be applied seasonally, where appropriate."[46] It appears that the Regional Board intended that such fresh water criteria may be

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43 1986 Basin Plan.

44 In Order No. WQ 90-5, we recently directed the Regional Board to adopt numeric water quality objectives for toxic pollutants in the South Bay.

45 EPA's most recent compilation of water quality criteria is the "Gold Book", entitled Quality Criteria for Water 1986 (EPA 440/5-86-001). These criteria have not been adopted as rules or regulations.

46 1986 Basin Plan, Table III-2A, footnote b.

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applied to such water courses as the Santa Clara Valley surface waters. We reach this conclusion because ambient criteria for protection of uses in freshwater are clearly more appropriate than the estuarine or marine water criteria. The record indicates that the water courses upstream of the South Bay may be impaired or threatened by a variety of pollutant sources, including storm drains and nonpoint sources, such as abandoned mines. However, none of the upstream water bodies was included on the Section 304(l) "B" list.

The petitioners argue that by including "stormdrains" as contributors to impairment of the South Bay on the B list, "[t]oxic pollutants and toxicity known to be present in the dischargers' (sic) discharges are known to violate water quality standards and impair uses."[47] We find, instead, that the decision to list storm drains as a point source on the B list was based on the available evidence at the time, and a broad reading of the types of pollutant sources to the South Bay which should be listed. In making the findings for the listing, we stated:

> "Our review of the data, therefore, concerning the relative metals loadings from point and nonpoint sources indicates that impairments of water quality in the South Bay cannot be attributed to one or the other category of source. Rather, any regulatory strategy to improve the water quality and protect beneficial uses in the South Bay must take both categories or sources into account."[48]

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47 See Exhibit 2 to Petition, page 11.

48 State Board Order No. WQ 90-5 at page 55.

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On April 11, 1991, we adopted the Statewide Water Quality Control Plans for Inland Surface Waters of California (Inland Plan) and for Enclosed Bays and Estuaries of California (Bays and Estuaries Plan), which include numeric water quality objectives which will apply to the surface waters of Santa Clara Valley and to the South Bay. The plans provide five years for the Regional Board to determine what actions are appropriate to ensure that storm water discharges are in compliance with the numeric objectives. The Plans further provide: "All dischargers shall be given a maximum of 10 years from the date of adoption of this plan to come into compliance with the numerical objectives in this plan." See, March 26, 1991 Draft, at page A-28.

C. Storm Water Discharge Characteristics

Pursuant to the 1986 Basin Plan requirements, the dischargers conducted dry- and wet-weather monitoring to characterize urban runoff and storm water flows from the municipal separate storm sewer system. From these investigations, cadmium, chromium, copper, lead, nickel and zinc were found in detectable concentrations in residential, commercial and industrial land use runoff and in the Santa Clara Valley surface waters. Arsenic, mercury, selenium and silver were seldom detected.[49] Further, significant differences were recorded between dry-weather and wet-weather stream concentrations, and runoff pollutant concentrations varied

49 *Santa Clara Valley Nonpoint Source Study, Volume I: Loads Assessment Report*.

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considerably between storms and between locations. The evidence suggests that storm water and urban runoff transport heavy metals which are then deposited with sediments in the Santa Clara Valley creeks and streams. The physical aspects of runoff (that is, the erosion and scour of these sediments in the receiving waters) resuspends pollutants during storm events. Wet weather flow in the natural water courses likely transports resuspended pollutants to the South Bay.

In comparing storm water runoff and receiving water concentrations to EPA's criteria, heavy metals concentrations were typically less than the chronic toxicity criteria during dry-weather periods. Copper and, to a lesser extent, zinc, lead and cadmium, exceeded the acute toxicity criteria values during wet-weather. Laboratory tests were also performed to study toxicity using undiluted, static-renewal effluent samples for both dry-and wet-weather periods. The dry-weather test results were inconsistent and inconclusive. In the dischargers' wet-weather laboratory samples, approximately 75 percent of these samples significantly affected Ceriodaphnia test organisms. Even though a few heavy metals did exceed acute toxicity criteria in the same samples, the lethal effects could not be definitively correlated to the presence of particular heavy metals alone. Test results suggest the presence of other, unmeasured chemical agents or factors.

The results of the characterization studies indicate that the nature and effects of storm water discharges are

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complicated. While we are concerned about the effects of the dischargers' storm water discharges on aquatic life and other beneficial uses, we also note that the various point sources and nonpoint sources affect these uses in a complicated and little-understood fashion. In attempting to solve the problems of the South Bay we must ensure that the Regional Board uses its authority to control both point and nonpoint sources in the most effective manner possible.

D. The Regional Board's Pollution Control Strategy

As we have discussed above, the dischargers' municipal separate storm sewer system generally discharges waste into numerous receiving waters, and not directly into the South Bay. The characterization studies which have been performed do suggest that potential threats exist and warrant appropriate control. Following the requirements of the 1986 Basin Plan and Clean Water Act Section 402(p), the Regional Board adopted the NPDES permit as an initial element of its storm water control strategy for protecting the surface waters of the Santa Clara Valley.

The NPDES permit employs a two-fold strategy; it prohibits non-storm water discharges and illicit connections, and it requires a comprehensive series of regulatory, governmental, and educational control measures. The first element effectively prohibits unpermitted industrial discharges into the storm sewer

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system, and should also prohibit most dry-weather "urban runoff" discharges.[50]

The second element prescribes area-wide and community-specific source reduction, hydraulic, and treatment-based control measures. For example, some of the regulatory measures include local ordinances to prohibit litter and hazardous waste disposal, regulations governing oil and grease disposal, provisions for construction site drainage, and increased use of permeable landscaping and surfaces. Public agency control measures include intensified street sweeping, bimonthly community cleanup days, illegal dumping investigations, and detention and infiltration projects. As potential contaminants in storm sewer flows substantially originate from human activities, the permit requires extensive educational and outreach programs geared toward residents and small businesses.

The method by which the specific control activities will be implemented is that the dischargers must submit a Management Plan for approval by the Regional Board, and then must implement the Plan. Thus, the permit lists some, but not all of the management practices which will be undertaken. The dischargers have already identified a list of practices from which the individual entities will select. The specific

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50 "Illicit discharge" is defined in EPA's regulation as "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 dischages from the municipal separate storm sewer) and discharges resulting from fire fighting activities." 40 CFR Section 122.26(b)(2). While this regulation was adopted subsequent to issuance of the permit, it is assumed that this definition will apply.

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practices will be selected over a two-year period starting with adoption of the NPDES permit.

In addition to the basin-wide and community-specific "best management practices" required by the permit and the prohibitions against discharging non-storm water, the permit also prohibits discharges of storm water which cause or contribute to violation of receiving water limitations. The receiving water limitations disallow the creation of conditions of pollution or nuisance in the receiving waters. In addition, the discharge may not cause a violation of "any applicable water quality objective for receiving waters."[51]

The permit does not include specific, numeric effluent limitations which would be measured at the outfalls. This omission is the crux of the petitioners' complaints.

E. Legal Requirements of Clean Water Act Sections 301 and 402(p)

The petitioners contend that the Clean Water Act, and regulations and court decisions interpreting the Act, require the inclusion of numeric effluent limitations in NPDES permits for the discharge of storm water from a municipal separate storm sewer system. We have reviewed these authorities, and also opinions we have received from EPA, and conclude that numeric effluent limitations are not legally required. Further, we have determined that the program of prohibitions, source control

51 *Permit, Receiving Water Limitation B.2.*

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measures and "best management practices" set forth in the permit constitutes effluent limitations as required by law.

First and foremost, the petitioners contend that by virtue of the absence of numeric effluent limitations, the permit contains no "effluent limitations" or "water quality-based effluent limitations."[52] The petitioners assert that effluent limitations can only be numeric concentration values for individual constituents. Our review of the relevant law reveals that the permit's scheme of prohibitions, source control measures and best management practices constitutes valid effluent limitations consistent with requirements of "maximum extent practicable" controls and water quality standards.

Before we address the acceptability of practices as "effluent limitations" we shall review the mandate contained in the Clean Water Act that NPDES permits in general must contain effluent limitations, and we shall decide whether that mandate applies to permits regulating municipal discharges of storm water in particular.

Section 301 of the Clean Water Act prohibits the discharge of any pollutant,[53] unless pursuant to a NPDES permit

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52 Indeed, even among Regional Board staff and the dischargers there appeared to be confusion regarding the term "effluent limitation". See e.g., transcript from May 16, 1990 Regional Board hearing, at page 11. All parties to the permit appeared to be under the impression that the permit did not contain effluent limitations. As we will explain, however, our determination that best management practices may constitute effluent limitations is certainly not novel.

53 "Discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source." Clean Water Act Section 502(12).

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(or other method in compliance with the Act). Section 301(b) further requires point sources to be in compliance with effluent limitations which require the application of "best practicable control technology currently available," and which are necessary to meet water quality standards established under state law, by July 1, 1977.[54] Section 301 also requires compliance with any more stringent effluent limitations which are necessary to protect water quality standards. The former effluent limitations are generally referred to as technology-based, while the latter are referred to as water quality-based.

Thus, the general rule in Section 301 is that point sources must comply with effluent limitations. These effluent limitations are contained in NPDES permits, for which standards are set out in Clean Water Act Section 402. Section 402(a)(1) provides that permits may allow the discharge of pollutants, so long as the permit requires compliance with applicable requirements including Section 301.

Subsection (p) was added to Section 402 in order to clarify the specific requirements relating to discharges of storm water. Section 402(p)(3) specifies the permit requirements for industrial and municipal discharges:

> "(A) Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 [Section 301] of this title.
> "(B) Permits for discharges from municipal storm sewers--

54 For certain pollutants, effluent limitations which require "best available technology economically achievable" must be met by March 31, 1989. As will be explained infra, the deadlines contained in Section 301(b) are clearly not applicable to municipal dischargers of storm water.

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> "(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."[55]

While the permit requirements for industrial discharges require compliance with all applicable provisions of Section 402 and with Section 301, Section 402(p)(3)(B) is ambiguous as to whether municipal storm water discharges must comply with these general requirements (including effluent limitations). The requirements specified for municipal discharges are only a prohibition against non-storm water discharges and "controls to reduce the discharge of pollutants to the maximum extent practicable."[56] Thus, the first issue which arises is whether the requirements of Section 301 and of Section 402, other than subsection 402(p), apply to municipal storm water discharges.

The petitioners claim that Section 402(p) requires the inclusion of effluent limitations in permits, and specifically effluent limitations necessary to meet water quality standards.

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55 It is clear that the time limitations in Section 301 do not apply to either type of discharge. Industrial and large municipal discharges are given three years after issuance to comply with permit terms. Section 402(p)(4)(A).

56 The third provision in the municipal requirements, issuance on a system- or jurisdiction-wide basis, is couched in permissive rather than mandatory terms.

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The dischargers, along with many interested municipalities throughout the State, claim that the only standards which they must meet are the reduction of pollutants to the "maximum extent practicable" ("MEP") and the prohibition against non-storm water discharges.

In reviewing the terms of Section 402(p), we find that the meaning of the statute on its face is not clear. On the one hand, there is nothing in Section 402(p) which states that the general provisions of Sections 301 and 402 do not apply to municipal storm water discharges. This would lead us to conclude that these general provisions do apply. On the other hand, the subsection applying to industrial discharges specifies that those general provisions apply, while the subsection referring to municipal storm water discharges is silent on this point. Because the meaning of the statute is ambiguous, we will look to other sources to determine the legislative intent.[57]

The legislative history is generally silent on the meaning of the MEP standard and the distinction between industrial and municipal discharges.[58] However, we have obtained an interpretation from EPA, and that interpretation must be accepted as a valid interpretation of the federal law, unless

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57 See Cal. Jur. III, Vol. 58, Statutes, page 453.

58 1987 U.S. Code Cong. and Adm. News, pages 38-39. Senator Durenberger is quoted as saying that MEP includes such controls as "management practices, control techniques and systems, [and] design and engineering methods." Volume 132, No. 143 Congressional Record, S16443 (October 16, 1986).

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it is manifestly unreasonable. National Wildlife Federation v. Gorsuch (D.C. Cir. 1982) 693 F.2d 156. In a memorandum from its Assistant Administrator and General Counsel,[59] EPA proceeds to consider two plausible interpretations: (1) Congress intended to waive all Section 301 requirements for municipal discharges in favor of the MEP standard, or (2) the MEP statutory requirement modified only the technology-based requirements contained in Section 301, and left in place the need for water quality-based requirements, even if those requirements would be more stringent than MEP. EPA concluded by adopting the latter interpretation.

EPA gave two reasons for its conclusion that municipal storm water discharges do not need to meet technology-based standards contained in Section 301, but that they must meet water quality-based standards. First, a contrary reading would require the conclusion that Congress implicitly repealed Section 301 as applied to these discharges. Such a conclusion would generally be disfavored by courts. Second, such a reading would interpret the Water Quality Act of 1987 as weakening the standards of the Clean Water Act, whereas the available legislative history indicates a desire to strengthen its provisions.

In reviewing EPA's interpretation, we cannot conclude that it is wholly unreasonable. Further, we have an interest as a state agency in supporting this rationale. It is the state-adopted water quality standards which EPA claims must be met by provisions of the permit. We must conclude that it is in the

59 Memorandum from E. Donald Elliot to Nancy J. Marvel, Regional Counsel, EPA Region IX, regarding "Compliance with Water Quality Standards in NPDES Permits Issued to Municipal Separate Storm Sewer Systems", dated January 9, 1991.

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interest of the State to be able to enforce its standards in the provisions of NPDES permits. See, Clean Water Act Section 510. Further, since the State has the authority to adopt the water quality standards, we believe that we can incorporate into these standards the necessary flexibility to allow realistic opportunity for compliance.[60] We have used this flexibility in our recently-adopted Inland Plan and Bays and Estuaries Plan. These provide ten years for storm water dischargers to come into compliance with numeric water quality objectives. In addition, the Plans emphasize source reduction of toxic pollutants and development of best management practices before costly end-of-the-pipe treatment is required. See, California Inland Surface Waters Plan, at page A-24.

We therefore conclude that permits for municipal separate storm sewer systems issued pursuant to Clean Water Act Section 402(p) must contain effluent limitations based on water quality standards. As we discussed earlier, the applicable water quality standards in this matter are those established for the creeks and streams which are predominantly the receiving waters of the storm water discharges. These standards appear generally to be EPA's fresh water criteria. The Inland Plan also contains applicable water quality objectives which will be submitted to EPA for approval as water quality standards. Dischargers of storm water are given a maximum of ten years to come into

60 The Regional Board adopts water quality objectives pursuant to its authority in Water Code Section 13240 and following. This Board may also adopt water quality objectives pursuant to Water Code Section 13170.

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complaince with the numeric objectives contained in the Inland Plan. We will now consider whether "best management practices" constitute acceptable effluent limitations, or whether numeric effluent limitations based on numeric water quality standards are required.[61]

While the petitioners have correctly pointed to the absence of numeric effluent limitations, the permit prohibits non-storm water discharges, and includes receiving water limitations and a requirement that the discharge not cause the violation of any water quality objectives. The permit does, therefore require compliance with water quality standards. The major issue is whether numeric effluent limitations are also required.

As we stated above, the Regional Board and the dischargers assumed that the permit did not include effluent limitations. However, in its response to the petition, Region IX of EPA concludes that effluent limitations need not be numeric, and may instead constitute any measures to reduce pollutants in the discharge including "best management practices."[62] This response is also consistent with EPA's 304(l) Decision, in which

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61 A point which is not directly at issue here is what sort of effluent limitations are required to meet the MEP standard set forth in Section 402(p). While the question of what actions are required to achieve MEP may indeed be a source of substantial controversy, it is clear that the inclusion of best management practices in a permit (rather than numeric effluent limitations) is an acceptable means of complying with the MEP requirement. See, Vol. 132, Congressional Record, S16443 (October 16, 1986).

62 See letter from Harry Seraydarian, Director, Water Management Division, to Elizabeth Miller Jennings, Senior Staff Counsel, State Water Resources Control Board, dated October 24, 1990.

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it approved the permit as an ICS pursuant to Clean Water Act Section 304(l). Because EPA undertook a final action in the 304(l) Decision, approving the permit with best management practices rather than numeric effluent limitations, we assume that EPA's formal agency position is that expressed in the response from Region IX. Therefore, we shall follow this interpretation unless it is manifestly incorrect.

The statutory definition of "effluent limitation" is broad and supports EPA's contention that a numeric limit is not required:

> "The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable water, the waters of the contiguous zone or the ocean, including schedules of compliance." Clean Water Act Section 502(11).

The definition of "effluent limitation" contained in EPA's regulations is similarly broad:

> "Effluent limitation means any restriction imposed by the Director [or a State] on quantities, discharge rates, and concentrations of 'pollutants' which are 'discharged' from 'point sources' into 'waters of the United States,' the waters of the 'continguous zone,' or the ocean." 40 CFR Section 122.2.

In a decision by a federal court of appeals, the court stated that it did not agree with the premise that effluent limitations must be articulated "in terms of a numeric effluent standard." Natural Resources Defense Council v. Costle (D.C. Cir. 1977) 568 F.2d 1369. Rather, the court stated that

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Section 402 "gives EPA considerable flexibility in framing the permit to achieve a desired reduction in pollutant discharges. The permit may proscribe industry practices that aggravate the problem of point source pollution." 586 F.2d at 1380. (Emphasis added.) Costle concerned whether specific discharges, including storm water, must be regulated by NPDES permits. EPA had assumed that numeric effluent limitations were required, and argued that these would be infeasible. Instead, the court clarified that specific practices could be required, especially in cases such as storm water regulations, where numeric permit limitations would be difficult to enforce.

Following the Costle case, and several attempts by EPA to establish a regulatory program for storm water permits, the Clean Water Act was amended to incorporate Subsection 402(p). Given this background in the development of storm water regulations, it appears reasonable to assume that in adopting subsection 402(p), Congress intended to allow EPA to regulate "practices" as suggested by the court.

In a more recent decision by the Ninth Circuit court of appeals, it was held that numeric, technology-based effluent limitations may not always be appropriate, and that EPA must include in permits it adopts whatever effluent limitations are necessary to achieve state water quality standards. Trustees for Alaska v. Environmental Protection Agency (9th Cir. 1984) 749 F.2d 549. Section 302 of the Clean Water Act describes the use of effluent limitations to protect beneficial uses of water where

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the application of technology-based standards is inadequate.[63] This section states that water quality-based effluent limitations may include "alternative effluent control strategies." Clean Water Act Section 302(a). Plainly, the term "alternative effluent control strategies" encompasses the types of control measures prescribed in the NPDES permit.[64] Costle, supra, at note 21.

Finally, EPA's storm water regulations, while not specifically addressing the contents of municipal permits, clearly emphasize a "best management practices" approach. The information which municipalities must submit in their applications concerns establishment of a control program with specific structural and non-structural controls. There is nothing in the storm water regulations which would indicate an approach which mandates numeric effluent limitations.

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63 Section 302(a) provides:

> *"Whenever, in the judgment of the Administrator or as identified under section [304(l)] of this title, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section [301(b)(2)] of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitation (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality." (Emphasis added.)*

64 EPA has also adopted regulations regarding the establishment of water quality-based effluent limitations. These regulations are discussed in the next section.

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In conclusion, we agree with EPA that Sections 301 and 402 must be read to require municipal storm water discharges to meet MEP and also to achieve compliance with water quality standards. The most reasonable way of blending these two sections together is to write permits which seek implementation of water quality standards through the controls which constitute MEP. In other words, Section 402(p) should be read to require permits to include actions which constitute MEP for the first three years, and then an evaluation of further actions which must be taken if water quality standards are not protected. We do not believe this reading is inconsistent with EPA's requirement that standards be met within three years, since MEP will be the most effective method of achieving reductions in pollutants contained in storm water, as discussed below. Region IX of EPA expressed this policy well in their response to the petition:

> "Region 9 believes that it would be premature for a municipal storm water permit to include numerical effluent limitations. Storm drains raise unique problems and differ from other types of point source discharges in that only limited information is currently available concerning the sources and loadings of the pollutants and the effectiveness of many of the control measures. While NPDES permits have been issued since the mid-1970s for industrial dischargers and POTWs, permitting of municipal storm drains is still in its infancy and additional information is necessary to determine the best means for achieving compliance with water quality standards."

As a final point, we note that the provisions contained in the permit also comply with the state law requirements for

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adoption of waste discharge requirements. Water Code Section 13263 provides that requirements:

> "...shall implement relevant water quality control plans, if any have been adopted, and shall take into consideration the beneficial uses to be protected, [and] the water quality objectives reasonably required for that purpose...."

We find that the permit includes a comprehensive and stringent program for reducing pollutants in storm water discharge, and that it will implement the Basin Plan, including the protection of beneficial uses.

F. Legal Requirements of Clean Water Act Section 304(l)

The NPDES permit was issued pursuant to both Clean Water Act Sections 402(p) and 304(l). Thus, the permit must be adequate not only as a NPDES permit regulating storm water under Section 402(p), but it must also meet the requirements of Section 304(l) and the regulations adopted thereunder.[65]

Section 304(l)(1)(B) required this Board to compile a list of surface waters for which we do not expect water quality standards will be achieved after requirements of Section 301 and other applicable sections are met, "due entirely or substantially to discharges from point sources" of specified toxic pollutants. In addition, for each segment of waters included on the B list, we were required to determine the "specific point sources

65 The Section 304(l) regulations concerning water quality-based effluent limitations, which we shall discuss in this section, are applicable whenever permits must require compliance with water quality standards, and not just where Section 304(l) is applicable. Therefore, these regulations would also have to be satisfied even if these storm drains had not appeared on the 304(l) B list.

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based limits on one or more point sources would result in the achievement of an applicable water quality standard for a toxic pollutant; or

"(ii) The discharge of a toxic pollutant from one or more point sources, regardless of any nonpoint source contribution of the same pollutant, is sufficient to cause or is expected to cause an excursion above the applicable water quality standard for the toxic pollutant." 40 CFR Section 130.10(d)(5).

It should be noted that waters must be listed where, notwithstanding the impacts of nonpoint sources, the contribution of the point source "is expected to cause" the water body to

66 54 Federal Register 23868-23899.

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exceed water quality standards. Section 130.10(d)(5)(ii). This means that waters may be put on the B list even where the nonpoint sources are the more significant contributors to the violation of water quality standards. Moreover, in its preamble to the 304(l) regulations, EPA noted two points especially relevant here. First, EPA noted the difficulty of developing ICS's for storm water outfalls. 54 Federal Register 23884 (1989). Second, EPA discussed the lack of available data to make the determinations required by Section 304(l) and the short time schedule available. Nonetheless, EPA directed the states to "rely on existing and readily available data" and discussed what it considered to be "the minimum existing and readily available water quality data and information that a state and EPA can reasonably attain." 54 Federal Register 23884 (1989).

Taking together 40 CFR 130.10(d)(5)(ii) and EPA's comments concerning storm water outfalls and scant available data, it is clear that there may be situations where point sources are included on the B list where at the time of listing, their proportionate wasteload contribution to the excursion of water quality standards is unknown, where regulation through traditional methods available for point sources is not feasible, and where any provisions requiring a reduction in the discharge of pollutants from these point sources may not be adequate to allow the receiving water to achieve water quality standards (in light of continuing contributions from nonpoint sources).

It appears that the instant matters includes all of these variables. As was discussed above, while the

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dischargers' storm drains are point sources, they do not generally discharge directly to the South Bay, and their relative contribution, via riverine transport, to the South Bay's impairment is still unknown.[67] In short, given the available data, we do not believe that any restraints--that is, numeric effluent limitations--which could be imposed on the discharge of pollutants through the storm drain system would alone attain water quality standards in the South Bay.

We do note that EPA's definition of ICS may be read to require that ICS's be set so as to ensure that receiving waters will achieve water quality standards. In 40 CFR Section 123.46, EPA set forth the requirements of ICS. The term ICS is defined as: "a final NPDES permit with supporting documentation showing that effluent limits are consistent with an approved wasteload allocation, or other documentation which shows that applicable water quality standards will be met not later than three years after the [ICS] is established." Section 123.46(c). However, a recent court decision has brought this requirement into question. In Natural Resources Defense Council v. Environmental Protection Agency (9th Cir. 1990) 915 F.2d 1314, the court disapproved of one portion of EPA's Section 304(l) regulations, and remanded the

67 In EPA's response to comments regarding its final decision regarding lists of waters, sources and pollutants under Section 304(l), it conceded the lack of scientific data available concerning South San Francisco Bay. EPA concluded "that narrative standards for toxicity are being exceeded in South San Francisco Bay and that the exceedance is due substantially to POTW and storm drain point source discharges of toxic pollutants." To support this conclusion, EPA pointed to a final Staff Report of the State Board, supporting our Order No. WQ 90-5, wherein it is stated that "the State Board agrees that the relative contribution of point and nonpoint sources to ambient water conditions has not been established." 304(l) Decision.

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regulations to EPA for reconsideration. The court determined that EPA must list point sources for all water bodies which appear on any of the Section 304(l) lists, not just the B list.[68] It did not reach the question whether ICS's are required for all listed point sources, or only for those related to B lists. This is the issue which was remanded to EPA. In reading this court decision, it is apparent that it is not expected that all point sources which are designated under Section 304(l) are capable of limiting pollutants to an extent that water quality standards will be met in the receiving water. Further, it is certainly questionable whether an ICS will be able to ensure that the receiving waters will achieve water quality standards.

The regulations themselves raise questions as to whether it will always be feasible to assure compliance with water quality standards simply through adoption of an ICS. The pollutants associated with storm water discharges are apparently bound up in sediments in dry weather periods and are resuspended and transported in storm events. The Preamble to the Section 304(l) regulations states that water quality impairments due to sediments contaminated and deposited by active point sources (such as storm drains) must be included on the B list.

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68 The other two lists are known as the "(A)(i) list" and the "(A)(ii) list." Section 304(l)(1)(A)(i) requires a list of water bodies in which water quality standards are not expected to be achieved after the application of effluent limitations to point sources. The list required by Section 304(l)(1)(A)(ii) must include waters which, after application of effluent limitations to point sources, are not expected to "assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water."

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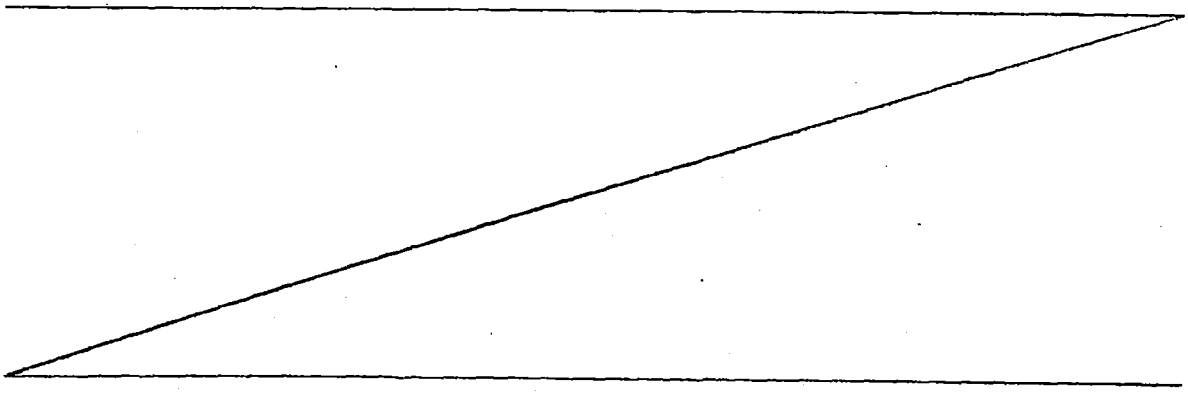
Nevertheless, NPDES permits do not apply to the sediments. 54 Federal Register 23883. Given the complicated and little understood process of transportation and resuspension of sediments, it is not possible to calculate numeric effluent limitations which would apply to storm drain outfalls and would be based upon water quality standards in downstream waters such as the South Bay.

Notwithstanding the ambiguities raised in interpreting Section 304(l), we must still address whether the effluent limitations contained in the permit are adequate as water quality-based effluent limitations pursuant to EPA's regulations. EPA adopted regulations at 40 CFR 122.44(d) which set forth requirements for water quality-based limitations. These regulations were adopted to comply with Section 304(l). See, 54 Federal Register 23870.

EPA's regulations concerning the establishment of limitations, standards, and other permit conditions, including effluent limitations, appear in 40 CFR 122.44. Section 122.44(d)(1) requires the inclusion of requirements in



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NPDES permits necessary to achieve water quality standards.[69] That subsection requires the inclusion of effluent limitations for specific pollutants where those pollutants cause, have the reasonable potential to cause, or contribute to an in-stream excursion above narrative or numeric criteria within an ambient water quality standard.

The petitioners point to Section 122.44(d)(1) in claiming that numeric effluent limitations are required. However, the term "numeric" effluent limitation does not appear in Section 122.44(d)(1). Concededly, in most cases, the easiest and most effective chemical-specific limitation would be numeric.[70] However, there is no legal requirement that effluent limitations be numeric.

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69 Section 122.44(d)(1) provides, in relevant part, that NPDES permits must include:

> *"any requirements...necessary to...[a]chieve water quality standards....*
>
> *"(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....*
>
> * * *
>
> *"(iii) When the permitting authority determines...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.*
>
> * * *
>
> *"(v) ...[W]hen the permitting authority determines...that a discharge causes, has the reasonable potential to cause, or contributes to an instream excursion above a narrative criterion within a applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity."*

70 In fact, in our order regarding discharges from POTW's to the South Bay, we found that numeric effluent limitations were appropriate and feasible.

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Even in Section 122.44 there is specific provision for best management practices in lieu of numeric effluent limitations. Section 122.44(k) states that NPDES permits should include "...best management practices to control or abate the discharge of pollutants when: ...(2) Numeric effluent limitations are infeasible...." As we shall describe below, we conclude that numeric effluent limitations are infeasible as a means of reducing pollutants in municipal storm water discharges, at least at this time. EPA Guidance allows further monitoring in lieu of immediate permit limitations. In EPA's Permit Writer's Guide to Water Quality-Based Permitting for Toxic Pollutants, numeric limits are not required.[71] Additionally, the Inland Plan provides up to ten years for storm water discharges to comply with numeric objectives and specifically endorses source reduction and best management practices to reduce pollutants.[72]

Finally, EPA has formally approved the permit as an ICS. In its 304(l) Decision, EPA stated:

> "EPA approves NPDES permit CA0029718 as the individual control strategy for the South San Francisco Bay Stormdrains. The permit requires attainment of water quality standards in South San Francisco Bay." (304(l) Decision, page 20.

This final agency action is entitled to great deference, as it is a determination by the administrative agency authorized to carry

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71 EPA Office of Water, July 1987 (EPA 440/4-87-005), Section 3.1.

72 We note here that there is certainly a lack of adequate information in the record concerning the specifics of the storm water system and its impacts. We point out, however, that regardless of how Section 122.44 is interpreted, municipal storm water dischargers have three years to come into compliance with permit terms, and the Regional Board incorporated a broad reopener provision into the permit, allowing the inclusion of more stringent effluent limitations as required.

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out the program, and which adopted the regulations which we are now attempting to interpret. Clearly, EPA found that the effluent limitations contained in the permit were adequate to protect water quality standards and to comply with 40 CFR Section 122.44.

As a final point, we take note of the broad authority the Regional Board possesses to regulate nonpoint sources which contribute to degradation of the South Bay. While the permit program under the Clean Water Act is limited to point sources, the Porter-Cologne Water Quality Control Act allows the Regional Board to regulate directly all discharges to state waters, including nonpoint sources and impacts from existing sediments. When this broad authority to ensure compliance with water quality standards is considered, it is clear that this permit, along with other actions the Regional Board will take (as contemplated in the 1986 Basin Plan) provides adequate protection of the impaired waters. We conclude that the permit does comply with the requirements of Section 304(l) of the Clean Water Act.

G. The Appropriateness and Propriety of the Permit

Our review of the permit does not end with the conclusion that the permit is legally defensible. Water Code Section 13320 provides that this Board must determine whether the Regional Board's action was appropriate and proper. Even though numeric effluent limitations are not legally required, we will consider whether numeric effluent limitations would result in more effective regulation of the dischargers' storm water

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discharges. We note, of course, that the Regional Board clearly left open the possibility of including numeric effluent limitations at a later date. The critical question before us, then, is whether it is appropriate and proper for numeric effluent limitations to be applied at this time at each outfall to receiving waters.

In order to obtain a realistic chance of compliance with numeric effluent limitations, dischargers would have to install some kind of end-of-pipe treatment technology. However, few such technologies have been investigated or developed for discharges of storm water and urban runoff. Available treatment technologies are limited because storm waters involve high volume, intermittent flows from a large number of outfalls. Physical treatment works generally necessitate interception and transport of storm sewer flows to central locations and require extensive land area for gravitational settling basins. The pollutant removal efficiencies of wet- and dry-detention basins were briefly examined in a national study conducted by EPA. For metals (the runoff constituents of most concern here), these physical treatment works varied in effectiveness. In the best cases, wet-detention basins removed 90 percent of the lead but only about 50 percent of the copper and zinc found in influent runoff. Consequently, conventional end-of-pipe treatment technologies have limited effectiveness.

Treatment techniques such as wet-detention basins also require large land areas to contain high volume, variable storm

flows. These techniques therefore result in extremely high costs. The County of Sacramento has submitted evidence to us estimating that its capital costs to build conveyance and wet detention treatment facilities would exceed $2 billion. Clearly, the potential costs for end-of-pipe treatment would be substantial, while the benefit to the receiving water would be difficult to predict accurately and reasonably. The impacts of holding large amounts of storm water for treatment may also pose potential adverse environmental impacts.

The inherent variability of storm water discharges also make numeric effluent limitations and end-of-pipe treatment impractical. The frequency, duration and magnitude of storm events and the constituents, concentrations, mechanisms, persistence and effects of runoff are poorly understood. As the current drought exemplifies, precipitation is highly variable temporally and spatially. The specific pollutants in runoff flows and their concentrations change dramatically from storm to storm and from location to location. The dischargers' monitoring investigation studies illustrate the variability of pollutants in the dischargers' runoff and possible receiving water effects. Similar regional and national studies of storm water and urban runoff discharges also reveal wide variability. The relative contribution and bioavailability of the potentially toxic trace metals in storm water remain uncertain. The mechanisms, nature, and potential threat of pollutant accumulation in sediments must be examined further.

The intermittent, irregular discharges of storm water also make it exceedingly difficult to formulate an appropriate numeric effluent limitation which would bear a reasonable relationship to established ambient water quality standards and criteria. The regulatory authority must minimally know the effluent flow rate (or the volume and duration), the receiving water flow and available dilution in order to establish numeric limitations. Without the necessary technical tools and a fundamental understanding of runoff variability, numeric effluent limitations cannot be legitimately developed or applied at this time.

In considering the anticipated effectiveness of the permit's best management practices approach, we consider that the discharges, while conveyed through point sources, are by nature more comparable to nonpoint sources. They derive from a vast variety of sources, including streets, residences, commercial areas, construction sites and industrial facilities. Source reduction and pollution prevention measures are, presently, the only practical means of controlling the truly nonpoint, diffuse waste flows from urban development. It is therefore apparent to us that a comprehensive and coordinated basin-wide approach, which stresses source reduction and elimination, will be most effective. This strategy focuses on the preventable causes rather than quantifying the tolerable effects of pollutants in runoff discharges.

At least at this preliminary point in the regulatory program for storm water discharges, it appears that an approach which implements "best management practices" to reduce sources and control pollutants is desirable. The Regional Board has taken this approach, but also has not foreclosed adding numeric, water quality-based effluent limits to the permit if it determines such limits are also necessary after receiving further monitoring data or after completion of a wasteload allocation for the South Bay.

We note also the probable impacts on the South Bay of mine drainage and resuspension of sediments. Just as we will rely on practices to reduce pollutants from storm water discharges, impacts from mine drainage and sediment resuspension must also be addressed if the South Bay is to achieve water quality standards and protection of beneficial uses. As we have stated, our interpretation of Section 304(l) of the Clean Water Act implies a coordination of activities intended to reduce impacts from all sources. The activities which the Regional Board has undertaken since 1986 are consistent with that approach. This is also the direction given this Board by the court in United States of America v. State Water Resources Control Board (1986) 182 Cal.App.3d 82, that we must assume a "global perspective" in water quality planning activities. In establishing objectives, we must consider all available remedial activities, and not just those which may be more readily regulated, such as point sources.

In summary, given the lack of clear evidence linking discharges of storm water in the Santa Clara Valley drainage courses to actual impacts in the South Bay, the difficulty of establishing numeric effluent limitations which have a rational basis, the lack of technology available to treat storm water discharges at the end of the pipe, the huge expenses such treatment would entail, and the level of pollutant reduction which we anticipate from the Regional Board's regulatory program, we conclude that the permit is proper and appropriate.

H. Transportation Control Measures

The petitioners contend that the permit must include specified transportation system control measures, or alternatively must name state and federal transportation entities as co-permittees, in order to regulate effectively runoff from streets, roads and highways. In support of these arguments, the petitioners contend that automobiles are the largest source of toxic pollutants in urban runoff and storm water discharges to the surface waters of the Santa Clara Valley. The specific control measures sought include extending regional transit systems, establishing inter-regional rail service, limiting further highway expansion, and enactment of "balanced growth" ordinances.

While runoff from highways and other transportation facilities undoubtedly contributes pollutants to the dischargers' municipal separate storm sewer system, for a number of reasons we decline to comply with the petitioners' requests.

First, while the permit was issued prior to promulgation of EPA's storm water regulations, the Regional Board proceeded in a manner consistent with those regulations in issuing the permit to municipalities with control over the municipal separate sewer system. Permits for municipal systems are to name only those municipal entities. Industrial discharges (and other discharges which contain other than storm water) are to be regulated both through the permits issued to the municipalities and through separate permits issued to industrial facilities.[73] Thus, it was not improper for the Regional Board to fail to name transportation authorities as dischargers.

Regarding the specified transportation measures requested by the petitioners, we find that the Regional Board's approach of requiring the municipalities to prepare a plan with proposed control measures for approval by the Regional Board preferable to specifying all such measures in the permit.[74] The permit does specifically require the dischargers to implement control measures focussing on transportation-related runoff.[75]

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73 In Finding 5, the permit states the Regional Board's intent to issue separate NPDES permits to state or federal agencies including the California Department of Transportation.

74 We note that this approach is consistent with EPA's regulations, even though the procedure differs. The regulations require submission of a plan containing control measures as part of the application process. The final permit envisioned in the permit will presumably contain the specified control measures. In contrast, the instant permit was issued long before permits will be issued to large municipal dischargers under EPA's regulations, but development of the control program is a part of the permit's provisions. The result in both cases will be that a mandatory control program will be developed after review of the municipality's proposal. The final program will be developed at an earlier date under the instant permit than under EPA's regulations.

75 See Provision C.9. of the permit.

I. Time Schedule for Compliance

The petitioners contend that the permit violates the Clean Water Act by not requiring timely compliance with water quality standards. Both Clean Water Act Sections 304(l) and 402(p) require compliance with permit conditions within three years of issuance of the permit. We find that the permit contains provisions requiring such compliance.

Clean Water Act Section 304(l)(1)(D) provides that an ICS must "produce a reduction in the discharges of toxic pollutants from point sources identified," in order "to achieve the applicable water quality standard as soon as possible, but not later than 3 years after the date of the establishment of such strategy." EPA has interpreted this provision to mean "that Congress recognized that permittees will need a reasonable amount of time, not to exceed three years, to comply with new effluent limits that are necessary to achieve new water quality standards, or re-interpretations of existing water quality standards."[76]

Similarly, Clean Water Act Section 402(p)(4) requires compliance with all permit conditions by large and medium municipal storm water dischargers no later than three years from the date of issuance. EPA has interpreted this provision similarly to its interpretation of Section 304(l)(1)(D), as applying to all permit conditions, including the requirement of water quality-based effluent limitations.[77]

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76 54 Federal Register 23889 (June 2, 1989).

77 General Counsel Memorandum.

In reviewing the permit, we find that its provisions do require compliance with water quality standards and that all practices necessary to achieve such compliance must be in place within three years of adoption of the permit. Therefore, the permit complies with the time schedule requirements of the Clean Water Act. We note further that the permit specifically provides that it may be reopened for the inclusion of more stringent effluent limitations, including numeric effluent limitations if necessary. If it appears within the three-year period after issuance that new permit limitations are required, the Regional Board may proceed under the reopener provisions.[78]

III. CONCLUSIONS

After review of the record and consideration of the contentions of the petitioners, and for the reasons discussed above, we conclude:

1. Impacts of storm water discharges on South San Francisco Bay are complicated and, at this time, it would be infeasible to establish numeric effluent limitations on discharges to storm drains in the Santa Clara Valley which are validly associated with impacts on the South Bay.

2. Pollutants associated with these storm water discharges alone do not substantially impair or threaten the beneficial uses of South San Francisco Bay.

3. The permit adopted by the Regional Board requires implementation of specific source control measures and contains

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78 *See Permit, Finding 17 and Provision 12.*

general prohibitions against discharge of non-storm water and violation of water quality standards.

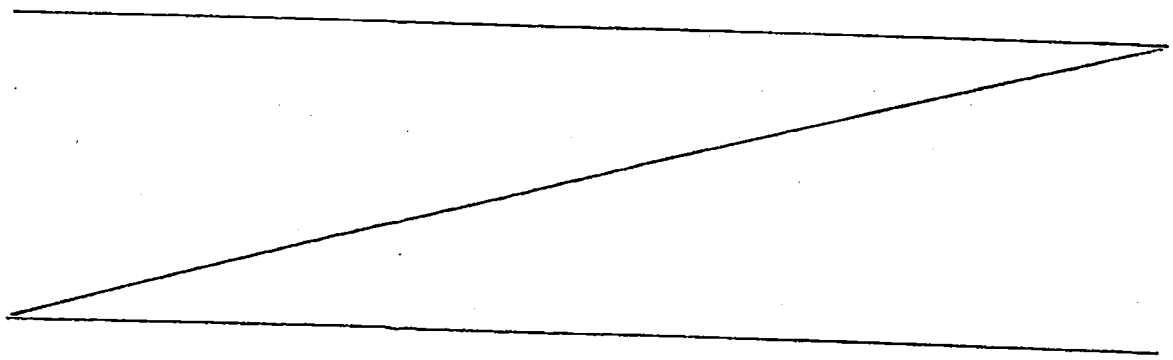
4. The provisions in the Clean Water Act regulating municipal storm water discharges require effluent limitations and achievement of water quality standards, but the limitations may consist of source control measures, rather than numeric effluent limitations.

5. The provisions in the Clean Water Act concerning impaired water bodies also allow the inclusion of source control measures rather than numeric effluent limitations in permits for point sources.

6. It is appropriate and proper to issue a permit regulating municipal separate storm sewer systems which requires specific practices, rather than containing numeric effluent limitations.

7. The specific transportation control measures requested by petitioners should be considered by the Regional Board when approval of the dischargers' control plan is sought, rather than by this Board.

8. The permit complies with the time schedule requirements of the Clean Water Act.



IV. ORDER

IT IS ORDERED that the petition is denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 16, 1991.

AYE: W. Don Maughan
Edwin H. Finster
Eliseo M. Samaniego
John Caffrey

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marché
Administrative Assistant to the Board

EXHIBIT "3"

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of NATURAL RESOURCES DEFENSE COUNCIL, INC. For Review of Waste Discharge Requirements Order No. 90-079 of the California Regional Water Quality Control Board, Los Angeles Region for Los Angeles County and Co-Permittees. NPDES Permit No. CA0061654. Our File No. A-693.	ORDER NO. WQ 91-04

BY THE BOARD:

On July 18, 1990, the State Water Resources Control Board (State Board) received a petition from Natural Resources Defense Council, Inc. (petitioner), seeking review of waste discharge requirements which the California Regional Water Quality Control Board, Los Angeles Region (Regional Board) adopted in Order No. 90-079, regulating discharges of storm water from municipal separate storm sewers throughout Los Angeles County.

Many of the issues raised by the petitioner are discussed in great detail in Order No. WQ 91-03, which we are also issuing today, and which concerns a permit issued by the Regional Water Quality Control Board, San Francisco Bay Region (San Francisco Bay Regional Board) regulating discharges of storm water from municipalities in the Santa Clara Valley. Given the similarity of these issues, we will discuss most of the

petitioner's contentions in only a summary manner, and will refer to our determinations in Order No. WQ 91-03.[1] In adopting that Order, we did consider the petitioner's arguments, and also those of the Regional Board, the dischargers, and interested persons.

I. BACKGROUND

As we discussed in Order No. WQ 91-03, over the last twenty years, the Environmental Protection Agency (EPA), has developed a program to regulate discharges of storm water and urban runoff through the National Pollutant Discharge Elimination System (NPDES) of permits. The requirements for this program are contained in Clean Water Act Section 402(p). In this case, as in the case of the San Francisco Bay Regional Board, the Regional Board adopted its permit regulating discharges from municipal separate storm sewer systems prior to EPA's promulgation of regulations implementing Section 402(p).

As did the San Francisco Bay Regional Board, the Los Angeles Regional Board also proceeded to take earlier steps to study and control storm water discharges while EPA's program development was delayed. In 1975, the Regional Board adopted its Water Quality Control Plan (Basin Plan).[2] The Basin Plan characterized constituents commonly found in runoff and roughly estimated runoff wasteloads through the Los Angeles River and

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1 A major portion of our other Order involved discussion of Clean Water Act Section 304(l). That section does not apply here. However, the discussion concerning the regulations which EPA adopted to implement Section 304(l), i.e. 40 CFR Section 122.44(d), is also relevant to this matter.

2 Water Quality Plan Report, Santa Clara River Basin (4A) and Los Angeles River Basin (4B) (March 1975). The Basin Plan was approved by the State Board in Resolution No. 75-21.

Santa Clara River sub-basins.[3] The Basin Plan also compared local runoff data with the results of several investigations conducted elsewhere in the nation.

The Basin Plan identified beneficial uses of the surface waters within the region, established water quality objectives to protect and enhance these uses, and described a detailed "Implementation Plan" to achieve those objectives. The beneficial uses of the surfaces waters typically include ground water recharge (replenishment), contact and non-contact recreation and wildlife habitat.[4] A few creeks also support warm and cold water habitat, fish migration and fish spawning uses. Some reservoirs also provide municipal, industrial supply and industrial process water uses.[5] Rare and endangered habitat and agricultural supply were identified as existing beneficial uses of several surface waters also.[6] The Basin Plan listed marine habitat, contact and non-contact recreation, commercial and sport fishing, navigation, and shellfish harvesting as the beneficial uses of the Pacific Ocean.

The Basin Plan also established water quality objectives. First, it referred to several state policies for water quality control and statewide plans. These include the "Water Quality Control Policy for the Enclosed Bays and Estuaries

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3 The 1975 Basin Plan divided its region into two sub-basins: the Santa Clara River Basin ("4A") and the Los Angeles River Basin ("4B").

4 1975 Basin Plan, Table 2-3.

5 Id.

6 Id.

of California"[7] and the "Water Quality Control Plan for Ocean Waters of California".[8] The Basin Plan stated that the Ocean Plan and the Bays and Estuaries Policies established effluent quality requirements for certain discharges. "Land runoff", however, was specifically excluded from the effluent requirements.[9]

The receiving water quality objectives set forth in the Basin Plan included several general requirements and narrative objectives. For inland surface waters, enclosed bays, and estuaries in the Los Angeles River sub-basin, narrative receiving water quality objectives were specified for tastes and odors, floating material, suspended material, settleable material, oil and grease, sediment, turbidity, bacteria, and several other pollutants.[10] The narrative toxicity objective required that all waters be maintained free of "toxic substances in concentrations that are toxic to, or produce detrimental physiological responses in human, plant, animal, or aquatic life."[11] The Basin Plan

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7 The "Bays and Estuaries Policy", as this document is know, was adopted on May 16, 1974.

8 The State Board first adopted this plan, commonly known as the "Ocean Plan", on July 6, 1972. The State Board approved amendments to the Ocean Plan on March 22, 1990 by Resolution No. 90-27.

9 The 1975 Basin Plan states:

> *"This policy does not apply to wastes from vessels or land runoff except as specifically indicated for siltation and combined sewer flows." See page I-4-5.*

10 1975 Basin Plan, pages I-4-6 through I-4-8.

11 Ibid., at page I-4-8.

further specified "limiting concentrations" for inorganic chemical constituents (primarily heavy metals) in waters used as domestic and municipal supply.[12] It also prescribed "mean mineral quality objectives" for the Los Angeles River, the San Gabriel River and their "tributaries".[13]

The Basin Plan also contained an "Implementation Plan" to reduce wasteloads from various pollutant sources and their effects on the basin's waters. For urban runoff and storm water discharges, the Basin Plan indicated that the pollutants found in runoff discharges varied considerably and exhibited a seasonal nature. More specifically, the Plan stated that the "bulk of these mass emissions is normally experienced in only a few days of wet weather during the rainy season."[14] Although certain beneficial uses, such as groundwater recharge and recreational uses, may be temporarily impaired during storm flow conditions, the Basin Plan noted few traditional "end-of-pipe" controls existed for runoff flows. It explained:

> "...there is little, if anything, that can be done to mitigate the effects of such runoff except for improved air pollution control practices, improved urban housekeeping, and improved environmental levels of performance for automotive equipment."[15]

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12 Ibid., at page I-4-9.

13 Ibid., at Table 4-1 and pages 1-4-11 and I-4-12.

14 1975 Basin Plan, "Impact of Runoff Waste Loads", page II-15-94.

15 Id.

Although much runoff data was included in the Basin Plan, limited information about the significance or effects of runoff discharges on receiving water quality existed.

The Basin Plan specified requirements and controls for "traditional" point sources,[16] but storm water discharges were not covered, based on the difficulty of their regulation:

> "...no practical and economical means has yet been developed for containment and treatment of urban runoff wastes for reduction of pollutants prior to downstream release, nor are standards for such measures presently in existence or contemplated for the foreseeable future, at least on a widespread basis....There are presently no generally applicable effluent limits nor water pollution control facilities in connection with urban runoff that appear practical or economical. The emphasis for water quality control from this standpoint should be public education, public cooperation in improved (outdoor) housekeeping, and continued search of solutions to the air pollution problems."[17] (Emphasis added)

The Regional Board has not amended the portions of its Basin Plan relating to storm water and urban runoff since 1975. Therefore, we conclude that the Basin Plan does not address controls on such discharges, except for the few practices listed above. Clearly, the effluent limitations listed for other point sources are not meant to apply. In addition, there are no

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16 As was explained in Order No. WQ 91-03, throughout the years many documents have treated storm water discharge as a nonpoint source, even though it is legally a point source. This has led to some confusion in terminology. However, it is often obvious from statements in the document that decision makers have sought to exclude storm water from requirements otherwise applicable to point sources.

17 Ibid., at pages I-5-87 and I-5-88.

numeric water quality standards which have yet been developed.[18] On April 11, 1991, the State Board adopted the Water Quality Control Plan for Inland Surface Waters (Inland Plan) which is applicable here. The Inland Plan establishes numeric water quality objectives but allows dischargers of storm water a maximum of ten years to achieve compliance.

As was discussed in Order No. WQ 91-03, in 1987 the federal Clean Water Act was amended[19] to add provisions specifically requiring a regulatory program for storm water discharges. Section 402 of the Clean Water Act was amended to add subsection 402(p), which establishes NPDES permit application requirements for municipal storm water discharges and for storm water discharges associated with industrial activities.[20]

Section 402(p) includes the following requirements for municipal discharges of storm water:

> "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 [EPA] Administrator or the State determines appropriate for the control of such pollutants." (Emphasis added.)

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18 The petitioner contends that numerical objectives contained in the Ocean Plan apply to discharges of storm water. We shall discuss that contention infra.

19 The amendments are entitled, Water Quality Act of 1987, Public Law 100-4 (February 4, 1987).

20 Section 405(p) of the Water Quality Act of 1987.

The Water Quality Act of 1987 also added Section 320 to the Clean Water Act. This amendment created the National Estuaries Program, an effort to develop and implement comprehensive conservation and management plans for estuaries of national importance. In December 1987, a federal appropriations act formally included Santa Monica Bay in EPA's National Estuaries Program.[21] The State of California then organized the Santa Monica Bay Restoration Project to coordinate local, state, and federal activities to develop the required plan which would improve the condition of Santa Monica Bay. The nomination document for this project indicated that urban runoff and storm water discharges may contain heavy metals, organic constituents, pathogens, and other pollutants that threaten or may impair the beneficial uses of Santa Monica Bay.[22] As a part of this project, the Los Angeles Regional Board--and the numerous local and regional governments and environmental interest groups that also participate in the project--began a more thorough investigation of runoff discharges to Santa Monica Bay. Because existing runoff data was incomplete or inconsistent, the Santa Monica Bay Restoration Project initiated detailed monitoring studies to identify pollutants in runoff flow, especially pathogens, and to assess their effects on the bay. This monitoring work is now in progress.

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21 National Estuary Program, The Nomination of Santa Monica Bay, Environmental Affairs Agency, May 1988.

22 Ibid., see "Executive Summary", page viii, and "Storm Drains and Runoff", page 41.

The permit which we are reviewing here was the result of a cooperative effort of the "Storm Water Permit Work Group," which was established to fulfill part of the objectives of the Santa Monica Bay Restoration Project. The Work Group assisted in drafting the permit.

In order to implement the Basin Plan, the provisions of state law regarding adoption of waste discharge requirements,[23] and the Clean Water Act provisions regarding storm water permits, the Regional Board issued a draft NPDES permit to regulate urban runoff and storm water discharged throughout Los Angeles County. The revised draft permit designated the County of Los Angeles as the "Principal Permittee" and 16 cities as "Co-permittees" (the dischargers). A workshop was held by the Regional Board on April 23, 1990, and a public hearing was held on June 18, 1990, and on the latter date the Regional Board adopted the NPDES permit (NPDES permit CA-0061654; Regional Board Order No. 90-079). Subsequently, the petitioner filed a timely petition for review of the NPDES permit.

II. CONTENTIONS AND FINDINGS

The petition raises a number of contentions which all address whether the permit must include numeric, water quality-based effluent limitations. The petitioner argues that the Clean Water Act requires permits regulating municipal discharges of storm water to prescribe numeric effluent limitations for toxic pollutants. The petitioner also contends that the permit does

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23 California Water Code Section 13000 et seq.

not require controls which reduce pollutants to the "maximum extent practicable". Finally, the petitioner argues that the permit does not comply with the three-year time schedule required in Clean Water Act Section 402(p).

A. The Need for Numeric Effluent Limitations

The petitioners' arguments are based on the premise that the dischargers' municipal separate storm sewer system discharges pollutants to Santa Monica Bay, and that these discharges violate numeric water quality standards in the bay. The numeric standards which the petitioner relies upon are found in the Ocean Plan. As we shall explain, the petitioner's broad assertions vastly oversimplify the complex nature of the dischargers' flood control and drainage facilities, imply that the storm sewer system discharges only into Santa Monica Bay, and misconstrue ambient water quality criteria, receiving water quality standards and effluent limitations.

The County of Los Angeles, Department of Public Works' municipal separate storm sewer system serves a geographic area greater than 4,000 square miles[24] and includes more than 87 overlapping local governmental jurisdictions. This system, a vast network of catchments, street gutters, conduits, pipes, and channels that were designed for drainage and flood control purposes, collects urban runoff flows and storm water flows from throughout Los Angeles County. The County's Department of Public Works and 87 cities own, operate, or maintain this enormous

24 *See Regional Board's Response to Petition, page 10.*

municipal separate storm sewer system. More than 5,000 outfalls or "point sources" discharge these runoff flows into both constructed works and the natural streams, rivers, and other surface water bodies that comprise the Los Angeles River hydrologic unit.

As we discussed in Order No. WQ 91-03, the specific location at which the storm water outfall intersects receiving waters is where the "point source" discharge occurs. While the precise location of each of the several thousand outfalls in Los Angeles County is understandably omitted from the record, the substantial majority of these outfalls discharge urban runoff and storm water flows to surface waters--such as Ballona Creek, Coyote Creek, and San Antonia Creek, the Los Angeles River and the San Gabriel River, Rio Hondo, and other water bodies--throughout the hydrologic basin.[25]

Obviously, not all of the dischargers' 5,000 municipal separate storm sewer system outfalls actually discharge directly to Santa Monica Bay. Although the numerous natural water courses which receive storm water generally are ultimately tributary to Santa Monica Bay, they are the receiving waters. As such, these natural water courses cannot be considered elements of the dischargers' municipal separate storm sewer system. In fact, many of these surface waters are clearly identified in the Los Angeles Regional Board's Basin Plan.

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25 The nomination document for the Santa Monica Bay Restoration Project stated that "over 60 storm drains" empty into the Bay.

In the Los Angeles Basin, the storm sewer outfalls generally discharge to the water courses upstream from Santa Monica Bay. Both Santa Monica Bay and the water courses which receive the storm water discharges have beneficial uses. However, the uses of the streams, creeks, reservoirs and rivers in the Los Angeles River Basin are not the same as the uses of Santa Monica Bay. The upstream waters support fresh water uses, while Santa Monica Bay sustains marine water uses.

As was described above, while the Basin Plan does include narrative water quality objectives for the upstream surface waters, the Regional Board has not yet developed numeric objectives for all of the pollutants the petitioner enumerates. Although the Inland Plan does contain numeric objectives, up to ten years is allowed for compliance. The Ocean Plan also includes numeric standards, but these do not apply to discharges of storm water.

The Ocean Plan states that all parts are applicable to point source discharges to the ocean. Narrative water quality objectives and toxic materials limitations (Table B) do apply to nonpoint sources, but compliance is determined by direct measurement in receiving waters. The petitioner requests that the storm water discharges be subject to Table B, and also to Table A (which is meant only to apply to publicly-owned treatment works).

While on its face, Table B may appear to apply to storm water discharges, it is clear from reading the Functional

Equivalent Document,[26] which was adopted by the State Board at the same time as the Ocean Plan, that neither Table A nor Table B are meant to apply to storm water discharges:

> "The attainability analysis did not include stormwater discharges because there are few data available on pollutant concentrations in stormdrains. EPA's proposed regulations for stormwater discharges do not use water quality-based effluent limits for stormdrains.[27] Instead, an approach based on Best Management Practices is proposed, following an initial period of characterization.
>
> "We do not propose to apply water quality-based effluent limits such as Table B to stormdrains at this time. Technology-based standards will not be based on Table A, but on Best Management Practices. Since the Table B objectives represent levels of pollutants that are protective of beneficial uses they may be applied to stormdrains at some future date. We do not anticipate that this would occur until adequate characterization data are available so that attainability can be assessed and implementation measures established."

Following the above statement, the Functional Equivalent Document states that the Plan explains how to apply Table B objectives to nonpoint sources. From this statement, it is clear that in drafting the Ocean Plan the State Board was viewing storm water discharges as nonpoint sources. This characterization is understandable. Storm water discharges,

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26 Functional Equivalent Document, Amendment of the Water Quality Control Plan for Ocean Waters of California, California Ocean Plan (March 1990), at pages 33 and 34.

27 It appears that the reference here was to numeric water quality-based limitations, since such limitations are required in Table B. As we explained in Order No. WQ 91-03, water quality-based limitations need not always be numeric.

while ultimately flowing through a point source to receiving waters, are by nature more akin to nonpoint sources as they flow from diffuse sources over land surfaces. This point is discussed in the Preamble to EPA's storm water regulations:

> "For the purpose of [national assessments of water quality], urban runoff was considered to be a diffuse source or nonpoint source pollution. From a legal standpoint, however, most urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the [Clean Water Act]." 55 Federal Register 47991.

We therefore conclude that the petitioner has misinterpreted appropriate criteria and the applicability of Ocean Plan provisions to storm water. There are no numeric objectives or numeric effluent limits required at this time, either in the Basin Plan or in any statewide plan that apply to storm water discharges. This absence, however, will not in any way diminish the permit's enforceability or its ability to reduce pollutants in storm water discharges substantially. While numeric objectives are contained in the Inland Plan, these need not be achieved for up to ten years. In addition, the Plan endorses the application of "best management practices" rather than numeric limitations as a means of reducing the level of pollutants in storm water discharges.

The permit which the Regional Board adopted is very similar to that reviewed in Order No. WQ 91-03. The NPDES permit employs a two-fold strategy: It effectively prohibits non-storm

water discharges and illicit connections; and, it requires a comprehensive series of regulatory, governmental, and educational control measures.

As in the case of the permit issued by the San Francisco Bay Regional Board, the method by which the specific control activities will be implemented is that the dischargers must submit an Implementation Plan for approval by the Regional Board's Executive Officer, and then must implement the Plan. Thus, the permit lists some, but certainly not all of the management practices which will be undertaken. The remaining specific practices will be developed over a two-year period starting with adoption of the NPDES permit. In addition, the "co-participant" cities, which have not yet been added to the permit, are also being required to select appropriate control measures.

Although the permit does not make specific reference to violation of water quality standards, the permit will be read so as to require the implementation of practices which will achieve compliance with applicable standards. Such a requirement is implicit in the issuance of an NPDES permit, since that is a minimum requirement of a permit, as we discussed in Order No. WQ 91-03. The requirement is also a part of the California Water Code. Water Code Section 13263. The permit does provide that the Regional Board may, in the future adopt numeric water quality objectives and limitations.[28]

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28 Permit, Finding 19.

We concluded in Order No. WQ 91-03 that permits for municipal separate storm sewer systems issued pursuant to Clean Water Act Section 402(p) must contain effluent limitations based on water quality standards. In addition, the applicable water quality standards are those established for the receiving waters of the storm water discharges. We further concluded there that even if such effluent limitations are intended to require compliance with water quality standards, "best management practices" constitute legally acceptable effluent limitations. We find here, as we did in Order No. WQ 91-03, that the permit includes a comprehensive and stringent program for reducing pollutants in storm water discharge, and that it will implement the Basin Plan, including the protection of beneficial uses.

We note that the dischargers argued in their response that the fact that the permit was derived from a cooperative effort, prior to the promulgation of regulations by EPA, had relevance to its enforceability. While we are certainly pleased that the dischargers and the Regional Board have been able to work together in a cooperative and positive manner, the permit which was adopted is a lawfully adopted NPDES permit, and is fully enforceable as such. The fact that it was adopted prior to the deadline for adoption of such permits, and prior to promulgation of the regulations, has no relevance to its enforceability. The prohibitions and practices contained in the

permit must be obeyed, and those prohibitions and practices must result in compliance with any applicable water quality standards.

Just as in our review of the San Francisco Bay Regional Board's permit, we have reviewed the appropriateness and propriety of this permit. We find here also that the approach of the Regional Board, requiring the dischargers to implement a program of best management practices which will reduce pollutants in runoff, and prohibiting non-storm water discharges, is appropriate and proper. We base our conclusion on the difficulty of establishing numeric effluent limitations which have a rational basis, the lack of technology available to treat storm water discharges at the end of the pipe, the huge expense such treatment would entail, and the level of pollutant reduction which we anticipate from the Regional Board's regulatory program. We feel compelled to note here our agreement with the Regional Board that this permit does truly represent a massive undertaking. No other permit in the State, and perhaps in the nation, will control the number of outfalls in a metropolitan area as this permit undertakes to regulate.

B. The Maximum Extent Practicable Standard

The petitioners contend that the permit must include specified management practices in order to comply with the requirement in Clean Water Act Section 402(p) of reducing pollutants in municipal separate storm sewer discharges to the maximum extent practicable (MEP). The petitioner states that MEP means, "what can be done now, must be done now." As we stated in

Order No. WQ 91-03, however, we find that the Regional Board's approach of requiring the dischargers to prepare a plan with proposed control measures for approval by the Regional Board is preferable to specifying all such measures in the permit. The petitioner gives as an example a requirement for catch basin cleaning, which it claims would reduce pollutants. However, an effective and cost-effective storm water program requires an analysis of the specific area subject to regulation, and should not involve a simple listing of practices that all municipalities must follow. As EPA stated in its Preamble to the draft storm water regulations:

> "A wide variety of control measures to reduce the discharge of pollutants from municipal storm sewer systems are currently available. The performance of appropriate control measures is highly dependent on site-specific factors. It is therefore not practicable to define one standard set of controls which will control all pollutants in all municipalities." 53 Federal Register 49456[29].

We also note that, while we share the petitioner's goal of rapid achievement of an effective practices program, the Clean Water Act does not require implementation of all measures now, but rather has set forth a three-year time schedule for compliance. We shall discuss this point further in the next section.

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29 This point was also made in the preamble to EPA's final regulations. 55 Fed. Reg. 48038. There a reference to the legislative history of Clean Water Act Section 402(p) makes clear that Congress' intent was not to dictate specific practices.

C. Time Schedule for Compliance

The petitioner contends that the permit violates the Clean Water Act by not requiring timely compliance with water quality standards. We addressed this point in Order No. WQ 91-03. Here, also, we find that the permit contains provisions requiring such compliance.

The permit includes a very aggressive and comprehensive program of developing and implementing best management practices over a three-year period. The permit does require a program aimed at compliance with applicable water quality standards and all practices necessary to achieve such compliance must be in place within three years of adoption of the permit. Therefore, the permit complies with the time schedule requirements of the Clean Water Act. The permit also specifically provides that the Regional Board may include more stringent effluent limitations, including numeric effluent limitations if necessary.

III. CONCLUSIONS

After review of the record and consideration of the contentions of the petitioners, and for the reasons discussed above, and in Order No. WQ 91-03, we conclude:

1. Impacts of storm water discharges on receiving waters and Santa Monica Bay are complicated, and at this time, it would be infeasible to establish numeric effluent limitations on

discharges to storm drains in the Los Angeles River Basin, which are validly associated with impacts in Santa Monica Bay.

2. The permit adopted by the Regional Board requires implementation of specific source control measures and effectively prohibits discharges of non-storm water and violation of water quality standards.

3. The provisions in the Clean Water Act regulating municipal storm water discharges require effluent limitations and achievement of water quality standards, but the limitations may consist of source control measures, rather than numeric effluent limitations.

4. It is appropriate and proper to issue a permit regulating municipal separate storm sewer systems which requires specific practices, rather than containing numeric effluent limitations.

5. The specific control measures requested by the petitioner should be considered by the Regional Board when approval of the dischargers' control plan is sought, rather than by this Board.

6. The permit complies with the time schedule requirements of the Clean Water Act.

IV. ORDER

IT IS ORDERED that the petition is denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 16, 1991.

AYE: W. Don Maughan
Edwin H. Finster
Eliseo M. Samaniego
John Caffrey

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marché
Administrative Assistant to the Board

EXHIBIT "4"

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LA County Stormwater

State of California

Memorandum

To : Archie Matthews
Division of Water Quality

Date: FEB 11 1993

Elizabeth M. Jennings

Elizabeth Miller Jennings
Senior Staff Counsel
OFFICE OF THE CHIEF COUNSEL
From : STATE WATER RESOURCES CONTROL BOARD
901 P Street, Sacramento, CA 95814
Mail Code: G-8

Subject: DEFINITION OF "MAXIMUM EXTENT PRACTICABLE"

ISSUE

What is the meaning of the standard "maximum extent practicable" (MEP) as used in the Clean Water Act's storm water provisions, and how can this standard be communicated to the regulated community? How can this concept be included in the draft BMP manual?

CONCLUSION

The standard "maximum extent practicable" is not specifically defined for use in the storm water program. It has been defined in other rules, however, to require taking all actions which are technically feasible. I have included draft language for the manual.

DISCUSSION

Section 402(p) of the Clean Water Act (33 U.S.C. § 1342(p)) provides that permits issued for discharges from municipal separate storm sewers must require controls to reduce the discharge of pollutants "to the maximum extent practicable". The statutory language provides that municipal 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

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> provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants." Clean Water Act Section 402(p)(3)(B)(iii); 33 U.S.C. § 1342(p)(3)(B)(iii).

Neither Congress nor the U.S. Environmental Protection- Agency (EPA) has defined the term "maximum extent practicable", and yet this is the critical standard which municipal dischargers must attain in order to comply with their permits. (The State could have spelled out the specific controls which the municipalities were required to undertake. However, such an approach would have relinquished the municipal dischargers of any flexibility in implementing their storm water programs.)

On its face, it is possible to discern some outline of the intent of Congress in establishing the MEP standard. First, the requirement is to reduce the discharge of pollutants, rather than totally prohibit such discharge. Presumably, the reason for this standard (and the difference from the more stringent standard applied to industrial dischargers in Section 402(p)(3)(A)), is the knowledge that it is not possible for municipal dischargers to prevent the discharge of all pollutants in storm water. The second point which is clearly encompassed in the standard is that it is the permitting agency, and not the discharger, which is the ultimate arbiter on whether there has been sufficient reduction of pollutants.

The most difficult issue is determining how much pollutants must be reduced, or, in other words, which best management practices (BMPs) must be employed in order to comply with the MEP standard. While the term is not defined in the Clean Water Act or the EPA regulations, the same term does appear in other federal laws and regulations, and there are some definitions or interpretations which may be useful to the storm water program.

In the Uranium Mill Tailings Radiation Control Act of 1978 (42 U.S.C. § 7901, et seq.), the Department of Energy was required to designate within one year of the Act's adoption "to the maximum extent practicable" contaminated areas within the vicinity of uranium processing sites. In addressing a lawsuit brought after the Department designated very few of the "vicinity properties", the federal court declared that MEP means "a substantial majority of the locations" should have been designated within the year. Sierra Club v. Edwards (D.C.D.C. 1983) 19 ERC 1357. Where a NEPA regulation required that "to the maximum extent practicable" environmental clearance was required for uncompleted projects which had never undergone NEPA review, a court held that the regulation "mandates a meaningful

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environmental review" rather than a "perfunctory evaluation". Save the Courthouse Committee v. Lynn (S.D.N.Y. 1975) 408 F.Supp. 1323.

In an interim final regulation recently promulgated by the Department of Transportation, MEP is defined, where operators of onshore oil pipelines must have resources "to the maximum extent practicable" to remove and to mitigate or prevent worst case discharges. 49 CFR Part 194. MEP is defined to mean:

> "The limits of available technology and the practical and technical limits on an individual pipeline operator in planning the response resources required to provide the on-water recovery capability and the shoreline protection and cleanup capability to conduct response activities . . .."

Finally, the term MEP is used in the Superfund legislation, wherein permanent solutions and alternative treatment technologies must be selected "to the maximum extent practicable". CERCLA, Section 121(b). The legislative history of the language indicates that the relevant factors in determining whether MEP is met include technical feasibility, cost, and state and public acceptance. 132 Cong. Rec. H 9561 (Oct. 8, 1986).

While each of the above interpretations and definitions varies, they do follow a pattern. The pattern that emerges is that there must be a serious attempt to comply, and that practical solutions may not be lightly rejected. If a municipality reviews a lengthy menu of BMPs, and chooses to select only a few of the least expensive, it is likely that MEP has not been met. On the other hand, if a municipal discharger employs all applicable BMPs except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit to be derived, it would have met the standard. In any case, the burden would be on the municipal discharger to show compliance.

The definitions contained in the pipeline regulation and the Superfund leg-islative history are most analogous to storm water regulation. The major emphasis in both of these rules are technical feasibility. Similarly, the municipal dischargers should be required to employ whatever BMPs are feasible, i.e., are likely to be effective and are not cost prohibitive. Thus, where a choice may be made between two BMPs which should provide generally comparative effectiveness, the discharger may choose the least expensive alternative and exclude the more expensive BMP. However, it would not be acceptable either to reject all BMPS which would address a pollutant source or to pick a BMP based solely on cost, which would be clearly less effective.

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As you know, the BMP Guidance manual is being published by the Task Force, which is made up of dischargers, rather than by the State Water Board. As far as I know, there is no intention for the State Water Board to adopt the manual as its own guidance document. Therefore, it is important to stress in the manual, both in the section on MEP and in the front of the manual, that this manual is not a publication of the State or the Regional Water Boards, and that these Boards have not specifically endorsed the contents. Rather, the manual was assembled by a group of dischargers in the interest of assisting themselves and others to comply with the storm water permits. In the section on MEP, it should be stated that the final determination regarding whether a discharger was reduced pollutants to the maximum extent practicable can only be made by the Regional or State Water Boards, but that selection and implementation of BMPs through consideration of the listed factors should assist dischargers in achieving compliance.

The following language is suggested in order to clarify that the manual is not the product of the State Water Board:

> "This Manual was produced and published by the Storm Water Task Force, an advisory body of municipal agencies regulated by the storm water program. This Manual is not a publication of the State Water Resources Control Board or any Regional Water Quality Control Board, and none of these Boards has specifically endorsed the contents thereof. The purpose of this manual is to assist the members of the Task Force and other dischargers subject to storm water permits, ,in attaining compliance with such permits."

The following language is recommended in place of Insert A in the manual for municipal dischargers:

> "Although MEP is not defined by the federal regulations, use of this manual in selecting BMPs should assist municipalities in achieving MEP. In selecting BMPs which will achieve MEP, it is important to remember that municipalities will be responsible to reduce the discharge of pollutants in storm water to the maximum extent practicable. This means choosing effective BMPs, and rejecting applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive. The following factors may be useful to consider:
>
> 1. Effectiveness: Will the BMP address a pollutant of concern?

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

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

'4. cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefits to be achieved?

'5. Technical Feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc.?

"After selecting a menu of **BMPs**, it is of course the responsibility of the discharger to insure that all **BMPs** are implemented."

EXHIBIT "5"

KCB

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 98-01

Own Motion Review of the Petition of
ENVIRONMENTAL HEALTH COALITION
to Review Waste Discharge Requirements Order 96-03,
NPDES Permit No. CAS0108740,
for Storm Water and Urban Runoff from the
Orange County Flood Control District
and the
Incorporated Cities of Orange County
Within the San Diego Region,
Issued by the
California Regional Water Quality Control Board,
San Diego Region.

SWRCB/OCC File A-1041

BY THE BOARD:

On August 8, 1996, the Regional Water Quality Control Board, San Diego Region (Regional Water Board), adopted Waste Discharge Requirements Order 96-03, NPDES No. CAS0108740, for storm water discharge from municipal separate sewer systems for the incorporated cities of Orange County within the San Diego Regional Water Board's boundaries (Orange County permit).[1] The waste discharge requirements constitute a national pollutant discharge elimination system (NPDES) permit pursuant to section 402(p) of the federal Clean Water Act (CWA).

[1] On March 8, 1996, the Regional Water Quality Control Board, Santa Ana Region, issued waste discharge requirements for storm water discharge to the incorporated cities of Orange County within the Santa Ana Regional Water Board's boundaries that are essentially identical to the permit adopted by the San Diego Regional Water Board.

On September 6, 1996, the State Water Resources Control Board (SWRCB) received a petition from the Environmental Health Coalition (petitioner) contesting certain provisions of the NPDES permit.[2] The SWRCB did not take formal action on the petition within the 270 days specified in Title 23, California Code of Regulations, section 2052(d). The SWRCB will, on its own motion, review the Regional Water Board's action as authorized by California Water Code section 13320(a).

I. BACKGROUND

The primary issue raised by petitioner concerns the Regional Water Board's implementation of the CWA requirement that all NPDES permits must include technology-based effluent limitations and any more stringent limitation necessary to meet water quality standards. Federal and state requirements relevant to the issues raised in the petition are discussed below.[3]

CWA section 301(a) prohibits the discharge of any pollutant unless pursuant to an NPDES permit. (33 U.S.C. § 1311(a).) Section 301(b)(1)(A) requires compliance with effluent limitations necessary to achieve compliance with technology-based standards (e.g., best practicable control technology currently available or secondary treatment). Section 301(b)(1)(C) also requires compliance with any more stringent effluent limitation "necessary to meet water quality standards." (33 U.S.C.

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[2] This order is based on the record before the Regional Water Board. The Regional Water Board also issued an NPDES permit to the Department of Transportation and a petition was filed challenging that permit. In preparing this order, we have reviewed the record for the petition challenging that permit and other documents noted in this Order.

[3] See State Water Resources Control Board Order WQ 91-03 (*Citizens For a Better Environment, et al.*) for an extensive discussion of the regulatory framework for municipal separate storm sewer systems.

§ 1311(b)(1)(c).) CWA section 402 establishes requirements for NPDES permits. (33 U.S.C. § 1342.) NPDES permits must comply with section 301. Section 402(p) establishes specific NPDES permit requirements for municipal storm water discharges and for storm water discharges associated with industrial activities. Section 402(p) includes a technology-based standard for storm water permits issued to municipal separate storm sewer systems. Such permits must 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)(iii).)

To comply with CWA sections 301 and 402 for municipal separate storm water discharges, a municipal storm water NPDES permit must include effluent limitations to meet the technology-based standard to reduce pollutants to the "maximum extent practicable" and any more stringent effluent limitations necessary to meet water quality standards. The United States Environmental Protection Agency (EPA) has promulgated regulations to implement NPDES requirements in CWA section 402, including storm water requirements of CWA section 402(p).[4] (See 40 C.F.R. Part 122.26.)

[4] CWA Section 402(p) specifies that permits for industrial discharges are required to comply with all technology-based and water quality-based requirements. (Section 402(p)(3)(A).) In contrast, CWA Section 402(p) specifies that permits for municipal separate storm water discharges shall require controls to comply with technology-based requirements but does not specifically state that municipal permits must require controls to comply with water quality-based requirements. (Section 402(p)(3)(B).) EPA, however, has interpreted the Clean Water Act to require permits for municipal separate storm water discharges to include requirements to achieve compliance with water quality standards. See memorandum "Compliance with Water Quality Standards in NPDES Permits Issued to Municipal Separate Storm Sewer Systems" from E. Donald Elliott, General Counsel, EPA, to Nancy J. Marvel, Regional Counsel, EPA Region 9 (January 9, 1991).

CWA section 303 requires states to adopt water quality standards for surface waters. (33 U.S.C. § 1313.) Water quality standards consist of the designated uses of waters and the water quality criteria for such waters that would support the designated uses. The Regional Water Board in its Water Quality Control Plan for the San Diego region has adopted water quality standards by designating the beneficial uses for waters in the region and establishing water quality objectives (i.e., water quality criteria) to protect those uses. See Water Quality Control Plan for the San Diego Basin (9), September 8, 1994, at Chapters 2 and 3. The SWRCB has also adopted water quality control plans and policies that specify water quality standards which are relevant to this permit (e.g., the SWRCB Ocean Plan). To comply with CWA section 301, municipal storm water permits must include effluent limitations where necessary to meet these water quality standards.

NPDES permits issued by the Regional Water Boards, including municipal storm water permits, typically include a requirement entitled "discharge limitations" or "effluent limitations" that specifies the technology-based effluent limitations and a requirement entitled "receiving water limitations" or "receiving water standards" that specifies the water quality objectives in the Water Quality Control Plan relevant to the discharge and limitations necessary to attain those objectives. The receiving water limitations provision is used to implement the requirement of CWA section 301(b)(1)(C) to include more stringent effluent limitations necessary to meet

water quality standards.[5] The limitations necessary to meet water quality standards are also called the water quality-based effluent limitations. NPDES permits are generally required to include numeric effluent limitations to implement the technology-based standard and water quality-based effluent limitations to attain the water quality standards.[6] (40 C.F.R. § 122.44.) However, the federal regulations allow the use of best management practices (BMPs) to control or abate the discharge of pollutants when numeric effluent limitations are infeasible. (40 C.F.R. § 122.44(k).) The SWRCB has determined that for municipal separate storm water permits, BMPs constitute valid effluent limitations to comply with both the technology-based and water quality-based effluent limitation requirements.[7] See SWRCB Orders WQ 91-03 and WQ 91-04. In fact, narrative effluent limitations requiring implementation of BMPs are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements, including reduction of pollutants to the maximum extent practicable, and water quality-based requirements of the CWA.

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[5] SWRCB Order WQ 91-03 concluded that municipal permits must include effluent limitations necessary to achieve water quality standards. See Order WQ 91-03 at slip op. 36. Orange County and other interested persons have argued that section 402(p) does not require municipal permits to meet water quality standards. While disagreeing, it should be noted that section 402(p) contains explicit authority for states to require provisions in addition to the "maximum extent practical" controls.

[6] See memorandum "Numeric Effluent Limitations in NPDES Permits" from Elizabeth Miller Jennings, Senior Staff Counsel, State Water Resources Control Board, to Central Valley Regional Water Quality Control Board (Aug. 1, 1997).

[7] EPA has issued a national policy entitled "Interim Permitting Approach for Water Quality-Based Effluent Limitations in Stormwater Permits," 61 Fed. Reg. 43761 (Aug. 26, 1996), that addresses issues related to the type of effluent limitations that are appropriate to provide for attainment of water quality standards. The policy applies only to EPA, but EPA has encouraged states to adopt similar policies for storm water permits. The policy states that storm water permits need not include numeric water quality-based effluent limitations. Rather, BMPs should be used to attain water quality-based effluent limitations, which should be expanded in later permits if necessary to provide for attainment of water quality standards.

II. CONTENTIONS AND FINDINGS[8]

The petitioner seeks review of the Orange County permit adopted by the Regional Water Board. The Orange County NPDES permit, adopted by the Regional Water Board, applies to the incorporated cities in Orange County within the boundaries of the San Diego region. The Santa Ana Regional Water Board, on March 8, 1996, adopted an NPDES permit for storm water discharges from the incorporated cities of Orange County within the boundaries of the Santa Ana region.[9] Orange County had requested that the Santa Ana Regional Water Board adopt one permit for all of Orange County. The San Diego Regional Water Board preferred to retain jurisdiction but agreed to adopt a permit consistent with the permit adopted by the Santa Ana Regional Water Board. Both permits for Orange County are essentially identical and require the permittees to develop a plan establishing BMPs to control discharges to the "maximum extent practicable." The Orange County permittees adopted a plan called the "drainage area management plan" (DAMP) that was approved by the San Diego Regional Water Board on April 6, 1996.[10] Both permits also contain the same provision addressing receiving water limitations, which, in relevant part, states:

> "1. Receiving water limitations have been established based on beneficial uses, water quality objectives, and water quality standards contained in the Basin Plan, and amendments thereto, and on ambient water quality. They are intended to protect the beneficial uses and attain the water quality objectives contained in the Basin Plan. The discharge of urban storm water, or non-storm water, from a municipal storm sewer system

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[8] All other contentions raised in the petition which are not discussed in this order are dismissed. (Cal. Code Regs., tit. 23, § 2052; *People* v. *Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349].)

[9] No petition was filed challenging the permit issued by the Santa Ana Regional Water Board.

[10] The DAMP was also approved by the Santa Ana Regional Water Board.

for which the permittees are responsible under the terms of this permit shall not cause continuing or recurring impairment of beneficial uses or exceedances of water quality objectives. The permittees will not be in violation of this provision so long as they are in compliance with the requirements set forth [in the following provision]."

"a. If the Executive Officer determines that a continuing or recurring impairment of beneficial uses or exceedances of water quality objectives has been caused by urban storm water discharges from the municipal storm sewer system, the following steps shall be taken. . . ."

The remainder of the provision requires the Executive Officer to evaluate the DAMP and if the Executive Officer determines that implementation of the DAMP will not have a reasonable likelihood of preventing future impairment of beneficial uses or exceedances of water quality objectives, the permittees would be required to submit a report evaluating impacts on water quality and proposing changes to implementation of the existing DAMP or proposing revisions to the DAMP. The permittees would then be required to implement the revised DAMP.

Petitioner contends that for several reasons, this receiving water limitations provision is inadequate under the CWA and its implementing regulations and under the Porter-Cologne Water Quality Control Act (Porter-Cologne Act). Petitioner points out that CWA section 402(b). and implementing regulations, require that NPDES permits issued by state agencies comply with the CWA. (33 U.S.C. 1342(b). 40 C.F.R. § 123.25.) The Porter-Cologne Act provides that permits issued subject to federal law must "ensure compliance with all applicable provisions of the [CWA and its implementing regulations]. 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.) Petitioner contends that the receiving water limitations language fails to require attainment of water quality standards.

1. Contention: The receiving water limitations section fails to comply with the CWA and the Porter-Cologne Act because it does not prohibit discharges that "contribute to" as well as "cause" exceedances of water quality objectives as required by federal regulations.

Finding: The SWRCB agrees that the NPDES permit must prohibit discharges that "cause" or "contribute" to violations of water quality standards. Federal regulations specify requirements that must be included in each NPDES permit. (40 C.F.R. § 122.44.) Each NPDES permit must include limitations necessary to achieve water quality standards:

> "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." (40 C.F.R. § 122.44(d)(1)(i).)[11] (Emphasis added.)

The receiving water limitations language of the Orange County NPDES permit requires the permittees to be responsible for those discharges that "cause continuing or recurring impairment of beneficial uses or exceedances of water quality objectives." To comply with the CWA, the phrase quoted in the immediately preceding sentence shall be interpreted so as to require permittees to control discharges that contribute to exceedances

[11] This provision applies to state programs. See 40 C.F.R. section 123.25.

of water quality objectives. Of course such contributions would have to be substantial (in more than a *de minimis* amount) contributions.

2. Contention: The petitioner contends that the receiving water limitations section in the permit violates the CWA and implementing regulations because it does not require compliance with water quality standards. The permit states that the permittees "will not be in violation of [receiving water limitations] so long as they are in compliance with the requirements" for evaluating the DAMP.

Finding: The SWRCB disagrees with petitioner's contention. In SWRCB Order WQ 96-13, the SWRCB reviewed and approved the storm water permit for certain permittees in the Santa Clara Valley issued by the San Francisco Bay Regional Water Board. The Santa Clara Valley permit contains a receiving water limitations section that specifically prohibits discharges that cause or contribute to a violation of water quality objectives, and states that the permittees "shall comply . . . through the timely implementation of control measures and other actions to reduce pollution in the discharge." (Emphasis added.) The receiving water limitations provision in the Orange County permit prohibits discharges that cause exceedances of water quality objectives, and states that the "permittees will not be in violation of this provision so long as they are in compliance with the requirements" for evaluating and improving the effectiveness of the DAMP. The Orange County permit receiving water limitations section is not, as a practical matter, different than the Santa Clara Valley permit approved by this SWRCB. In each case, compliance with the receiving water limitations is achieved by following a

procedure to evaluate and improve the BMPs where necessary to comply with water quality standards.

The SWRCB has already determined that the use of BMPs to achieve both the technology-based effluent limitations and the water quality-based effluent limitations complies with the CWA and the Porter-Cologne Act. See SWRCB Order WQ 91-03. Accordingly, the SWRCB agrees that use of the phrase that the "permittees will not be in violation of . . ." complies with the CWA and, in fact, used that same phrase in SWRCB Water Quality Order 97-03-DWQ (Waste Discharge Requirements for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities, NPDES General Permit No. CAS000001) (the General Industrial Permit).

3. Contention: The petitioner contends that the receiving water limitations provision violates the CWA and implementing regulations because the mechanism for determining exceedances of receiving water limitations is unworkable and, therefore, would not result in achievement of water quality standards. The permittees are not considered to be in violation of receiving water limitations as long as the process for evaluating the DAMP are followed. This process, however, will not result in achievement of water quality standards because (1) it is very difficult to demonstrate that urban runoff has "caused" an exceedance of water quality objectives; (2) Regional Water Board staff stated at the Board hearing at which the permit was adopted that there were inadequate resources to oversee the storm water program; (3) the permit does not require submittal of information on the adequacy of the DAMP until after the Executive Officer determines that the plan will not result in achievement of water quality objectives;

and (4) the permit places no time schedule on review of the adequacy of the plan to meet water quality standards. The permit does not require any change to the DAMP until directed by the Executive Officer. Due to these limitations, water quality standards are not likely to be achieved.

Finding: Petitioner has raised legitimate concerns. As discussed above, permittees will be required to control discharges that contribute to exceedances of water quality objectives. The SWRCB's charge under Water Code section 13320 is to determine whether the Regional Water Board has acted appropriately. In this case, the Regional Water Board has directed its Executive Officer to determine when receiving water limitations have been exceeded. In order for such determinations to be made the Executive Officer must devote sufficient resources to make such determinations in a timely manner. Provided this is the case, it can be concluded that the permit is adequate to achieve water quality standards. This conclusion to uphold the permit language is further predicated on the fact that to do otherwise would result in two inconsistent storm water permits for Orange County.

III. ADDITIONAL ISSUES

While upholding the permit as appropriate, the SWRCB has concerns that future storm water permits contain the strongest and clearest possible language to protect water quality. As evidenced by the discussion at the January 7, 1998 workshop review of this petition, there are serious disagreements as to how best to ensure such protection. A review of the record leads to the following conclusions:

- Future storm water permits should contain consistent requirements to ensure water quality protection.
- Such permits must comply with CWA and Porter-Cologne Water Quality Control Act requirements.
- Storm water permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs in lieu of numeric water quality-based effluent limitations.
- Permittees must ultimately be responsible for evaluating and revising BMPs to achieve compliance with water quality standards.
- Permits should be written to clearly identify water quality standards and to clearly require that permittees, through the implementation of BMPs, shall not cause or contribute to exceedances of such water quality standards.
- Given the unique nature of the storm water discharges, it is reasonable that implementation take place, where appropriate, on a phased basis.
- Determinations that additional BMPs are necessary to achieve water quality standards should be based on findings by the permittees or the Regional Boards that storm water discharges are a substantial (in more than a *de minimis* amount) contributor to continuing or recurring exceedances of such standards.

Based upon these conclusions and as a precedent decision,[12] the following receiving water limitation language shall be included in future municipal storm water permits.

RECEIVING WATER LIMITATIONS

1. Storm water discharges and authorized non-storm water discharges to any surface or ground water shall not adversely impact human health or the environment.

2. The SWMP shall be designed and implemented, or shall be in the process of being revised in accordance with the procedures set forth below to ensure that discharges authorized by this permit shall not cause or substantially (in more than a *de minimis* amount) contribute to a continuing or recurring exceedance of any applicable water quality standards contained in a Statewide Water Quality Control Plan or the applicable Regional Water Quality Control Board's Basin Plan.

3. If the discharges cause or contribute to an exceedance of the applicable water quality standards, permittee shall take the following steps:

   a. Upon a determination by either the facility operator or the Regional Water Board that discharges are causing or contributing to an exceedance of an applicable water quality standard, the facility operator shall promptly notify and thereafter submit a report to the appropriate Regional Water Quality Control 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 water quality standards. The report may be incorporated in the annual update to the SWMP unless the Regional Water Board directs an earlier submittal. The report shall include an implementation schedule. The Regional Water Quality Control Board may require modifications to the report;

   b. Submit any modifications to the report required by the Regional Board within 30 days of notification;

[12] In SWRCB Order WR 96-1, the SWRCB determined that water quality orders are precedent decisions. (See Gov. Code § 11425.60.)

c. Within 30 days following approval of the report described above by the Regional Water Quality Control Board, the facility operator shall revise its SWMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required;

d. Implement the revised SWMP and monitoring program in accordance with the approved schedule; and

e. Reduce pollutants in storm water discharges and authorized non-storm water discharges, following implementation of the SWMP revised in accordance with paragraph 3 above, to levels which shall not cause or contribute to an exceedance of any applicable water quality standards.

4. So long as permittees have complied with the procedures set forth in paragraph 3 above and are implementing the revised SWMP, 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 Water Board to develope additional BMPs.

IV. CONCLUSIONS

After review of the record and consideration of the contentions of the petitioner, and for the reasons discussed above, we conclude:

1. The federal regulations implementing CWA section 402(p) require NPDES permits to prohibit discharges of pollutants that "cause or contribute" to exceedances of water quality standards and the permit will be so interpreted.

2. The specific portion of the receiving water limitations provision that states that "permittees will not be in violation of this provision so long as they are in compliance with the requirements" specifying the process for evaluating and improving the effectiveness of the DAMP complies with the CWA.

3. The Regional Water Board acted appropriately in adopting the permit.

4. Receiving water limitation provisions of future municipal storm water permits shall be consistent with this Order.

V. ORDER

IT IS ORDERED that Order 96-03 shall be interpreted as discussed above.

It is further ordered that in other respects, the petition is denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 22, 1998.

AYE:	John Caffrey Marc Del Piero Mary Jane Forster John W. Brown
NO:	None
ABSENT:	James M. Stubchaer
ABSTAIN:	None

Maureen Marché
Administrative Assistant to the Board

EXHIBIT "6"

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER: WQ 2000 - 11

In the Matter of the Petitions of
THE CITIES OF BELLFLOWER, ET AL., THE CITY OF ARCADIA, AND WESTERN STATES PETROLEUM ASSOCIATION
Review of January 26, 2000 Action of the Regional Board
and
Actions and Failures to Act
by both the
California Regional Water Quality Control Board,
Los Angeles Region and Its Executive Officer
Pursuant to Order No. 96-054,
Permit for Municipal Storm Water and Urban Run-Off Discharges Within
Los Angeles County
[NPDES NO. CAS614001]

SWRCB/OCC FILES A-1280, A-1280(a) and A-1280(b)

BY THE BOARD:

On July 15, 1996, the Los Angeles Regional Water Quality Control Board (Regional Water Board) issued a revised national pollutant discharge elimination system (NPDES) permit in Order No. 96-054 (permit) to the 85 incorporated cities and the county within Los Angeles County (the County).[1] The permit covers storm water discharges from municipal separate storm sewer systems throughout the County.[2]

[1] This was the second storm water permit adopted for Los Angeles County and its cities. The first permit was the subject of an earlier Order. (In the Matter of Natural Resources Defense Council, Inc., Order WQ 91-04). In this permit, the County is designated as the Principal Permittee, and each city is designated as a permittee. The County is required to submit various documents on behalf of all of the permittees.
[2] The Regional Water Board has since issued a separate permit for one city, Long Beach. The relevant provisions of the Long Beach permit are similar to those in Order No. 96-054.

The permit contains provisions for the regulation of storm water discharges from development planning and construction.[3] Pursuant to these provisions, the County was required to submit Standard Urban Storm Water Mitigation Plans (SUSMPs).[4] The SUSMPs are plans that designate best management practices (BMPs) that must be used in specified categories of development projects. The County submitted SUSMPs, but the Regional Water Board approved the SUSMPs only after making revisions. The Executive Officer issued the revised SUSMPs on March 8, 2000.[5]

On February 25, 2000, the State Water Resources Control Board (State Water Board or Board) received a petition for review of the actions and failures to act regarding the SUSMPs from a number of cities, the Building Industry Association of Southern California and the Building Industry Legal Defense Foundation (jointly referred to as Cities). A second petition was received from the City of Arcadia. And a third petition was received from the Western States Petroleum Association (WSPA). On April 7, 2000, the petitioners filed amendments to their petitions, concerning the March 8, 2000 issuance of the SUSMPs. The Cities' amendment also revised the list of cities included in the petition. The Cities' petition now includes 32 cities. The petitions are legally and factually related, and have therefore been consolidated for purposes of review.[6] The petitioners also requested a stay of the SUSMPs. This request was denied by letter, dated May 11, 2000.

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[3] Permit, Part 2.III. These provisions focus more on post-construction impacts of development than on discharges from construction activities.
[4] Permit, Part 2.III.A.1.c.
[5] These are referred to herein as the Final SUSMPs. The Final SUSMPs also apply to Long Beach, even though it is subject to a separate permit.
[6] Cal. Code of Regs., tit. 23, section 2054.

On June 7 and 8, 2000, the Board held a hearing in Torrance. Several entities, including the petitioners, the Regional Water Board, and several environmental groups[7], were designated parties. The evidence from that hearing has been included in the record before the Board. The record for comments on the petition was kept open until the end of the hearing. The parties were allowed to submit post-hearing briefs.[8]

I. BACKGROUND

In prior Orders[9] this Board has explained the need for the municipal storm water programs and the emphasis on BMPs in lieu of numeric effluent limitations. The emphasis for preventing pollution from storm water discharges is still on the development and implementation of effective BMPs, but with the expectation that the level of effort will increase over time. In its Interim Permitting Approach[10], the United States Environmental Protection Agency (U.S. EPA) stated that first-round permits should include BMPs, and expanded or better-tailored BMPs in subsequent permits where necessary to attain water quality standards. Dischargers, consultants, and academic institutions in California and nationwide have conducted numerous studies on the effectiveness of BMPs and appropriate design standards. While many questions are still

[7] The environmental groups are Natural Resources Defense Council, Inc., Santa Monica BayKeeper, and Heal the Bay.

[8] There are several documents that were not timely received and, therefore, are not made a part of the record before the Board. The hearing notice specified that all evidence from parties must be received by May 31, 2000. The Regional Water Board submitted documents on June 6, 2000. The hearing notice specified that policy statements were due by the close of the hearing. Several comment letters were received June 12, 13, and 19, 2000. None of these submittals are a part of the record. The post-hearing briefs were subject to a 10-page limit. The environmental groups submitted objections to the post-hearing brief submitted by the Cities. First, the environmental groups challenge the length of the brief. All briefs were subject to a 10-page limit. The Cities submitted a 10-page brief, with a 22-page attachment showing extensive proposed revisions to the SUSMPs. This submittal violates the page limit, and only the brief is considered part of the record. Second, the environmental groups claim that an e-mail message referred to by the petitioners is subject to attorney-client privilege and should not have been used in this hearing. This e-mail message, from the Regional Water Board's counsel to one of its engineers, was placed in the Regional Water Board's administrative record and submitted to the State Water Board. Any privilege that may have attached to the message has been waived and no longer exists. Finally, the post-hearing brief from the City of Arcadia was received late and will not be considered. Documents submitted late for interim deadlines (such as the deadline for submitting responses to the petitions), have been included in the record.

[9] See, especially Orders WQ 91-03 (In the Matter of Citizens for a Better Environment et al.) and WQ 91-04.

[10] Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits. (61 Federal Register 57425.)

outstanding, more is expected of municipal dischargers, and many are implementing more effective programs.

While storm water management plans are improving, our knowledge of the impacts is also growing. Urban runoff has been determined to be a significant contributor of impairment to waters throughout the state. In Los Angeles specifically, beach closures are sometimes associated with urban runoff. In adopting the SUSMPs, the Regional Water Board took note of the urgent need for preventing further pollution from urban runoff and storm water discharges.

It is important to emphasize the role of the SUSMPs within the totality of regulating storm water discharges, and the purpose of these particular control measures. The requirement to prepare SUSMPS was part of the development controls in the permit. In addition to development controls, the permit requires education, public outreach, programs to restrict illicit connections and discharges, and controls on public facilities. In the context of the entire effort required by the permit, the development controls can be seen as preventing the existing situation from becoming worse.

The Final SUSMPs include a list of mandatory BMPs for nine categories of development. There are provisions that are applicable to all categories and lists of BMPs for individual categories. Requirements applicable to all categories include provisions to limit erosion from new development and redevelopment, requirements to conserve natural areas, protection of slopes and channels, and storm drain stenciling. Examples of BMPs specific to categories of discharge include design of loading docks for commercial projects and design of fueling areas for retail gasoline outlets. In most respects, the Final SUSMPs were similar to those proposed by the County. The significant departures were the inclusion of a numeric design standard for structural or treatment control BMPs, and the inclusion of certain types of projects that were not

covered in the County's proposal. The design standard creates objective and measurable criteria for the amount of runoff that must be treated or infiltrated by BMPs.

The record indicates that the purpose of the development controls, including the SUSMPs, is not simply to prevent pollution associated with construction runoff. As the petitioners point out, construction discharges are already subject to this Board's Statewide Construction Permit. The development controls in the SUSMPs, on the other hand, focus on post-construction runoff. They are aimed at limiting not just the pollutants in runoff from the new development, but also the volume of runoff that enters the municipal storm sewer system. By limiting runoff from new development, the SUSMPs prevent increased impacts from urban runoff generally. There is adequate technical information in the record to show that by controlling the volume of runoff from new development, BMPs can be effective in reducing the discharge of pollutants in storm water runoff.

The Procedure for Adopting the SUSMPs

The permit requires a program for controls on Development Planning and Construction. It involved a number of submissions by the County in consultation with the Cities. The first step was submission of a checklist for determining priority projects and exempt projects. The checklist was due on January 30, 1998. A list of recommended BMPs for development projects was also due on that date. The SUSMPs were due within six months of approval of the BMP list, and were to incorporate BMPs for certain categories of development. Following approval of the SUSMPs, the cities and County were to implement development programs for priority projects, consistent with the BMP list and the SUSMPs.

The BMP list was not approved until April 22, 1999. Thereafter, the County submitted proposed SUSMPs on July 22, 1999. The Regional Water Board held a public workshop on

August 10, 1999. Following the workshop, the County submitted revisions to the SUSMPs on August 12, 1999. On August 16, 1999, the Regional water Board gave notice that it would discuss the SUSMPs in a public meeting on September 16, 1999. There was significant discussion at that meeting regarding the intent of the Executive Officer to approve the SUSMPs, but with revisions including a numeric design standard. At the conclusion of the meeting, the Regional Water Board members asked the Executive Officer to revise the SUSMPs and bring them back to another meeting. On December 7, 1999, the Executive Officer circulated revised SUSMPs for public review. This document incorporated a numeric design standard and made other revisions to the permittees' proposal. The Regional Water Board held a hearing on the SUSMPs on January 26, 2000. At that meeting, the Regional Water Board endorsed the SUSMPs revised by the Executive Officer, but directed him to make further changes. The Executive Officer issued the Final SUSMPs on March 8, 2000.

The Contents of the Final SUSMPs

The permit provides that the SUSMPs must incorporate the appropriate elements of the BMP list and, at a minimum, apply to seven development categories: 100-plus home subdivisions; 10-plus home subdivisions; 100,000-plus square foot commercial developments; automotive repair shops; retail gasoline outlets; restaurants; and hillside single-family dwellings.

The SUSMPs proposed by the County applied to these seven categories. Various BMPs applied to the different categories, and the SUSMPs contained narrative mitigation requirements for source control and treatment. The July proposals stated:

> "The development must be designed so as to mitigate (infiltrate and/or treat) the site runoff generated from impervious directly connected areas that may contribute pollutants of concern to the storm water conveyance system."

There were no numeric design criteria for mitigation. According to various participants, earlier County drafts had included design standards to mitigate flows from 0.6-inch storm events. But any numeric criteria had been removed from the version that was submitted.

In its revised SUSMPs, submitted on August 12, the County explained in its cover letter that the mitigation language did not mean that all runoff must be mitigated. Rather, the County's intent was to omit a numerical standard from the SUSMPs. The revised SUSMPs no longer referred to mitigation at all. Instead, the following language replaced the mitigation requirement:

> "The development must be designed so as to minimize, to the maximum extent practicable (MEP), the introduction of pollutants of concern that may result in significant impacts, generated from site runoff of directly connected impervious areas (DCIA), to the storm water conveyance system as approved by the building official."

The Final SUSMPs, as approved by the Executive Officer and the Regional Water Board, included several revisions from the County's submittal. The revision that is of greatest concern to the petitioners is the addition of Design Standards for Structural or Treatment Control BMPs.[11] The design standards require that developments subject to the SUSMPs shall be designed to mitigate storm water runoff (by treatment or infiltration) from one of the following:

> "1. The 85th percentile 24-hour runoff event determined as the maximized capture storm water volume for the area..., or
> 2. The volume of annual runoff based on unit basin storage water quality volume, to achieve 80 percent or more volume treatment..., or
> 3. The volume of runoff produced from a 0.75 inch storm event, prior to its discharge to a storm water conveyance system, or
> 4. The volume of runoff produced from a historical-record based reference 24-hour rainfall criterion for "treatment" (0.75 inch average for the Los Angeles County area) that achieves approximately the same reduction in pollutant loads achieved by the 85th percentile 24-hour runoff event."

[11] The Final SUSMPs also include the narrative language quoted from the County's August 22, 1999 proposal.

The Final SUSMPs also applied to two additional categories of development: parking lots over 5,000 square feet or with 25 or more spaces and exposed to storm water, and to developments in environmentally-sensitive areas. Other revisions included application to all projects in the categories instead of discretionary projects only and the definition of redevelopment.

II. CONTENTIONS AND FINDINGS[12]

Contention: The petitioners contend that the Regional Water Board erred in not complying with the Administrative Review Process within the permit, and acted arbitrarily and capriciously and in violation of the Clean Water Act and state law.

Finding: The permit required the County, in consultation with the cities subject to the permit, to submit SUSMPs. The permit includes some general minimum requirements for the SUSMPs.[13] The Executive Officer is granted authority to approve the SUSMPs.[14]

The permit also contains an administrative review process.[15] The permit states that the administrative review process "formalizes the procedure for review and acceptance of reports and documents" and "provides a method to resolve any differences in compliance expectations between the Regional Board and Permittees, prior to initiating enforcement action."[16] Following this introductory statement, the permit includes two procedures. The first is for review and approval or disapproval of reports and documents. The second is the dispute resolution section that must be followed prior to enforcement action.

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[12] This Order does not address all of the issues raised by the petitioners. The Board finds that the issues that are not addressed are insubstantial and not appropriate for State Water Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158, [239 Cal.Rptr. 349], Cal. Code Regs., tit. 3, § 052.)
[13] Permit, Part 2, III.A.1.c.
[14] Permit, Part 2, III.A.2.
[15] Permit, Part 2, I.G.
[16] *Id.*

The process for review of documents that are subject to the Executive Officer's approval is that the Executive Officer will notify the permittees of the results of the review and approval or disapproval within 120 days. If the Executive Officer does not do so, the permittees must notify the Regional Water Board of their intent to implement the documents without approval. The Executive Officer then has 10 days to respond, or the permittees may implement the program and the Executive Officer may not make modifications.

The dispute resolution procedure is to be used when the Executive Officer determines that a permittee's storm water program is insufficient to meet the permit's provisions. The Executive Officer must send a "Notice of Intent to Meet and Confer" with the permittee. A meet and confer period then ensues, resulting in a written "Storm Water Program Compliance Amendment (SWPCA)." The permittee is provided time to comply with the SWPCA. The Executive Officer is not allowed to take enforcement action against a permittee until the Executive Officer notifies the permittee in writing that the administrative review process has been exhausted and that a violation exists warranting enforcement.

The petitioners contend that the Executive Officer failed to notify the permittees that their SUSMPs were inadequate within 120 days of its submittal. The petitioners also argue that, by revising the SUSMPs without pursuing the dispute resolution process, the Regional Water Board "violated" the terms of the permit.

The provision for review of documents, which clearly includes the SUSMPs, requires that the Executive Officer notify the permittees of the results of the review and approval or disapproval within 120 days. The County submitted the revised SUSMPs on August 12, 1999. Within 120 days, the Regional Water Board held a workshop where staff expressed their concerns with the SUSMPs. Also within 120 days the Regional Water Board itself held a public

meeting where there was extensive discussion and concern by board members that the SUSMPs did not include a numeric standard. And, prior to any notification by the permittees that they would proceed with implementing their SUSMPs, the Regional Water Board held a hearing January 26, 2000, where it directed the Executive Officer to issue the SUSMPs with revisions. The Executive Officer did so on March 8, 2000.

It is clear from the record that the Executive Officer, and the Regional Water Board itself, did inform the permittees that the SUSMPs were inadequate. There was no requirement for a specific form for expressing disapproval of documents. The extensive discussion and meetings on the need for revisions to the SUSMPs, and the Executive Officer's approval of revised SUSMPs, plainly refutes the allegation that the Regional Water Board never notified the permittees of its disapproval of the County's proposed SUSMPs.

The permittees also claim that the Regional Water Board "violated" the permit by failing to institute the meet and confer process.[17] The dispute resolution process, which includes meet and confer, did not apply to the decision to disapprove the proposed SUSMPs. That process is only required when the Regional Water Board ultimately takes an enforcement action against a permittee. It is separate from the process for review and approval or disapproval of documents, and does not even appear to relate to possible enforcement actions for submission of inadequate documents. This is illustrated by the fact that the provision regarding documents refers to submittals from both the Principal Permittee and the individual permittees, while the dispute resolution provision refers only to the permittees. This distinction is relevant because the County is charged with submitting the documents, while the individual permittees are responsible for compliance. A fair reading of the entire section on the administrative review process is that the

[17] We note that permits are issued to permittees to allow discharges to waters of the state. It is only permittees, and not Regional Water Boards, who can be charged with violating permits.

review and approval or disapproval of documents applies to submission of documents by the County on behalf of the cities, while the dispute resolution process applies to enforcement actions against any permittees for failing to implement adequate programs.

Contention: The petitioners contend that the Regional Water Board was not authorized to revise the SUSMPs to add more stringent requirements.

Finding: The petitioners contend that the mitigation standards in the SUSMPs are more stringent than the requirement in the permit to reduce pollutants in storm water runoff to the maximum extent practicable (MEP)[18]. The issue of what level of protection constitutes MEP will be discussed *Infra*, in the discussion of the reasonableness of the numeric standards. But the petitioners also make certain procedural claims on this point. They argue that in approving the BMP list, the Regional Water Board determined that those BMPs constituted MEP and that the Board could not add additional BMPs in the SUSMPs. They also contend the Regional Water Board itself had no authority to "usurp" the Executive Officer's role in reviewing the SUSMPs.[19] Finally, the petitioners contend that the Regional Water Board was not authorized to mandate a program for the permittees without amending the permit.

The permit requires the County to submit a list of BMPs for approval. The Regional Water Board approved this list. Following approval of the list, the County was required to submit the SUSMPs, which must "incorporate the appropriate elements of the recommended BMPs list."[20] The petitioners contend that by approving the list, the Regional Water Board determined that those BMPs constituted MEP, and that under the terms of the permit the Regional Water Board could not require additional BMPs.

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[18] The technology-based standard for controls under municipal storm water permits is MEP. For a fuller discussion of this standard, see Order WQ 91-03.
[19] It is undisputed that, at its January 26, 2000 meeting, the Board directed the Executive Officer to make additional revisions to the SUSMPs.
[20] Permit, Part 2, III.A.1.c.

In addressing this contention, we face what appears to be a fundamental misunderstanding of the numeric design standards on the part of the petitioners. The design standards are objective criteria that developers must achieve in designing their BMPs. The design standards are not separate BMPs. The standards tell what magnitude of storm event the BMPs must be designed to treat or infiltrate. They do not specify the BMPs that must be employed.

The SUSMPs as submitted by the County specify BMPs for various categories of development. Many of these BMPs are designed to minimize the pollutants in storm water runoff, by reducing flow through infiltration or by treatment. Examples of BMPs proposed by the County include infiltration basins and trenches, oil/water separators, and media filtration. The County's proposed SUSMPs also included language requiring minimizing the introduction of pollutants to the storm water conveyance system. That language remains unchanged in the Final SUSMPs. The only significant difference between the two versions of the SUSMPs was that the Regional Water Board established numeric criteria for designing the BMPs.

In adopting the Final SUSMPs, the Regional Water Board based its decision on the MEP standard.[21] The Regional Water Board did not significantly revise the BMP list or specify further the actions that developers must take to comply with the SUSMPs. Thus, we find that the Regional Water Board did not inappropriately revise its determination of what constituted MEP.

The Regional Water Board is the political body responsible for water quality control in the Los Angeles region.[22] While the Regional Water Board may delegate specified powers and duties to its Executive Officer,[23] it can at any time act on its own behalf. The fact that the Board authorized its Executive Officer to approve the SUSMPs in the permit did not mean that the Board thereby denied itself the opportunity to provide direction to the Executive Officer in his

[21] Resolution R-00-02.
[22] Water Code sections 13200 and 13225.
[23] Water Code section 13223.

approval. Such an interpretation of its delegation authority would result in an improper failure of the Board to assume responsibility for water quality in the region.

We also find that the Regional Water Board was authorized to revise the SUSMPs to achieve compliance with the permit's requirements. The SUSMPs are a part of implementation of the permit. Because the permit regulates storm water discharges throughout the entire Los Angeles region and it is implemented by 85 cities and the County, it is obvious that the permit could not spell out every detail of the program for the five-year term of the permit. Instead, the implementation is through the submission, review and approval, and implementation of various programs, including the SUSMPs.[24] Where it receives a submission that it finds is not consistent with the requirements of the permit, it is reasonable for the Regional Water Board to be able to require revisions. The Regional Water Board is not required to amend the permit each time it approves a submittal or approves a submittal with revisions. On the other hand, if the Regional Water Board's action in requiring revisions is inconsistent with the terms of the permit, then the Board should not act without first amending the permit. While the Regional Water Board could have required the County to make the revisions rather than making them itself, we see no harm in the Regional Water Board's approach.

As will be discussed below, in most respects the Final SUSMPs are consistent with the permit. But there are some portions of the SUSMPs that are not consistent, and in those cases the SUSMPs provisions are further revised in this Order.

Contention: The petitioners make various procedural claims, including that they were denied due process, and that the Regional Water Board violated the Administrative Procedure

[24] A fuller discussion of the use of storm water management plans to incorporate a developing program is found in Order No. WQ 91-03.

Act, the California Environmental Quality Act (CEQA), and the California Constitution, Article XIII B, section 6 (regarding state mandates).

Finding: The petitioners point out that at the January 26, 2000 Regional Water Board hearing, there was some confusion over late changes to the SUSMPs and they contend they were not provided adequate opportunity to comment. There was significant discussion of the SUSMPs over several months. We do not agree with the petitioners that a program of this magnitude must necessarily take years to develop. But we are concerned that at the January 26, 2000 hearing, interested persons and permittees were not given adequate time to review late revisions or to comment on them. Given the intense interest in this issue, the Regional Water Board should have diverged from its strict rule limiting individual speakers to three minutes and conducted a more formal process. Such a process should provide adequate time for comment, including continuances where appropriate.[25] But to the extent the Regional Water Board's process caused any harm, this Board cured those harms. We held a two-day hearing in Los Angeles County, where all parties were allowed significant time to present their positions and testimony. In addition, we allowed the introduction of new evidence that had not been presented to the Regional Water Board. At this point, all parties have been afforded a full opportunity to review the Final SUSMPs, to present their positions and evidence, and to engage in cross-examination. The petitioners' due process rights have been protected.

The Board has already addressed the contentions regarding compliance with other laws in prior decisions. The Administrative Procedure Act exempts the adoption of permits from its requirements.[26] While the SUSMPs are not a permit, they are implementing documents for a

[25] For future adjudicative proceedings that are highly controversial or involve complex factual or legal issues, we encourage regional water boards to follow the procedures for formal hearings set forth in Cal. Code of Regs., tit. 23, section 648 et seq.

[26] Government Code section 11352; See, Order No. 95-4 (In the Matter of the City and County of San Francisco).

permit, and are therefore subject to the exemption. Moreover, they are relevant only to this permit, and are not a general rule of application. The constitutional provisions regarding state mandates also do not apply to NPDES permits.[27] As will be explained below, the SUSMPs as revised herein, are consistent with MEP and therefore are federally mandated. The provisions of CEQA requiring adoption of environmental documents also do not apply to NPDES permits.[28] Again, as an implementing document for the permit, there is no requirement for a separate CEQA analysis.[29]

Contention: The petitioners contend that the SUSMPs do not properly apply the maximum extent practicable standard.

Finding: The permit, consistent with Clean Water Act section 402(p)(3)(B)(iii), requires controls to reduce the discharge of pollutants to the maximum extent practicable, or MEP.[30] In approving the Final SUSMPs, the Regional Water Board acknowledged that one of the primary objectives of the municipal storm water program is the requirement to reduce the discharge of pollutants from storm water conveyance systems to the MEP.[31] While all parties appear to agree that the standard for the SUSMPs is MEP, they disagree about what level of effort is necessary to comply with that standard.

The petitioners approach this issue from two angles. First, they contend that the SUSMPs will not provide water quality benefits that reflect MEP. Second, they contend that there could be adverse impacts on groundwater quality that have not been adequately evaluated.

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[27] See, Order No. WQ 90-3 (In the Matter of San Diego Unified Port District).
[28] Water Code section 13389.
[29] We do note with interest the environmental groups' comment that if the permittees believed it was necessary to comply with the APA and CEQA prior to adoption of the SUSMPs, then they themselves would have violated those acts in their submissions of the proposed SUSMPs.
[30] Permit, Finding 13.
[31] Final SUSMPs, at page 2; Resolution No. R-00-02, at page 3.

Storm Water Design Standards as MEP

In adopting the Final SUSMPs, the Regional Water Board found that many rivers and streams in Los Angeles County are impaired for pollutants found in storm water and urban runoff, and that storm water runoff carries pollutants from nearly all types of developed properties.[32] Pollutant loading from the aggregate of development in the basin results in impairments from sediments, metals, complex organic compounds, oil and grease, nutrients, and pesticides.[33] The Final SUSMPs reflect two goals: to reduce the amounts of these pollutants in runoff and to reduce the ability of runoff to act as a conveyance system to deliver more pollutants to receiving waters. The Final SUSMPs, which include lists of BMPs and design standards requiring treatment or infiltration, address these two goals.

Clean Water Act section 402(p)(3)(B)(iii), which sets forth the requirements for establishing MEP in municipal storm water permits, provides that such 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." The United States Environmental Protection Agency (U.S. EPA), in a guidance document, explains that BMPs should be used in first-round storm water permits, and "expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards."[34] The Clean Water Act, as interpreted by U.S. EPA, does require that, in a second-round permit,[35] expanded BMPs may be appropriate. In light of the number of water

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[32] Resolution No. R-00-02.
[33] *Id.*
[34] Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Federal Register 57425 (1996).
[35] The original permit was issued in 1990. The 1996 permit is a second-round permit.

bodies impaired by runoff in Los Angeles County, it was appropriate to expand the scope of BMPs during the permit term.

The regulations implementing section 402(p) specifically require municipalities to have controls to reduce the discharge of pollutants from their storm sewer systems that "receive discharges from areas of new development and significant redevelopment," including post-construction discharges.[36] Clearly, it was appropriate for the Regional Water Board to require BMPs for new development and significant redevelopment. The permittees, who submitted their own version of SUSMPs with listed BMPs for categories of development, appear to have no real quarrel with this general mandate.

This Board has already endorsed requirements to limit the flow of the "first flush" of storm water, which may contain more significant pollutants.[37] The permittees' own version of the SUSMPs required mitigation of storm water runoff by treatment or infiltration, thus conceding the propriety of these two approaches to lessening the impact of storm water discharges. The crux of the disagreement is that the Regional Water Board added numeric design standards to establish the amount of runoff that must be treated or infiltrated, and required the mandatory application of these standards to categories of development.

The addition of measurable standards for designing the BMPs provides additional guidance to developers and establishes a clear target for the development of the BMPs. The U.S. EPA guidance manual suggests the use of design criteria and performance standards for post-construction BMPs.[38] The numeric criteria the Regional Water Board adopted essentially

[36] 40 CFR section 122.26(d)(2)(iv)(A)(2).
[37] In the Matter of National Steel and Shipbuilding Company, et al., Order WQ 98-07, at slip opinion 7.
[38] Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Strom Sewer Systems, at page 6-4 (November 1992).

requires that 85 percent of the runoff from the development be infiltrated or treated.[39] In adopting these standards, the Regional Water Board based its decision on a research review of standards in other states and a statistical analysis of the rainfall in the area. The standard was set to gain the maximum benefit in mitigation while imposing the least burden on developers.[40] In light of the evidence of the use of this or more stringent standards in other states, the expert testimony supporting this standard, the endorsement by U.S. EPA in its comments, and the cost-effectiveness of its implementation (discussed below), the Regional Water Board acted appropriately in determining that the standards reflect MEP.[41]

We also find that the Regional Water Board appropriately applied these standards to seven of the categories listed in the SUSMPs: single-family hillside residences, 100,000 square foot commercial developments, automotive repair shops, restaurants, home subdivisions with 10 to 99 housing units, home subdivisions with 100 or more housing units, and parking lots with 5,000 square feet or more or with 25 or more parking spaces and potentially exposed to storm water runoff.[42] These categories, except for parking lots, were already targeted for special treatment in the permit. The evidence shows that each listed category can be a significant source of pollutants and/or runoff following development. It is appropriate that the design standards apply so that BMPs for these categories of development result in the infiltration or treatment of a significant about of the runoff.

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[39] Four different methods of calculation are permitted, so the percentage of capture may vary slightly.

[40] At the hearing in this matter, Regional Water Board staff explained that the standard was set at the bottom of the "knee" of the curve where the benefits of the mitigation requirements decrease and the cost increases. Other states have set the standard higher along this curve, requiring 90 to 95 percent mitigation.

[41] This conclusion in no way departs from our acceptance of BMPs in lieu of numeric effluent limitations in storm water permits. (See, e.g., Order WQ 91-03 and Order WQ 91-04.) The numeric standard is a design standard for BMPs. It does not quantify or limit the pollutants in the effluent. It also does not specify which of the listed BMPs must be employed.

[42] As discussed below, this Board is revising the SUSMPs to delete the application of the design standards to retail gasoline outlets and to locations within or directly adjacent to or discharging directly to environmentally-sensitive areas.

Potential Impacts on Ground Water

The petitioners contend that infiltration of runoff may lead to ground water pollution, and that the Regional Water Board did not properly consider such potential impacts. The mitigation standards provide for a waiver where there is a risk of ground water contamination because a known unconfined aquifer lies beneath the land surface or an existing or potential underground source of drinking water is less than ten feet from the soil surface.[43] The Final SUSMPs also include a discussion on how to use infiltration so that the risk of contamination of groundwater is reduced, and where infiltration is not appropriate.[44]

The Regional Water Board did consider the potential impacts to groundwater from infiltration, and included appropriate limitations and guidance on its use as a BMP. These provisions will ensure adequate protection of groundwater from any adverse impacts due to infiltration.

Contention: The petitioners contend the Regional Water Board failed to show that the SUSMPs as adopted are cost-effective and that the benefits to be obtained outweigh the costs.

Finding: The petitioners refer to the Preamble to the Phase II storm water regulations[45] as the basis for their economic argument. The quoted language, however, does not wholly support the petitioners' contention. The Preamble states that President Clinton's Clean Water Initiative clarifies "that the maximum extent practicable standard should be applied in a site-specific, flexible manner, taking into account cost considerations as well as water quality effects."[46] It is clear that cost should be considered in determining MEP; this does not mean that

[43] Final SUSMP, page 14.
[44] *Id.*, at page 15.
[45] 64 Federal Register 68722 and following. These regulations do not apply to the permit, but the general language on MEP is relevant to EPA's interpretation of the standard.
[46] 64 Federal Register 68722, 68732 (December 8, 1999).

the Regional Water Board must demonstrate that the water quality benefits outweigh the economic costs.

While the standard of MEP is not defined in the storm water regulations or the Clean Water Act, the term has been defined in other federal rules. Probably the most comparable law that uses the term is the Superfund legislation, or CERCLA, at section 121(b). The legislative history of CERCLA indicates that the relevant factors, to determine whether MEP is met in choosing solutions and treatment technologies, include technical feasibility, cost, and state and public acceptance.[47] Another example of a definition of MEP is found in a regulation adopted by the Department of Transportation for onshore oil pipelines. MEP is defined as to "the limits of available technology and the practical and technical limits on a pipeline operator . . . ."[48]

These definitions focus mostly on technical feasibility, but cost is also a relevant factor. There must be a serious attempt to comply, and practical solutions may not be lightly rejected. If, from the list of BMPs, a permittee chooses only a few of the least expensive methods, it is likely that MEP has not been met. On the other hand, if a permittee employs all applicable BMPs except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit to be derived, it would have met the standard. MEP requires permittees to choose effective BMPs, and to reject applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive. Thus while cost is a factor, the Regional Water Board is not required to perform a cost-benefit analysis.

In reviewing the record, it is apparent that the Regional Water Board did evaluate the cost of the SUSMPs. While the petitioners claim there is no evidence in the record to show the

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[47] 132 Cong. Rec. H 9561 (Oct. 8, 1986).
[48] 49 CFR section 194.5.

SUSMPs are necessary and cost effective, the opposite is true. The record is replete with documentation of costs of pilot mitigation projects, studies from similar programs in other states, and research studies. The Regional Water Board complied with the requirement to consider cost.

The Regional Water Board found that the cost to include BMPs that will meet the mitigation criteria will be one to two percent of the total development cost. This amount appears reasonable, especially in light of the amount of impervious surface already in Los Angeles County and the impacts on impaired water bodies. In considering the cost of compliance, it is also important to consider the costs of impairment. The beach closures in the Los Angeles region, well documented in the evidence, have reached critical proportions. These beach closures clearly have a financial impact on the area, and should be positively affected by the SUSMPs.

We do note that there could be further cost savings for developers if the permittees develop a regional solution for the problem. We recommend that the cities and the County, along with other interested agencies, work to develop regional solutions so that individual dischargers are not forced to create numerous small-scale projects. While the SUSMPs are an appropriate means of requiring mitigation of storm water discharges, we also encourage innovative regional approaches.[49]

Contention: The petitioners have raised contentions regarding details of the SUSMPs, including the amount of time allowed for inclusion of SUSMPs in local ordinances, and their application to both "discretionary" and "non-discretionary" projects. In addition, during the hearing certain ambiguities in the wording of the Final SUSMPs became apparent, including the provisions regarding redevelopment and environmentally-sensitive areas. In this portion of the

[49] We note that the SUSMPs as written do not in any way preclude the development of regional solutions approved by the Regional Water Board as a means to comply with the BMP and design standard requirements.

Order we address these issues and also the application of the design standards to retail gasoline outlets (RGOs) and the waiver funding requirements.

Finding: The testimony at the hearing in this matter revealed that there are specific provisions of the SUSMPs that create confusion as to the types of development projects subject to the mitigation design standards. The petitioners also contend that application of the standards to specific types of development either is unreasonable or is inconsistent with the terms of the permit. The specific requirements are discussed below.

Retail Gasoline Outlets

Petitioner WSPA contends that RGOs should be excluded from the SUSMPs. Its petition raised the same general contentions as the other petitioners, but at the hearing WSPA presented evidence specific to RGOs. In particular, WSPA raised questions about the propriety of applying the design standards for BMPs to RGOs. In considering this issue, we conclude that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. Moreover, in light of the small size of many RGOs and the proximity to underground tanks, treatment may not always be feasible, or safe. The mandatory BMPs that are included in the SUSMPs may be adequate to achieve MEP at RGOs, but the Regional Water Board should add additional mandatory BMPs, such as use of dry cleanup methods (e.g. sweeping) for removal of litter and debris, use of rags and absorbents for leaks and spills, restricting the practice of washing down hard surfaces unless the wash water is collected and disposed of properly, annual training of employees on proper spill cleanup and waste disposal methods, and the inclusion of BMPs to address trash receptacle areas and air/water supply

areas.[50] We conclude that because RGOs are already heavily regulated and may be limited in their ability to construct infiltration facilities or to perform treatment, they should not be subject to the BMP design standards at this time, and recommend that the Regional Water Board undertake further consideration of a threshold relative to size of the RGO, number of fueling nozzles, or some other relevant factor. This Order should not be construed to preclude inclusion of RGOs in the SUSMP design standards, with proper justification, when the permit is reissued.

Redevelopment Projects

The SUSMPs were written to apply to new development and to some types of redevelopment in nine categories of projects. The definition of "redevelopment" reflected the intent of the Regional Water Board to define the scope of redevelopment projects subject to the requirements. That definition[51], however, was somewhat confusing, and it was apparent from testimony at the hearing that the parties had different understandings of the scope of redevelopment subject to the SUSMPs. In their post-hearing briefs, the various parties appeared to agree on the actual intent of the Regional Water Board in including redevelopment in the SUSMPs. This intent was to include redevelopment that adds or creates at least 5,000 square feet of impervious surface to the original development and, where the addition constitutes less than 50 percent of the original development, to limit the application of the BMP design standards to the addition.

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[50] These BMPs are from a list of BMPs in a publication of the California Storm Water Quality Task Force. (Best Management Practice Guide – Retail Gasoline Outlets. March 1997.) This publication includes BMPs in addition to those listed in the SUSMPs. All BMPs recommended in this publication should be mandated.

[51] The SUSMPs state: "Redevelopment" means, on an already developed site, the creation or addition of at least 5,000 square feet of impervious surfaces or the creation or addition of fifty percent or more of impervious surfaces or the making of improvements to fifty percent or more of the existing structure. Redevelopment includes, but is not limited to: the expansion of a building footprint or addition or replacement of a structure; structural development including an increase in gross floor area and/or exterior construction or remodeling; replacement of impervious surface that is not part of a routine maintenance activity; and land disturbing activities related with structural or impervious surfaces.

While some parties requested further requirements for development, it appears that the Regional Water Board's original intent was relatively simple to apply and results in a fair and appropriate application of the SUSMPs' requirements to redevelopment. Therefore, we will revise the definition in the SUSMPs accordingly.

Environmentally-Sensitive Areas

The permit required that the SUSMPs address at least seven development categories.[52] The final SUSMPs added two more categories: parking lots of 5,000 square feet or more or with 25 or more parking spaces and potentially exposed to storm water runoff; and location within or directly adjacent to an environmentally-sensitive area (ESA). The petitioners contend that the addition of ESAs was inappropriate because the permit refers only to "development categories"[53] and ESA is a location category.

Whether or not the Regional Water Board went beyond the permit's terms in including this category, we find a fundamental problem with the language of the SUSMPs regarding ESAs. All of the other categories are relatively simple to apply because they describe the types of development that fall within the category. For instance, the threshold for a commercial development is 100,000 square feet. If the development is smaller, it is not subject to the SUSMPs. But for developments within ESAs, the SUSMPs contain no threshold. This absence led to speculation by the petitioners that something as small as a new patio on a home in an ESA would make the SUSMPs applicable. The Regional Water Board, at the hearing and in its post-hearing brief, conceded that there should be some threshold. While the Regional Water Board

[52] The categories listed in the permit are: single-family hill residences, 100,000 square-foot commercial developments, automotive repair shops, retail gasoline outlets, restaurants, home subdivisions with 10 to 99 housing units, and home subdivisions with 100 or more housing units. Permit, Part 2, III.A.1.c.
[53] *Id.*

did recommend a specific threshold, we believe that it is inappropriate for this Board to add a threshold that has not been fully discussed by all interested persons.

While it may be appropriate to include more stringent controls for developments in ESAs, we also note that such developments are already subject to extensive regulation under other regulatory programs. Moreover, in light of the permit language limiting the SUSMPs to development categories, ESAs are not an appropriate category within the SUSMPs. The Regional Water Board may choose to consider the issue further when it reissues the permit.

Discretionary and Non-Discretionary, or Ministerial, Projects

The petitioners contend that the SUSMPs should apply only to projects that are considered "discretionary" within the meaning of California Environmental Quality Act (CEQA).[54] They argue that the inclusion of non-discretionary, or ministerial, projects is inconsistent with the terms of the permit.

The permit provisions on development projects do refer to "discretionary" projects in several places. The permittees are directed to develop a checklist for determining priority and exempt projects.[55] Priority projects are defined as development and redevelopment projects requiring discretionary approval, which may have a potential significant effect on storm water quality.[56] The permittees are also required to develop a BMP list.[57] In developing the SUSMPs, the permittees are required to incorporate appropriate elements of the BMP list.[58] Next, the permittees must develop a program on planning control measures for priority projects (which are limited to projects requiring discretionary approval), consistent with the list of BMPs and the

[54] Public Resources Code section 21000 *et seq.*
[55] Permit, Part 2, III.A.1.a.
[56] *Id.*
[57] Permit, Part 2, III.A.1.b.
[58] Permit, Part 2, III.A.1.c.

SUSMPs.[59] The permit further states that, in order to assure compliance with these requirements, the permittees must develop guidelines on preparing CEQA documents that link mitigation conditions to "local discretionary project approvals."[60]

Taken as a whole, the provisions of the permit appear to link the development requirements for SUSMPs to developments that receive discretionary approval by local governments, as defined in CEQA. The SUSMPs are an implementation tool for the permit and must be consistent with the permit. While the limitation of the SUSMPs to discretionary projects may not be sufficiently broad for an effective storm water control program, the Regional Water Board acted inappropriately in expanding the SUSMPs to include non-discretionary projects. The Regional Water Board may consider expanding the development controls beyond CEQA discretionary projects when it reissues the permit. But at this time, the SUSMPs must be revised so that they are limited to development projects requiring discretionary approval within the meaning of CEQA.[61]

Waiver Funding Requirement

Where a waiver is granted from the design standard requirements, the Final SUSMPs provide that the permittee must require the project proponent to transfer the cost savings to a storm water mitigation fund. The fund is to be operated by a public agency or a non-profit entity, to promote regional or alternative solutions for storm water pollution in the same storm watershed. The petitioners contend that the funding requirement will create an additional administrative burden.

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[59] Permit, Part 2, III.a.2.
[60] Permit, Part 2, III.a.3.b.
[61] We note that the Final SUSMPs already include a definition of "discretionary project" consistent with the definition in the CEQA guidelines. Final SUSMPs at page 4 of 25; Title 14, California Code of Regulations, section 15357. Apparently this definition was inadvertently retained after the Regional Water Board decided to expand the SUSMPs beyond discretionary projects.

The concept of a mitigation fund or "bank" is a positive idea for obtaining regional solutions to storm water runoff. As a long-term strategy, municipal storm water dischargers should work to establish regional mitigation facilities, which may be more cost-effective and more technically effective than mitigation structures at individual developments. But at this point there are not sufficient resources in place to require all permittees to establish such funds or to find appropriate non-profit organizations. Before mandating funding, preliminary questions should be answered, including who will manage the fund, what types of projects it will be used for, what entities can legally operate such funds, and how permittees will determine the amount of the assessments. It would be appropriate for the County to consider developing a program with the appropriate flood control agency, or as a model for the separate cities to develop. There may be suitable agencies to administer such funds, but the development of programs may take some time. The Regional Water Board should consider adopting such a program when it reissues the permit, after consultation with the appropriate local agencies.

III. CONCLUSIONS

Based on the discussion above, the Board concludes that:

1. The Regional Water Board complied with the procedural requirements of the permit, including the Administrative Review Process, in approving the Final SUSMPs.
2. The Regional Water Board was authorized to revise the SUSMPs by including more stringent requirements than the permittees had proposed.
3. The Regional Water Board complied with did not violate the Administrative Procedure Act, CEQA, or the Constitutional provisions on state mandates. The petitioners' due process rights have been protected
4. The Regional Water Board considered the costs of the SUSMPs, and acted reasonably in requiring these controls in light of the expected benefits to water quality.

5. The Final SUSMPs reflect a reasonable interpretation of development controls that achieve reduction of pollutants in storm water discharges to the maximum extent practicable.
6. The SUSMPs include adequate protections of groundwater quality from any impacts from infiltration.
7. The SUSMPs will be revised to clarify the intent of the Regional Water Board and to make them consistent with the permit. Specifically, retail gasoline outlets should not be subject to the BMP design standards because they are already heavily regulated and may be limited in their ability to construct infiltration facilities or to perform treatment. Redevelopment projects should be subject to the SUSMPs only if they result in creation or addition of 5,000 square feet of impervious surfaces. Environmentally-sensitive areas should not be listed as a category in the SUSMPs. The SUSMPs should only apply to discretionary projects. The requirement for funding by project proponents who receive waivers should be deleted. The SUSMPs will be amended as shown in the attachment to this Order.
8. In light of the revisions of the SUSMPs made by this Order, and to allow the permittees adequate time to adopt implementing ordinances, the deadline for adopting ordinances will be revised to January 15, 2001, and the effective date of the Final SUSMPs will be revised to February 15, 2001.

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IV. ORDER

IT IS HEREBY ORDERED that the Standard Urban Storm Water Mitigation Plans for Los Angeles County and Cities in Los Angeles County is revised consistent with the amendments attached hereto. In all other respects the petitions are dismissed.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 5, 2000.

AYE: Arthur G. Baggett, Jr.
Mary Jane Forster
John W. Brown

NO: None

ABSENT: Peter S. Silva

ABSTAIN: None

/s/
Maureen Marché
Administrative Assistant to the Board

AMENDMENTS TO SUSMPS

[These amendments are to the Final SUSMP, as published March 8, 2000]

Page 3 of 25

First full paragraph:

All **discretionary development and redevelopment** projects that fall into one of ~~seven~~ **the following** categories are ~~identified in the Los Angeles County MS4 Permit as requiring~~ **subject to these** SUSMPs. These categories are:

- Single-family Hillside Residences
- 100,000 Square Foot Commercial Developments
- Automotive Repair Shops
- Retail Gasoline Outlets
- Restaurants
- Home Subdivisions with 10 to 99 housing units
- Home Subdivisions with 100 or more housing units
- **Parking lots 5,000 square feet or more or with 25 or more parking spaces and potentially exposed to storm water runoff**

Second full paragraph:

~~The Regional Board Executive Officer has designated two additional categories subject to SUSMP requirements for the Los Angeles County MS4 Permit. These categories are:~~

- ~~Location within or directly adjacent to or discharging directly to an environmentally sensitive area, and~~
- ~~Parking lots 5,000 square feet or more or with 25 or more parking spaces and potentially exposed to storm water runoff~~

Fourth full paragraph:

Permittees shall amend codes, if necessary, not later than ~~September 8, 2000~~ **January 15, 2001,** to give legal effect to the SUSMP requirements. The SUSMP requirements for projects identified herein shall take effect not later than ~~October 8, 2000~~ **February 15, 2001.**

Page 4 of 25

Delete definition of "Environmentally Sensitive Area"

Revise Definition of "Redevelopment":

"Redevelopment" means, on an already developed site, the creation or addition of at least 5,000 square feet of impervious surfaces ~~or the creation or addition of fifty percent or more of impervious surfaces or the making of improvements to fifty percent or more of the existing structure~~. Redevelopment includes, but is not limited to: the expansion of a building footprint or addition or replacement of a structure; structural development including an increase in gross floor area and/or exterior construction or remodeling; replacement of impervious surface that is not part of a routing maintenance activity; and land disturbing activities related with structural or impervious surfaces. **Where redevelopment results in an increase of less than fifty percent of the impervious surfaces of a previously existing development, and the existing development was not subject to these SUSMPs, the Design Standards apply only to the addition, and not to the entire development.**

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Add to "Limited Exclusion": Retail Gasoline Outlets

Page 15 of 25

Delete the first full paragraph (storm water mitigation funding)

EXHIBIT "7"

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2001-15

In the Matter of the Petitions of

BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY
AND
WESTERN STATES PETROLEUM ASSOCIATION

For Review Of Waste Discharge Requirements Order No. 2001-01
for Urban Runoff from San Diego County
[NPDES No. CAS0108758]
Issued by the
California Water Quality Control Board,
San Diego Region

SWRCB/OCC FILES A-1362, A-1362(a)

BY THE BOARD:

On February 21, 2001, the San Diego Regional Water Quality Control Board (Regional Water Board) issued a revised national pollutant discharge elimination system (NPDES) permit in Order No. 2001-01 (permit) to the County of San Diego (County), the 18 incorporated cities within the County, and the San Diego Unified Port District. The permit covers storm water discharges from municipal separate storm sewer systems (MS4) throughout the County. The permit is the second MS4 permit issued for the County, although the first permit was issued more than ten years earlier.[1]

[1] NPDES permits generally expire after five years, but can be extended administratively where the Regional Water Board is unable to issue a new permit prior to the expiration date. As the record in this matter amply demonstrates, the Regional Water Board engaged in an extensive process of issuing draft permits, accepting comments, and holding workshops and hearings since at least 1995.

The permit includes various programmatic and planning requirements for the permittees, including construction and development controls, controls on municipal activities, controls on runoff from industrial, commercial, and residential sources, and public education. The types of controls and requirements included in the permit are similar to those in other MS4 permits, but also reflect the expansion of the storm water program since the first MS4 permit was adopted for San Diego County 11 years ago.[2]

On March 23, 2001, the State Water Resources Control Board (State Water Board or Board) received petitions for review of the permit from the Building Industry Association of San Diego County (BIA) and from the Western States Petroleum Association (WSPA).[3] The petitions are legally and factually related, and have therefore been consolidated for purposes of review.[4] None of the municipal dischargers subject to the permit filed a petition, nor did they file responses to the petitions.

I. BACKGROUND

MS4 permits are adopted pursuant to Clean Water Act section 402(p). This federal law sets forth specific requirements for permits for discharges from municipal storm sewers. One of the requirements is that permits "shall require controls to reduce the discharge of pollutants to the maximum

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[2] For a discussion of the evolution of the storm water program, consistent with guidance from the United States Environmental Protection Agency (U.S. EPA), see Board Order WQ 2000-11.

[3] On March 23, the State Water Board also received brief letters from the Ramona Chamber of Commerce, the North San Diego County Association of Realtors, the San Diego County Apartment Association, the National Association of Industrial and Office Properties, and the California Building Industry Association. All of these letters state that they are "joining in" the petition filed by BIA. None of the letters contain any of the required information for petitions, which is listed at Cal. Code of Regs., tit. 23, section 2050. These letters will be treated as comments on the BIA petition. To the extent the authors intended the letters be considered petitions, they are dismissed.

[4] Cal. Code of Regs., tit. 23, section 2054.

extent practicable [MEP]." States establish appropriate requirements for the control of pollutants in the permits.

This Board very recently reviewed the need for controls on urban runoff in MS4 permits, the emphasis on best management practices (BMPs) in lieu of numeric effluent limitations, and the expectation that the level of effort to control urban runoff will increase over time.[5] We pointed out that urban runoff is a significant contributor of impairment to waters throughout the state, and that additional controls are needed. Specifically, in Board Order WQ 2000-11 (hereinafter, LA SUSMP order), we concluded that the Los Angeles Regional Water Board acted appropriately in determining that numeric standards for the design of BMPs to control runoff from new construction and redevelopment constituted controls to the MEP.[6]

The San Diego permit incorporates numeric design standards for runoff from new construction and redevelopment similar to those considered in the LA SUSMP order.[7] In addition, the permit addresses programmatic requirements in other areas. The LA SUSMP order was a precedential decision,[8] and we will not reiterate our findings and conclusions from that decision.[9]

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[5] Board Order WQ 2000-11.

[6] As explained in that Order, numeric design standards are not the same as numeric effluent limitations. While BIA contends that the permit under review includes numeric effluent limitations, it does not. A numeric design standard only tells the dischargers how much runoff must be treated or infiltrated; it does not establish numeric effluent limitations proscribing the quality of effluent that can be discharged following infiltration or treatment.

[7] The San Diego permit also includes provisions that are different from those approved in the LA SUSMP Order, but which were not the subject of either petition. Such provisions include the inclusion of non-discretionary projects. We do not make any ruling in this Order on matters that were not addressed in either petition.

[8] Government Code section 11425.60; State Board Order WR 96-1 (Lagunitas Creek), at footnote 11.

[9] BIA restates some of the issues this Board considered in the LA SUSMP order. For instance, BIA contends that it is inappropriate for the permit to regulate erosion control. While this argument was not specifically addressed in our prior Order, it is obvious that the most serious concern with runoff from construction is the potential for increased erosion. It is absurd to contend that the permit should have ignored this impact from urban runoff.

The petitioners make numerous contentions, mostly concerning requirements that they claim the dischargers will not be able to, or should not be required to, comply with. We note that none of the dischargers has joined in these contentions. We further note that BIA raises contentions that were already addressed in the LA SUSMP order. In this Order, we have attempted to glean from the petition issues that are not already fully addressed in Board Order Board Order WQ 2000-11, and which may have some impact on BIA and its members. WSPA restated the contentions it made in the petition it filed challenging the LA SUSMP order. We will not address those contentions again.[10] But we will address whether the Regional Water Board followed the precedent established there as it relates to retail gasoline outlets.[11]

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[10] On November 8, 2001, following the October 31 workshop meeting that was held to discuss the draft order, BIA submitted a "supplemental brief" that includes many new contentions raised for the first time. (Interested persons who were not petitioners filed comments on the draft order asking the State Water Board to address some of these.) The State Water Board will not address these contentions, as they were not timely raised. (Wat. Code § 13320; Cal. Code of Regs., tit. 23, § 2050(a).) Specific contentions that are not properly subject to review under Water Code section 13320 are objections to findings 16, 17, and 38 of the permit, the contention that permit provisions constitute illegal unfunded mandates, challenges to the permit's inspection and enforcement provisions, objections to permit provisions regarding construction sites, the contention that post-construction requirements should be limited to "discretionary" approvals, the challenge to the provisions regarding local government compliance with the California Environmental Quality Act, and contentions regarding the term "discharge" in the permit. BIA did not meet the legal requirements for seeking review of these portions of the permit.

[11] On November 8, 2001, the State Water Board received eight boxes of documents from BIA, along with a "Request for Entry of Documents into the Administrative Record." BIA failed to comply with Cal. Code of Regs., tit. 23, section 2066(b), which requires such requests be made "prior to or during the workshop meeting." The workshop meeting was held on October 31, 2001. The request will therefore not be considered. BIA also objected in this submittal that the Regional Water Board did not include these documents in its record. The Regional Water Board's record was created at the time the permit was adopted, and was submitted to the State Water Board on June 11, 2001. BIA's objection is not timely.

II. CONTENTIONS AND FINDINGS[12]

Contention: BIA contends that the discharge prohibitions contained in the permit are "absolute" and "inflexible," are not consistent with the standard of "maximum extent practicable" (MEP), and financially cannot be met.

Finding: The gist of BIA's contention concerns Discharge Prohibition A.2, concerning exceedance of water quality objectives for receiving waters: "Discharges from MS4s which cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited." BIA generally contends that this prohibition amounts to an inflexible "zero contribution" requirement.

BIA advances numerous arguments regarding the alleged inability of the dischargers to comply with this prohibition and the impropriety of requiring compliance with water quality standards in municipal storm water permits. These arguments mirror arguments made in earlier petitions that required compliance with water quality objectives by municipal storm water permittees. (See, e.g., Board Orders WQ 91-03, WQ 98-01, and WQ 99-05.) This Board has already considered and upheld the requirement that municipal storm water discharges must not cause or contribute to exceedances of water quality objectives in the receiving water. We adopted an iterative procedure for complying with this requirement, wherein municipalities must report instances where they cause or contribute to exceedances, and then must review and improve BMPs so as to protect the receiving

[12] This Order does not address all of the issues raised by the petitioners. The Board finds that the issues that are not addressed are insubstantial and not appropriate for State Water Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349]; Cal. Code Regs., tit. 23, § 2052.) We make no determination as to whether we will address the same or similar issues when raised in future petitions.

waters. The language in the permit in Receiving Water Limitation C.1 and 2 is consistent with the language required in Board Order WQ 99-05, our most recent direction on this issue.[13]

While the issue of the propriety of requiring compliance with water quality objectives has been addressed before in several orders, BIA does raise one new issue that was not addressed previously. In 1999, the Ninth Circuit Court of Appeals issued an opinion addressing whether municipal storm water permits must require "strict compliance" with water quality standards.[14] (*Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.) The court in *Browner* held that the Clean Water Act provisions regarding storm water permits do not require that municipal storm-sewer discharge permits ensure strict compliance with water quality standards, unlike other permits.[15] The court determined that: "Instead, [the provision for municipal storm water permits] *replaces* the requirements of [section 301] 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'." (191 F.3d at 1165.) The court further held that the Clean Water Act does grant the permitting agency discretion to determine what pollution controls are appropriate for municipal storm water discharges. (*Id.* at 1166.) Specifically, the court stated that U.S.

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[13] In addition to Discharge Prohibition A.2, quoted above, the permit includes Receiving Water Limitation C.1, with almost identical language: "Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited." Receiving Water Limitation C.2 sets forth the iterative process for compliance with C.1, as required by Board Order WQ 99-05.

[14] "Water quality objectives" generally refers to criteria adopted by the state, while "water quality standards" generally refers to criteria adopted or approved for the state by the U.S. EPA. Those terms are used interchangeably for purposes of this Order.

[15] Clean Water Act § 301(b)(1)(C) requires that most NPDES permits require strict compliance with quality standards.

EPA had the authority either to require "strict compliance" with water quality standards through the imposition of numeric effluent limitations, or to employ an iterative approach toward compliance with water quality standards, by requiring improved BMPs over time. (*Id.*) The court in *Browner* upheld the EPA permit language, which included an iterative, BMP-based approach comparable to the language endorsed by this Board in Order WQ 99-05.

In reviewing the language in this permit, and that in Board Order WQ 99-05, we point out that our language, similar to U.S. EPA's permit language discussed in the *Browner* case, does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs. As pointed out by the *Browner* court, there is nothing inconsistent between this approach and the determination that the Clean Water Act does not mandate strict compliance with water quality standards. Instead, the iterative approach is consistent with U.S. EPA's general approach to storm water regulation, which relies on BMPs instead of numeric effluent limitations.

It is true that the holding in *Browner* allows the issuance of municipal storm water permits that limit their provisions to BMPs that control pollutants to the maximum extent practicable (MEP), and which do not require compliance with water quality standards. For the reasons discussed below, we decline to adopt that approach. The evidence in the record before us is consistent with records in previous municipal permits we have considered, and with the data we have in our records, including data supporting our list prepared pursuant to Clean Water Act section 303(d). Urban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing their

beneficial uses. In order to protect beneficial uses and to achieve compliance with water quality objectives in our streams, rivers, lakes, and the ocean, we must look to controls on urban runoff. It is not enough simply to apply the technology-based standards of controlling discharges of pollutants to the MEP; where urban runoff is causing or contributing to exceedances of water quality standards, it is appropriate to require improvements to BMPs that address those exceedances.

While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvement of BMPs, is appropriate. We will generally not require "strict compliance" with water quality standards through numeric effluent limitations and we will continue to follow an iterative approach, which seeks compliance over time.[16] The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced throughout large and medium municipal storm sewer systems.[17]

We have reviewed the language in the permit, and compared it to the model language in Board Order WQ 99-05. The language in the Receiving Water Limitations is virtually identical to the language in Board Order WQ 99-05. It sets a limitation on discharges that cause or contribute to violation of water quality standards, and then it establishes an iterative approach to complying with the limitation. We are concerned, however, with the language in Discharge Prohibition A.2, which is

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[16] Exceptions to this general rule are appropriate where site-specific conditions warrant. For example, the Basin Plan for the Lake Tahoe basin, which protects an outstanding national resource water, includes numeric effluent limitations for storm water discharges.

[17] While BIA argues that the permit requires "zero contribution" of pollutants in runoff, and "in effect" contains numeric effluent limitations, this is simply not true. The permit is clearly BMP-based, and there are no numeric effluent limitations. BIA also claims that the permit will require the construction of treatment plants for storm water similar to the publicly-owned treatment works for sanitary sewage. There is no basis for this contention; there is no requirement in the permit to treat all storm water. The emphasis is on BMPs.

challenged by BIA. This discharge prohibition is similar to the Receiving Water Limitation, prohibiting discharges that cause or contribute to exceedance of water quality objectives. The difficulty with this language, however, is that it is not modified by the iterative process. To clarify that this prohibition also must be complied with through the iterative process, Receiving Water Limitation C.2 must state that it is also applicable to Discharge Prohibition A.2. The permit, in Discharge Prohibition A.5, also incorporates a list of Basin Plan prohibitions, one of which also prohibits discharges that are not in compliance with water quality objectives. (See, Attachment A, prohibition 5.) Language clarifying that the iterative approach applies to that prohibition is also necessary.[18]

BIA also objects to Discharge Prohibition A.3, which appears to require that treatment and control of discharges must always occur prior to entry into the MS4: "Discharges into and from MS4s containing pollutants which have not been reduced to the [MEP] are prohibited."[19] An NPDES permit is properly issued for "discharge of a pollutant" to waters of the United States.[20] (Clean Water Act § 402(a).) The Clean Water Act defines "discharge of a pollutant" as an "addition" of a pollutant to waters of the United States from a point source. (Clean Water Act section 502(12).) Section 402(p)(3)(B) authorizes the issuance of permits for discharges "from municipal storm sewers."

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[18] The iterative approach is not necessary for all Discharge Prohibitions. For example, a prohibition against pollution, contamination or nuisance should generally be complied with at all times. (See, Discharge Prohibition A.1.) Also, there may be discharge prohibitions for particularly sensitive water bodies, such as the prohibition in the Ocean Plan applicable to Areas of Special Biological Significance.

[19] Discharge Prohibition A.1 also refers to discharges into the MS4, but it only prohibits pollution, contamination, or nuisance that occurs "in waters of the state." Therefore, it is interpreted to apply only to discharges to receiving waters.

[20] Since NPDES permits are adopted as waste discharge requirements in California, they can more broadly protect "waters of the state," rather than being limited to "waters of the United States." In general, the inclusion of "waters of the state" allows the protection of groundwater, which is generally not considered to be "waters of the United States."

We find that the permit language is overly broad because it applies the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s. It is certainly true that in most instances it is more practical and effective to prevent and control pollution at its source. We also agree with the Regional Water Board's concern, stated in its response, that there may be instances where MS4s use "waters of the United States" as part of their sewer system, and that the Board is charged with protecting all such waters. Nonetheless, the specific language in this prohibition too broadly restricts all discharges "into" an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters.[21] It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control. In particular, dischargers subject to industrial and construction permits must comply with all conditions in those permits prior to discharging storm water into MS4s.

Contention: State law requires the adoption of wet weather water quality standards, and the permit improperly enforces water quality standards that were not specifically adopted for wet weather discharges.

Finding: This contention is clearly without merit. There is no provision in state or federal law that mandates adoption of separate water quality standards for wet weather conditions. In arguing that the permit violates state law, BIA states that because the permit applies the water quality

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[21] There are other provisions in the permit that refer to restrictions "into" the MS4. (See, e.g., Legal Authority D.1.) Those provisions are appropriate because they do not apply the MEP standard to the permittees, but instead require the permittees to demand appropriate controls for discharges into their system. For example, the federal regulations require that MS4s have a program "to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system . . . ." (40 C.F.R. § 122.26(d)(2)(iv)(D).)

objectives that were adopted in its Basin Plan, and those objectives were not specifically adopted for wet weather conditions only, the Regional Water Board violated Water Code section 13241. These allegations appear to challenge water quality objectives that were adopted years ago. Such a challenge is clearly inappropriate as both untimely, and because Basin Plan provisions cannot be challenged through the water quality petition process. (See Wat. Code § 13320.) Moreover, there is nothing in section 13241 that supports the claim that Regional Water Boards must adopt separate wet weather water quality objectives. Instead, the Regional Water Board's response indicates that the water quality objectives were based on all water conditions in the area. There is nothing in the record to support the claim that the Regional Water Board did not in fact consider wet weather conditions when it adopted its Basin Plan. Finally, Water Code section 13263 mandates the Regional Water Board to implement its Basin Plan when adopting waste discharge requirements. The Regional Water Board acted properly in doing so.

BIA points to certain federal policy documents that authorize states to promulgate water quality standards specific to wet-weather conditions.[22] Each Regional Water Board considers revisions to its Basin Plan in a triennial review. That would be the appropriate forum for BIA to make these comments.

Contention: BIA contends that the permit improperly classifies urban runoff as "waste" within the meaning of the Water Code.

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[22] These documents do not support the claim that U.S. EPA and the Clinton Administration indicated that the absence of such regulations "is a major problem that needs to be addressed," as claimed in BIA's Points and Authorities, at page 18.

Finding: BIA challenges Finding 2, which states that urban runoff is a waste, as defined in the Water Code, and that it is a "discharge of pollutants from a point source" under the federal Clean Water Act. BIA contends that the legislative history of section 13050(d) supports its position that "waste" should be interpreted to exclude urban runoff. The Final Report of the Study Panel to the California State Water Resources Control Board (March, 1969) is the definitive document describing the legislative intent of the Porter-Cologne Water Quality Control Act. In discussing the definition of "waste," this document discusses its broad application to "current drainage, flow, or seepage into waters of the state of harmful concentrations" of materials, including eroded earth and garbage.

As we stated in Board Order WQ 95-2, the requirement to adopt permits for urban runoff is undisputed, and Regional Water Boards are not required to obtain any information on the impacts of runoff prior to issuing a permit. (At page 3.) It is also undisputed that urban runoff contains "waste" within the meaning of Water Code section 13050(d), and that the federal regulations define "discharge of a pollutant" to include "additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man." (40 C.F.R. § 122.2.) But it is the waste or pollutants in the runoff that meet these definitions of "waste" and "pollutant," and not the runoff itself.[23] The finding does create some confusion, since there are discharge prohibitions that have been incorporated into the permit that broadly prohibit the discharge of "waste" in certain circumstances.

[23] The Regional Water Board is appropriately concerned not only with pollutants in runoff but also the volume of runoff, since the volume of runoff can affect the discharge of pollutants in the runoff. (See Board Order WQ 2000-11, at page 5.)

(See Attachment A to the permit.) The finding will therefore be amended to state that urban runoff contains waste and pollutants.

Contention: BIA contends that the Regional Water Board violated California Environmental Quality Act (CEQA).

Finding: As we have stated in several prior orders, the provisions of CEQA requiring adoption of environmental documents do not apply to NPDES permits.[24] BIA contends that the exemption from CEQA contained in section 13389 applies only to the extent that the specific provisions of the permit are required by the federal Clean Water Act. This contention is easily rejected without addressing whether federal law mandated all of the permit provisions. The plain language of section 13389 broadly exempts the Regional Water Board from the requirements of CEQA to prepare environmental documents when adopting "any waste discharge requirement" pursuant to Chapter 5.5 (§§ 13370 et seq., which applies to NPDES permits).[25] BIA cites the decision in *Committee for a Progressive Gilroy v. State Water Resources Control Board* (1987) 192 Cal.App.3d 847. That case upheld the State Water Board's view that section 13389 applies only to NPDES permits, and not to waste discharge requirements that are adopted pursuant only to state law. The case did not concern an NPDES permit, and does not support BIA's argument.

Contention: WSPA contends that the Regional Water Board did not follow this Board's precedent for retail gasoline outlets (RGOs) established in the LA SUSMP order.

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[24] Water Code section 13389; see, e.g., Board Order WQ 2000-11.

[25] The exemption does have an exception for permits for "new sources" as defined in the Clean Water Act, which is not applicable here.

Finding: In the LA SUSMP order, this Board concluded that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. We also noted that, in light of the small size of many RGOs and the proximity to underground tanks, it might not always be feasible or safe to employ treatment methodologies. We directed the Los Angeles Regional Water Board to mandate that RGOs employ the BMPs listed in a publication of the California Storm Water Quality Task Force. (*Best Management Practice Guide – Retail Gasoline Outlets* (March 1997).) We also concluded that RGOs should not be subject to the BMP design standards at this time. Instead, we recommended that the Regional Water Board undertake further consideration of a threshold relative to size of the RGO, number of fueling nozzles, or some other relevant factor. The LA SUSMP order did not preclude inclusion of RGOs in the SUSMP design standards, with proper justification, when the permit is reissued.

The permit adopted by the Regional Water Board did not comply with the directions we set forth in the LA SUSMP order for the regulation of RGOs. The permit contains no findings specific to the issues discussed in our prior order regarding RGOs, and includes no threshold for inclusion of RGOs in SUSMPs. Instead, the permit requires the dischargers to develop and implement SUSMPs within one year that include requirements for "Priority Development Project Categories," including "retail gasoline outlets." While other priority categories have thresholds for their inclusion in SUSMPs, the permit states: "Retail Gasoline Outlet is defined as any facility engaged in selling gasoline."[26]

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[26] Permit at F.1.b(2)(a)(x).

The Regional Water Board responded that it did follow the directions in the LA SUSMP order. First, it points to findings that vehicles and pollutants they generate impact receiving water quality. But the only finding that even mentions RGOs is finding 4, which simply lists RGOs among the other priority development project categories as land uses that generate more pollutants. The Regional Water Board staff also did state some justifications for the inclusion of RGOs in two documents. The Draft Fact Sheet explains that RGOs contribute pollutants to runoff, and opines that there are appropriate BMPs for RGOs. The staff also prepared another document after the public hearing, which was distributed to Board Members prior to their vote on the permit, and which includes similar justifications and references to studies.[27] The LA SUSMP order called for some type of threshold for inclusion of RGOs in SUSMPs. The permit does not do so. Also, justifications for permit provisions should be stated in the permit findings or the final fact sheet, and should be subject to public review and debate.[28] The discussion in the document submitted after the hearing did not meet these criteria. There was some justification in the "Draft Fact Sheet," but the fact sheet has not been finalized.[29] In light of our concerns over whether SUSMP sizing criteria should apply to RGOs, it was incumbent on the Regional Water Board to justify the inclusion of RGOs in the permit findings or in a final fact sheet, and to consider an appropriate threshold, addressing the concerns we stated. The Regional Water Board also responded that when the dischargers develop the SUSMPs, the dischargers

[27] See "Comparison Between Tentative Order No. 2001-01 SUSMP Requirements and LARWQCB SUSMP Requirements (as Supported by SWRCB Order WQ 2000-11)."

[28] See 40 C.F.R. sections 124.6(e) and 124.8.

[29] U.S. EPA regulations require that there be a fact sheet accompanying the permit. (40 C.F.R. § 124.8.) The record contains only a draft fact sheet, which was never published or distributed in final form. The Regional Water Board should finalize the fact sheet, accounting for any revisions made in the final permit, and publish it on its web site as a final document.

might add specific BMPs and a threshold as directed in the LA SUSMP order. But the order specifically directed that any threshold, and the justification therefore, should be included in the permit. The Regional Water Board did not comply with these directions.

III. CONCLUSIONS

Based on the discussion above, the Board concludes that:

1. The Regional Water Board appropriately required compliance with water quality standards and included requirements to achieve reduction of pollutants to the maximum extent practicable. The permit must be clarified so that the reference to the iterative process for achieving compliance applies not only to the receiving water limitation, but also to the discharge prohibitions that require compliance with water quality standards. The permit should also be revised so that it requires that MEP be achieved for discharges "from" the municipal sewer system, and for discharges "to" waters of the United States, but not for discharges "into" the sewer system.

2. The Regional Water Board was not required to adopt wet-weather specific water quality objectives.

3. The Regional Water Board inappropriately defined urban runoff as "waste."

4. The Regional Water Board did not violate the California Environmental Quality Act.

5. The permit will be revised to delete retail gasoline outlets from the Priority Development Project Categories for Standard Urban Storm Water Mitigation Plans. The Regional Water Board may consider adding retail gasoline outlets, upon inclusion of appropriate findings and a threshold describing which outlets are included in the requirements.

IV. ORDER

IT IS HEREBY ORDERED that the Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems in San Diego County (Order No. 2001-01) are revised as follows:

1. Part A.3: The words "into and" are deleted.

2. Part C.2: Throughout the first paragraph, the words ", Part A.2, and Part A.5 as it applies to Prohibition 5 in Attachment A" shall be inserted following "Part C.1."

3. Finding 2: Revise the finding to read: **URBAN RUNOFF CONTAINS "WASTE" AND "POLLUTANTS"**: Urban runoff contains waste, as defined in the California Water Code, and pollutants, as defined in the federal Clean Water Act, and adversely affects the quality of the waters of the State.

4. Part F.1.b(2)(a): Delete section "x."

In all other respects the petitions are dismissed.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 15, 2001.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz

NO:

ABSENT:

ABSTAIN:

/ s/

Maureen Marché
Clerk to the Board

EXHIBIT "8"

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of **Save San Francisco Bay Association, et al.,** for Review of Waste Discharge Requirements Order No. 95-180, NPDES Permit No. CAS029718, by the California Regional Water Quality Control Board, San Francisco Bay Region. File No. A-992.	ORDER NO. WQ 96-13

BY THE BOARD:

On August 23, 1995, the California Regional Water Quality Control Board, San Francisco Bay Region (SFBRWQCB) adopted waste discharge requirements for storm water discharges from municipal separate sewer systems throughout the Santa Clara Valley.[1] The waste discharge requirements constituted a national pollutant discharge elimination system (NPDES) permit pursuant to Section 402(p) of the federal Clean Water Act (CWA). The co-permittees include Santa Clara Valley Water District, County of Santa Clara, and thirteen cities (dischargers).

On September 25, 1995, the State Water Resources Control Board (SWRCB) received a petition from Save San Francisco Bay Association, San Francisco BayKeeper, Peninsula Conservation Center Foundation, Sierra Club Bay Chapter, Sierra Club Loma Prieta Chapter, Citizens Committee to Complete the Refuge, and

[1] For an extensive discussion of the system, see Order No. WQ 91-03 which concerned an earlier version of waste discharge requirements for the same discharges.

Silicon Valley Toxics Coalition (petitioners), contesting the issuance of the NPDES permit.[2]

I. BACKGROUND

The NPDES permit is a reissuance of a permit first issued in 1990 for discharges of storm water from municipal separate storm sewer systems (MS4s) throughout the Santa Clara Valley to creeks and streams tributary to South San Francisco Bay. The earlier permit (Order No. 90-094) was reviewed and upheld by the SWRCB in Order No. WQ 91-03. That order included extensive discussion of the federal statutory and regulatory requirements for storm water discharges from MS4s, which will not be repeated here.

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[2] This order is based on the record before the SFBRWQCB. In addition, the record is supplemented by the following documents: "Municipal Separate Storm Sewer System Permit Reapplication Policy," transmitted by "Interpretative Policy Memorandum on Reapplication Requirements for Municipal Separate Storm Sewer Systems," U.S. Environmental Protection Agency (EPA), May 17, 1996 (hereafter, Reapplication Policy); Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits," EPA, August 1, 1996 (hereafter Effluent Limitations Policy); "Antibacksliding: Effect on Water Quality-Based Effluent Limitations," EPA, August 8, 1994 (hereafter Antibacksliding Brief); and letter from Terry Oda, EPA Region 9, dated June 26, 1996, concerning the Orange County storm water permit (hereafter, letter from EPA Region 9). Following the close of the public comment period, several letters were received from interested persons. These are not part of the record, except for the comments received on the draft order from counsel for the parties.

II. CONTENTIONS AND FINDINGS[3]

The petition contends that the SFBRWQCB should not have issued the NPDES permit because the permit application was incomplete and that various aspects of the permit are inadequate or improper.

Contention: The NPDES permit should not have been reissued because the permit application was insufficient.

Findings: The petitioners contend that the permit application submitted by the dischargers was insufficient and that the SFBRWQCB was, therefore, prohibited from issuing the permit. The petitioners cite regulations adopted by the EPA.

The EPA set forth detailed permit application requirements for large and medium municipal separate storm sewer discharges, such as the discharges at issue here, in 40 CFR Section 122.26(d). These requirements include extensive information about the storm sewer system and the methods by which the municipal entities will regulate and monitor their discharges. A part of these application requirements is submission of a storm water management plan (SWMP) to reduce the discharge of pollutants to the maximum extent practicable (MEP). (40 CFR Section 122.26(d)(2)(iv).) The petitioners claim that the dischargers' SWMP does not contain adequate control measures. The petitioners also claim that other information required in Section 122.26(d) was missing, including source identification,

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[3] All other contentions raised in the petition which are not discussed in this order are dismissed. (23 Code of California Regulations (CCR) Section 2052; *People* v. *Barry* (1987) 194 Cal.App.3d 158.)

characterization data, and assessment of controls. The petitioners contend that the SFBRWQCB was precluded from issuing the NPDES permit by 40 CFR Section 122.21(e), which limits the issuance of NPDES permits where an application is incomplete.

It is not necessary to address the contention that Section 122.21(e) prevents the SFBRWQCB from issuing an NPDES permit if an application is incomplete since the EPA has issued a policy and interpretative memo clarifying that, while reapplication for a second-round permit is required, the permit application requirements in 40 CFR Section 122.26(d)(2) apply only to first-round permit applications for large and medium MS4s, and not to the second round of permits. Instead, the reapplication requirements are "flexible" and are based on the minimum application requirements for all NPDES permits contained in 40 CFR Section 122.21(f). (Reapplication Policy.) The EPA encourages the reapplication package to consist only of the dischargers' fourth annual report,[4] which would include the proposed SWMP. (Id.) As explained above, the NPDES permit is a second-round storm water permit and the EPA policy is, therefore, applicable. The dischargers' permit application was consistent with the Reapplication Policy.

Administrative agencies are generally accorded a high degree of deference in the areas of law which they regulate.

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[4] Annual reports are required components of all MS4 permits. Each permit operates for five years and use of the fourth annual report allows for timely preparation of a new permit.

(See, e.g., *Chevron U.S.A. v. Natural Res. Def. Council* (1984) 467 U.S. 837.) In interpreting EPA's regulations, it is proper to accord significant deference to EPA's policy expressions. The SWRCB will therefore follow the Reapplication Policy, and other EPA policy statements discussed in this order, in determining compliance with the Clean Water Act and EPA's regulations promulgated thereunder.

Contention: The petitioners contend that the permit lacks control measures.

Finding: The petitioners contend that the permit improperly requires the dischargers to implement their SWMP, and instead should specify the control measures that dischargers must implement. The petitioners believe that control measures must be specified in the permit pursuant to CWA Section 402(p)(3)(B)(iii). The petitioners argue the SFBRWQCB should not have incorporated the SWMP requirements into the permit without circulating the SWMP as a part of the permit and that the permit should have specified further control measures.

CWA Section 402(p)(3)(B)(iii) states that permits for MS4s:

> "[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 State determines appropriate for the control of such pollutants."

The petitioners have misconstrued this section to mean that the SFBRWQCB must dictate the specific controls that

dischargers must implement. Instead, the SWRCB interprets the section to mean that the permit must contain provisions that will require the dischargers to select and implement adequate controls. It is perfectly appropriate for the SFBRWQCB, as it did here, to implement this section by requiring the dischargers to comply with their own SWMP, and to make revisions to the SWMP in the areas where the document was found lacking. While the SFBRWQCB did incorporate the SWMP into the permit, it also provided for amendments to the SWMP as necessary to achieve MEP and water quality standards. The SWRCB interprets the incorporation not as applying to the SWMP as it existed on the date the permit was adopted, but as a continuing duty to comply with any current SWMP provisions. In other words, the permit requires continual improvements to the SWMP and compliance with the plan requirements. This approach is consistent with the federal law and is in concert with the approach favored by the EPA.

The permit requires the dischargers to implement control measures and BMPs to reduce pollutants in storm water discharges to the MEP, as provided by federal law. The federal law does not require the SFBRWQCB to dictate the specific controls. The permit recognizes the SWMP as a dynamic document which requires ever-changing revisions and improvements as monitoring and assessment of BMPs to provide new information. The annual report is the mechanism for such assessment, and the

permit anticipates that assessment will result in modification of the SWMP.

The SFBRWQCB's approach is supported by the EPA's policy documents. The Reapplication Policy transmitted by the EPA acknowledges that the best management practices (BMPs) that will be implemented are contained in the SWMP and explains that each annual report must include proposed revisions to the SWMP. (Reapplication Policy, at page 3; 40 CFR Section 122.42(c)(2).) The EPA encourages use of the fourth annual report as the basic application package. In other words, the EPA acknowledges the SWMP as a dynamic document which should be revised more frequently than the permit is reissued. The SFBRWQCB has appropriately accommodated the needed flexibility in the SWMP while also specifying the standards to be attained (MEP and compliance with water quality objectives) and the areas requiring improvement.

The SFBRWQCB found that the SWMP was generally adequate, although it required certain improvements to resolve deficiencies in some of the actions and the time frame. (NPDES Permit, finding 5.) Provision C of the permit includes specific requirements to improve and implement the SWMP. The permit requires implementation of BMPs stated in the SWMP, ensures coverage of all major source areas known to the SFBRWQCB, and mandates improvements where necessary. The implementation and effectiveness of the BMPs must be evaluated in the annual reports. This combination of extensive control measures and an

annual evaluation of the implementation and effectiveness of the control measures is a program that meets the MEP standard.[5]

Contention: The petitioners claim that the permit unlawfully "backslides" from the prior permit.

Findings: Section 402(o) of the CWA contains limitations on the ability of the permitting authority to reissue NPDES permits that contain effluent limitations less stringent than in a prior NPDES permit. The provisions of Section 402(o) are detailed and contain several exceptions. The petitioners claim that Section 402(o) was violated because the permit deleted some of the activities specifically listed in the earlier permit where these activities are covered by the SWMP. Further, the petitioners claim that the SWMP includes a time schedule and that the time schedule violates the EPA order *In the Matter of Star-Kist Caribe, Inc.*, NPDES Appeal No. 88-5.

The SWRCB does not agree that Section 402(o) has been violated. First, as explained above, the SFBRWQCB appropriately ordered the dischargers to achieve MEP by complying with their SWMP and by making improvements where necessary. In revising the language from the first permit (which specified all areas the SWMP must cover) to the second permit (which instead ordered the dischargers to comply with the SWMP where it did adequately address those areas), the SFBRWQCB did not adopt a less stringent

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[5] While the permit does not require the dischargers to estimate the expected reduction of pollutant loads for each source control measure, the EPA has acknowledged that in most cases permitting authorities do not have the ability at this time to link directly the BMPs implemented with impacts on receiving waters. (Effluent Limitations Policy.)

permit. Second, as explained below, the SFBRWQCB has latitude to revise BMP requirements without violating Section 402(o).

The petitioners argue that CWA Section 402(o) prohibits the SFBRWQCB from eliminating any previous requirements for BMPs because the requirements were necessitated both to achieve MEP and to protect water quality, and that Section 402(o) prohibits the adoption of less stringent effluent limitation if the original limitation was adopted to protect water quality. While the SWRCB agrees that the NPDES permit requirements to implement BMPs are, in part, water-quality based effluent limitations,[6] the SWRCB does not read Section 402(o) to prohibit the SFBRWQCB from revising the BMP requirements, even if that may include eliminating the need for some previously implemented BMPs.[7]

Section 402(o) contains exceptions where

> ". . . information is available which was not available at the time of permit issuance . . . and which would have justified the application of a less stringent effluent limitation . . . ." (Section 402(o)(2)(B)(i).)

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[6] In Order No. WQ 91-03, the SWRCB addressed the contention that the requirement to implement BMPs did not constitute the water quality-based effluent limitations required by the Clean Water Act. There it was stated:

> "Our review of the relevant law reveals that the permit's scheme of prohibitions, source control measures and best management practices constitutes valid effluent limitations consistent with requirements of 'maximum extent practicable' controls and water quality standards."

[7] As stated above, there is, in fact, no evidence that the BMP requirements in this permit are less stringent or that any BMPs have been eliminated.

According to the EPA, in its Antibacksliding Brief, revisions to water quality-based effluent limitations based on new information are appropriate so long as there is a net reduction in pollutant loadings. Any revisions to BMPs incorporated into or anticipated by the permit clearly fall within this exception, since they will be the result of new information from monitoring or analysis of effectiveness, and the dischargers remain bound to the same standards of compliance. The EPA has also acknowledged that the process of developing the SWMP will result in revising BMPs as new information becomes available. (Reapplication Policy.) It is absurd to assume that such revisions would violate the antibacksliding prohibition.

The SWRCB also finds that the SFBRWQCB did not violate the EPA's rule in *Star-Kist Caribe* by allowing time for BMPs to work and be evaluated and implemented. While the SWRCB agrees that an NPDES permit cannot include a time schedule for compliance with water quality objectives established prior to July 1, 1977,[8] the SFBRWQCB has not established such a time schedule here. Under the provisions of the permit, the effluent limitations (i.e., the requirements to implement BMPs pursuant to a SWMP) are in place and effective immediately. The time schedule for assessment and improvements are meant to increase the ability of the SFBRWQCB and the dischargers to ensure that the dynamic nature of selecting, evaluating, and implementing BMPs occurs throughout the term of the permit.

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[8] See, *City of Stockton*, Order No. WQ 96-09.

Contention: The petitioners claim the permit does not provide for compliance with water quality standards.

Findings: Storm water permits for MS4s must achieve compliance with water quality objectives, but they may do so by requiring the implementation of BMPs. (Order No. WQ 91-03.) The petitioners claim that although the permit specifically prohibits discharges that cause violation of water quality objectives, that prohibition is "nullified" by stating that the dischargers "shall comply . . . through the timely implementation of control measures and other actions to reduce pollutants in the discharge." (Permit, Provision C.1.) Provision C.1. also authorizes the SFBRWQCB to reopen the permit if necessary to require further BMPs or revision of the SWMP. (Id.) Petitioners claim the lengthy process of reopening the permit would result in delays in achieving water quality objectives.

The petitioners' concerns are not warranted. The NPDES permit clearly requires the implementation of BMPs that will not cause a violation of water quality objectives. The method for achieving compliance is through implementation of a SWMP and BMPs which must, throughout the term of the permit, be evaluated, assessed, and improved. The reopener provision in C.1. simply provides that if, notwithstanding these processes, adverse impacts to receiving waters persist, the permit may be reopened.

The approach taken by the SFBRWQCB is consistent with statements from the EPA concerning the most effective regulation of MS4s. The Effluent Limitations Policy encourages a permitting

approach using "expanded or better-tailored" BMPs in second-round permits. The EPA states that most MS4 permits include "educational and programmatic BMPs," and describes this approach as one where dischargers are required to "adopt and implement adequate BMPs." In other words, the permitting approach, wherein the discharger is required to implement a SWMP with BMPs, has been found by the EPA to be the most effective way to ensure compliance with water quality standards, at least until more information is available definitively tying storm water discharges to impacts on receiving waters. Finally, a similar approach taken by the RWQCB for the Santa Ana Region, was sanctioned by the EPA as follows:

> "The Orange County storm water permit states that receiving water limitations may not exceeded [sic], but then provides that if there are exceedences, [sic] the permittees would not be in violation of the permit if they follow up with certain actions. We appreciate the concerns . . . regarding the way the permit seems to say that 'a violation is not a violation.' However, the net effect of this condition is to focus on BMP implementation for now, and this is consistent with the draft national policy." (Letter from EPA Region 9.)

III. CONCLUSIONS

After review of the record and consideration of the contentions of the petitioners, and for the reasons discussed above, the SWRCB concludes that the Regional Water Quality Control Board, San Francisco Bay Region, acted appropriately and

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properly in adopting the NPDES permit for storm water discharges from municipal separate storm sewers in the Santa Clara Valley.

IV. ORDER

IT IS ORDERED that the petition is denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted a meeting of the State Water Resources Control Board held on September 19, 1996.

AYE: John P. Caffrey
John W. Brown
James M. Stubchaer
Mary Jane Forster

NO: Marc Del Piero

ABSENT: None.

ABSTAIN: None.

Maureen Marché
Administrative Assistant to the Board

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

AUG 08 1994

Mr. Walt Pettit
Executive Director
California State Water Resources
Control Board
P.O. Box 100
Sacramento, CA 95812-0100

re: Antibacksliding Related to Water Quality-Based Effluent Limitations

Dear Walt:

The issue of antibacksliding has been at the forefront of discussions regarding water quality-based effluent limitations. Many dischargers are concerned with being bound to effluent limitations they may not be able to meet. As a result they have been reluctant to accept permits containing stringent water quality-based effluent limitations. This has resulted in delays in issuing some permits.

To allay those concerns we have prepared a brief on antibacksliding as it relates to water quality-based effluent limitations. The interpretation reflects the Agency's current thinking on this matter and relies on published documents. In summary we do not believe that antibacksliding is as onerous as some would believe. The statute provides sufficient exceptions to the prohibition against antibacksliding that allow for reasonable relaxation of effluent limitations. The brief is enclosed.

I hope this will be of assistance to the State and Regional Boards. I am taking the liberty to forward copies to the Regional Boards, CASA and Tri-TAC.

Sincerely,

Catherine Kuhlman

Catherine E. Kuhlman
Chief
Permits and Compliance Branch

cc: Regional Water Quality Control Boards

ANTIBACKSLIDING
EFFECT ON WATER QUALITY-BASED EFFLUENT LIMITATIONS

Due to doubts about complying with effluent limitations based on stringent water quality criteria, the effect of antibacksliding (section 402(o) of the Clean Water Act) on modifications of effluent limitations has become an important issue. Dischargers are loath to accept permits with stringent water quality-based effluent limitations, even where the effectiveness of those effluent limitations are delayed through the use of compliance schedules. The concern is the fear of being forever bound to effluent limitations that can not be met.

To allay those concerns, two of the most prominent issues are addressed in this brief. The first issue is whether antibacksliding prohibits relaxation of water quality-based effluent limitations whose compliance date has not yet passed, i.e., the effective date of those limitations are delayed by a compliance schedule. The second issue is whether antibacksliding prohibits relaxation of water quality-based effluent limitations which a discharger has been unable to achieve.

The CWA prohibits reissuing or modifying a permit to include effluent limitations less stringent than comparable effluent limitations in the previous permit unless certain exceptions are met. Those exceptions are set forth in sections 303(d)(4) and 402(o)(2) of the CWA. These two sections of the CWA provide independent exceptions to the prohibition. Meeting any one of the exceptions of either section is sufficient basis for relaxing the effluent limitations. [see 40 FR, p. 20837, Vol. 58 No. 72, April 16, 1993, Proposed Great Lakes Initiative (GLI); and Technical Support Document for Water Quality-Based Toxics Control (TSD), p. 113, EPA/505/2-90-001, March 1991]

1) Effect on Water Quality-Based Effluent Limitations prior to the Compliance Date.

Antibacksliding does not apply to changes made to an effluent limitation prior to its compliance date. If a permit is issued with a compliance schedule delaying the effective date of a water quality-based effluent limitation, that limitation may be relaxed without concern for antibacksliding if the modification is made prior to the effective date of the limitation. (see GLI, pp. 20837, 20981 and 21045)

2) Effect on Water Quality-Based Effluent Limitations being Violated.

The exceptions to the prohibition set forth in section 402(o)(2) of the CWA applies to water quality-based and best professional judgement (BPJ) based effluent limitations. Water quality-based effluent limitations may be relaxed if any of the following is met (TSD, p. 113):

a) There have been material and substantial alterations or additions to the permitted facility which justify the application of less stringent effluent limitations.

b) Good cause exists due to events beyond the permittee's control and for which there is no reasonably available remedy.

c) 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 still has been unable to meet the effluent limitations (relaxation may only be allowed to the treatment levels actually achieved).

d) New information (other than revised regulations, guidance, or test methods) justifies relaxation of water quality-based permit limitations. (This applies to water quality-based limitations only where revised limitations result in a net reduction in pollutant loadings and are not the result of another discharger's elimination or substantial reductions of its discharge for reason's unrelated to water quality, e.g., plant shutdown.)

Anyone of the above section 402(o)(2) exceptions may be used as a basis to justify relaxation of water quality-based effluent limitations. Alternatively, the provisions of 303(d)(4) may be used to obtain such relief.

Section 303(d)(4) allows establishment of less stringent water quality-based effluent limitations. The criteria for the exceptions varies for attainment and nonattainment waters:

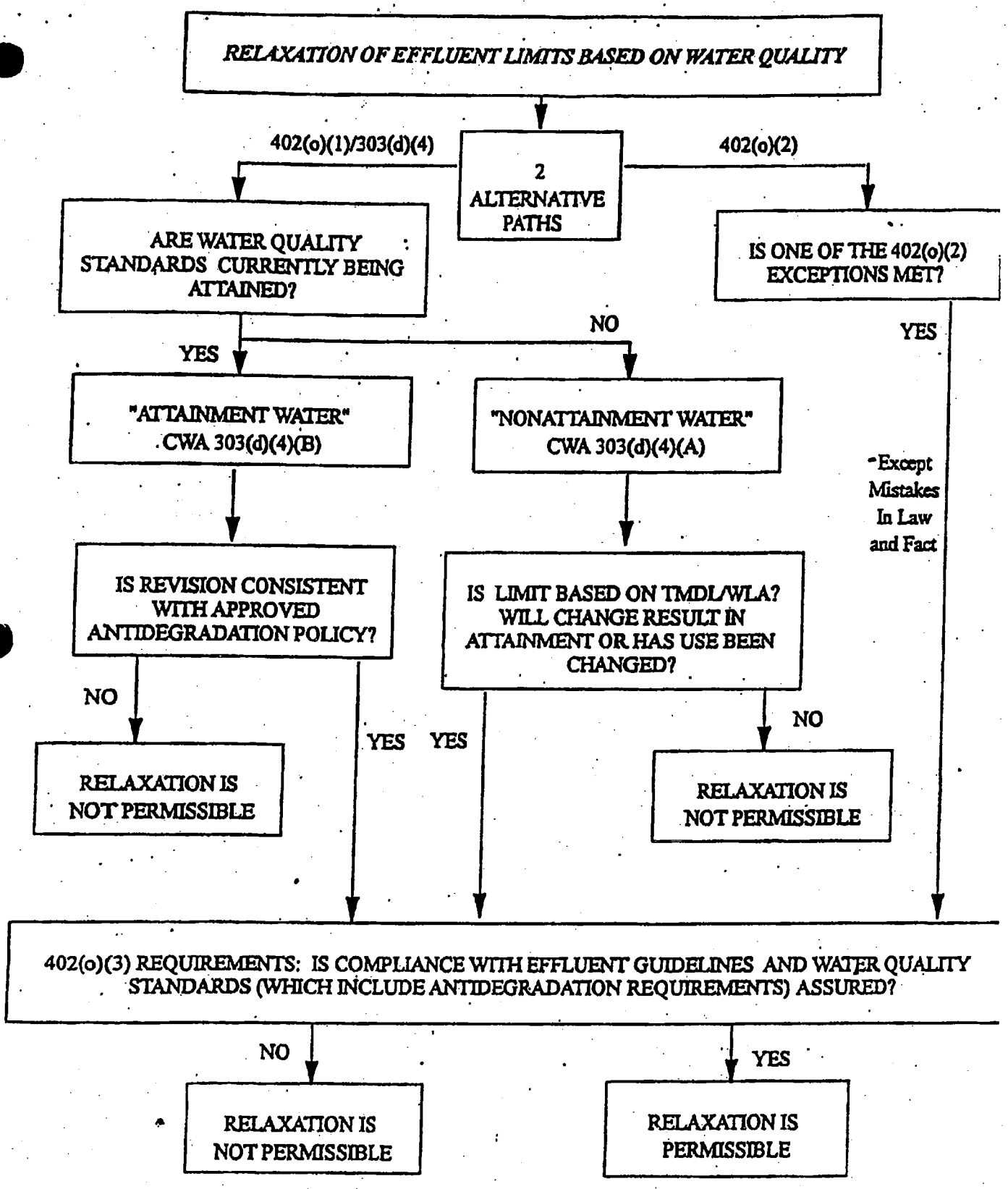
a) Attainment Waters: In waters where the applicable water quality standard has been attained, a water quality-based effluent limitation may be relaxed to the extent that the less stringent limitation is consistent with the State's antidegradation policy.

b) Nonattainment Waters: In waters where the applicable water quality standard has not yet been attained, an effluent limitation based on a total maximum daily load (TMDL) or other waste load allocation may be made less stringent if the cumulative effect of all such revisions assures attainment of the water quality standard, or the designated use which is not being attained is removed in accordance with the applicable regulation (40 CFR 131.10).

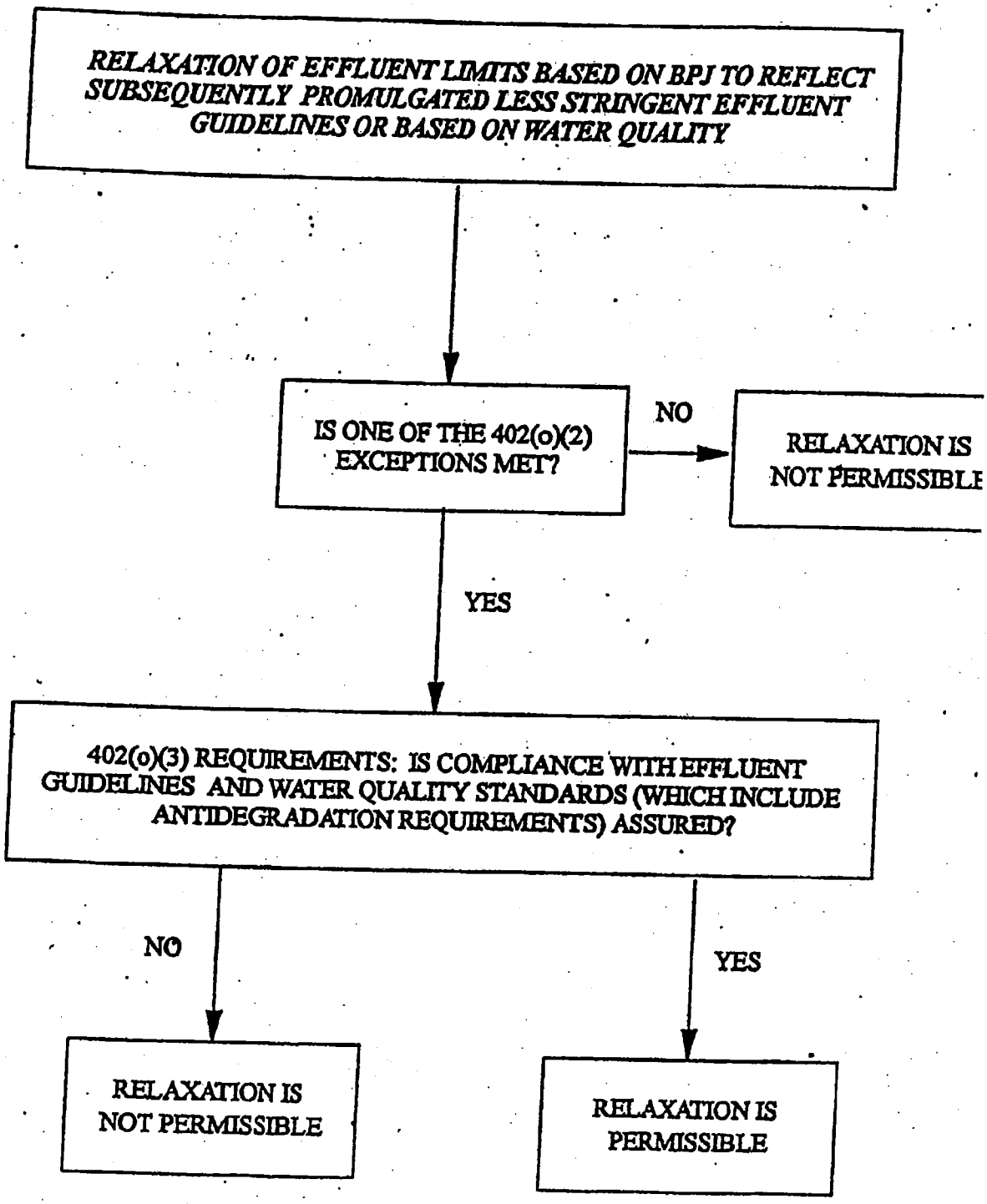
It should be noted that any relaxation of an effluent limitation can not be less stringent than the technology-based requirement set forth in the applicable effluent limitations guideline, or cause a violation of the applicable water quality standard. (see section 402(o)(3) of the CWA)

The processes discussed above are illustrated in the attached diagrams (Flow Charts

FLOW CHART A
ANTIBACKSLIDING



FLOW CHART B
ANTIBACKSLIDING



FLOW CHART C
ANTIBACKSLIDING

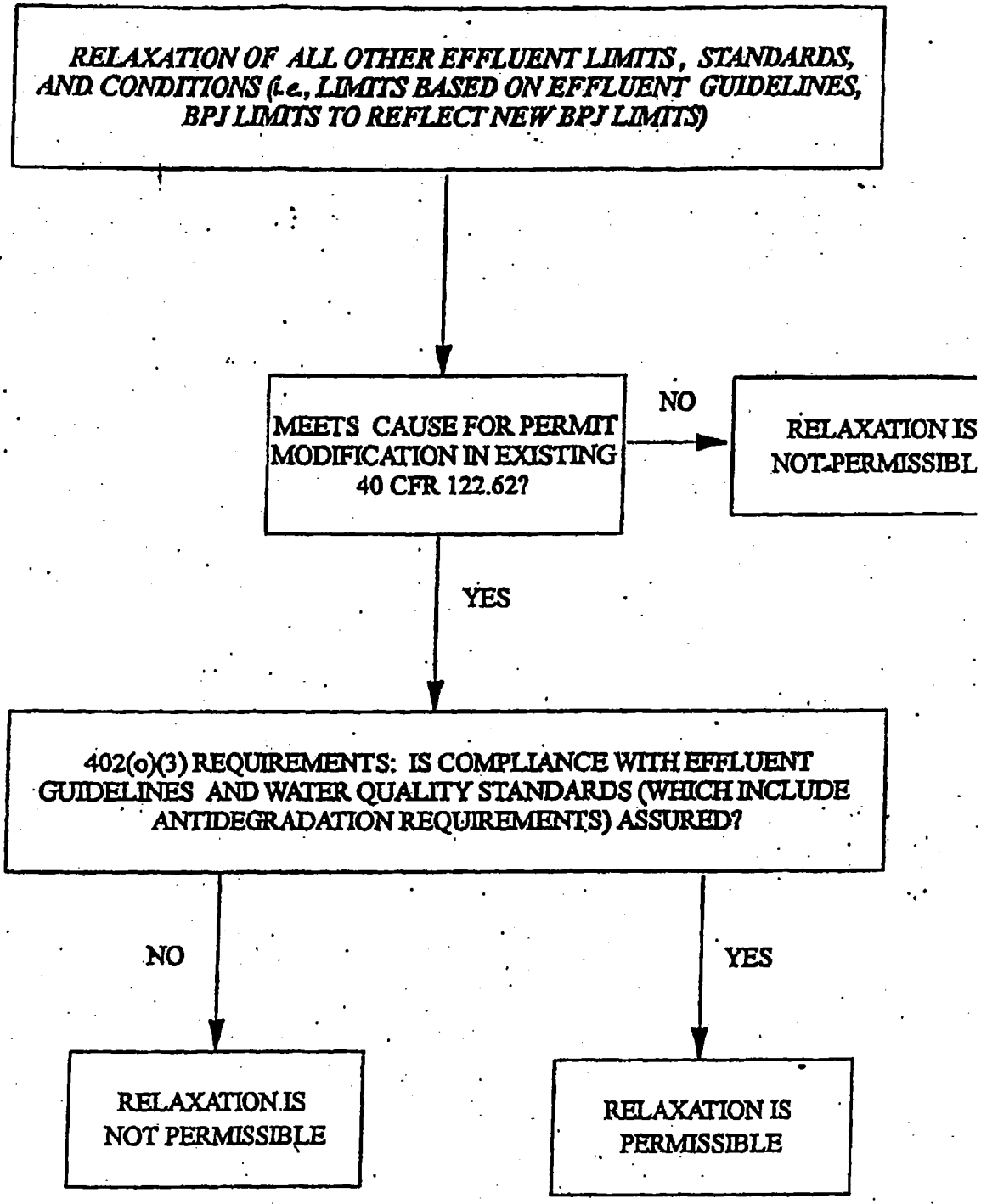


EXHIBIT "9"

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2006-0012

In the Matter of the Petition of

BOEING COMPANY

For Review of Waste Discharge Requirements (WDR) Orders R4-2004-0111, R4-2006-0008, and R4-2006-0038 for the Santa Susana Field Laboratory Issued by the California Regional Water Quality Control Board, Los Angeles Region

SWRCB/OCC FILES A-1653 AND A-1737

BY THE BOARD:

The Boeing Company (Boeing) operates the Santa Susana Field Laboratory (SSFL) in Ventura County.[1] The Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) has regulated wastewater discharges from SSFL to waters of the United States since at least 1992.[2] The regulated discharges include storm water runoff, discharges from groundwater remediation systems, industrial wastewater from ongoing operations such as engine test stands, and domestic wastewater from two sewage treatment plants.

On July 1, 2004, the Los Angeles Water Board re-issued a permit to Boeing for discharges from SSFL. (Waste Discharge Requirements Order No. R4-2004-0111 (2004 Permit).) On August 2, 2004, Boeing filed a petition with the State Water Resources Control

[1] Boeing owns SSFL with the National Aeronautical Space Agency (NASA). The United States Department of Energy (DOE) also owns several buildings at the site. NASA and DOE are not named in the permit reviewed herein, and their participation is not an issue before us.

[2] Waste Discharge Requirements Order No. 92-092, adopted December 7, 1992. The permit was reissued in 1998 (1998 Permit). Waste Discharge Requirements Order No. 98-051, adopted June 29, 1998. This is a national pollutant discharges elimination system (NPDES) permit, No. CA0001309.

Board (State Water Board) challenging the 2004 Permit.[3] (Our File No. A-1653.) Boeing requested that its petition be held in abeyance.[4]

On January 19, 2006, the Los Angeles Water Board modified the 2004 Permit, adding and revising the outfalls listed and the effluent limitations. (Waste Discharge Requirements Order No. R4-2006-0008; January 2006 Permit.) On February 21, 2006, Boeing filed a petition challenging the January 2006 Permit and the failure of the Los Angeles Water Board to adopt a Cease and Desist Order with a compliance schedule and interim effluent limitations. (Our File No. A-1737.) Boeing also asked the State Water Board to activate its 2004 petition, File No. A-1635. On March 9, 2006, the Los Angeles Water Board again revised Boeing's permit, this time adding additional effluent limitations. (Waste Discharge Requirements Order No. R4-2006-0036; March 2006 Permit.) On March 16, 2006, Boeing filed a petition challenging the March 2006 Permit.[5] Boeing also requested a stay of various effluent limitations. The State Water Board denied the stay request in Order WQ 2006-0007.[6]

Many of Boeing's contentions concern the propriety and legality of numeric effluent limitations in the Permit. In particular, Boeing emphasizes that its discharges are largely storm water, and it points to the issues this Board faces as to whether to include numeric effluent limitations in storm water permits. As we will explain, the issues addressed in this Order are relevant only to a unique industrial operation subject to an individual NPDES permit. Our conclusions here do not apply to the issue of numeric effluent limitations for general permits

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[3] Committee to Bridge the Gap (CBG) also filed a petition challenging the permit. (Our File No. A-1658(a).) The State Water Board dismissed CBG's petition on February 14, 2005.

[4] The State Water Board's regulations allow a petitioner to request its petition be held in abeyance. (California Code of Regulations (Cal. Code Regs.), tit. 23, § 2050, subd. (d).) When a petition challenging a permit is held in abeyance, the State Water Board does not act upon the petition until it is activated and the challenged permit remains in full force and effect. (*Ibid.*)

[5] The March 16 petition was not assigned a separate file number, and instead is considered to be an amendment to File No. A-1737. All of the petitions filed by Boeing have been consolidated for purposes of review. (Cal. Code Regs., tit. 23, § 2054.) The 2004 Permit, as modified, is referred to as "the Permit." Where necessary, the different versions are referred to as the 2004 Permit, the January 2006 Permit, and the March 2006 Permit.

[6] The State Water Board received the administrative record and responses to the petitions on May 15, 2006. Part of the record was a report Boeing submitted to the Los Angeles Water Board for its February 2006 meeting. CBG asks this Board to limit the use of that report. All portions of the record were before the Los Angeles Water Board in its actions and are appropriately part of our administrative record. On October 13, 2006, Boeing submitted a new report to the State Water Board and asks that it be considered a part of our administrative record. We decline to do so. That report was received long after the Los Angeles Water Board acted and only two weeks before the State Water Board issued its draft order in this matter. Moreover, Boeing refused to place its petitions in abeyance, which would have allowed time for the State Water Board to review the report and for interested persons to respond to the permit. (See, Cal. Code Regs., tit. 23, § 2050.6.) Boeing's request is denied.

regulating discharges of storm water from thousands of entities engaged in construction and industrial activities.

In this Order, the State Water Board upholds the Permit in most respects. We conclude that the Los Angeles Water Board acted properly in issuing the Permit and in including requirements more akin to a typical individual NPDES permit than the General Permit for Industrial Activities.[7] We also conclude that the Permit includes appropriate monitoring requirements and sites. Moreover, we conclude that at least until Boeing submits a report of waste discharge describing its changed discharge, the Permit must continue to regulate many of the discharges from SSFL as commingled wastewater, rather than as storm water discharges. We also conclude Outfall 001 is duplicative with Outfall 011 and that Outfall 002 is duplicative with Outfall 018 for enforcement purposes. Only two of these outfalls should be regulated with numeric effluent limitations as compliance points. The numeric effluent limitations contained in the Permit were properly calculated and were properly based on the "reasonable potential" for discharges from SSFL to cause or contribute to exceedances of water quality standards and it is appropriate and proper for the Permit to retain these numeric effluent limitations. Finally, we conclude that the Los Angeles Water Board erred in failing to issue a cease and desist order (CDO), including a compliance schedule with interim effluent limitations, following a catastrophic fire at SSFL in September 2005. We will remand the Permit to the Los Angeles Water Board to make revisions consistent with this Order. The compliance schedule shall apply retroactively to the adoption of the January 2006 Permit.[8]

I. BACKGROUND

Boeing's SSFL is located at the top of Woolsey Canyon Road in Simi Hills. The site includes approximately 1500 acres of developed land and 1200 acres of undeveloped land. Industrial activities have occurred at the site for more than 50 years. These activities have included research, development, assembly, disassembly, and testing of rocket engines, missile components, and chemical lasers. There have also been nuclear reactors at SSFL, and the administrative record shows evidence of accidents with these reactors. As of the time the Permit was issued, Boeing activities that contributed to discharges, include rocket engine

[7] General Permit for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities (WQO No. 97-03-DWQ).

[8] All contentions not discussed in this Order are not sufficiently substantial to warrant review. (See *People v. Barry* (1987) 194 Cal.App.3d 158; Cal. Code Regs., tit. 23, § 2052(a)(1).)

testing, fire suppression, pressure-testing of equipment to support rocket engine testing, domestic wastewater treatment, and contaminated groundwater treatment.

Boeing representatives have recently stated, including in testimony at the hearing on its stay request, that the only existing discharges from the site are storm water runoff. In particular, Boeing representatives state that it has stopped all rocket engine testing and will not resume testing, if at all, until it can remove all wastewater associated with testing from the site (presumably by trucking the wastewater offsite). In addition, they testified that the treatment plants (groundwater remediation and domestic sewage treatment) are no longer discharging at the site, but instead all wastewater is trucked away. There is nothing in the record to indicate that Boeing has submitted a report of waste discharge regarding these changes in its discharge or requested that the Permit be modified.[9]

Because of the historical activities at SSFL, the site is subject to remediation requirements pursuant to the Resource Conservation and Recovery Act of 1976 (RCRA).[10] The lead agency for the RCRA cleanup is the California Department of Toxic Substances Control (DTSC). DTSC regulates nine closed surface impoundments. The site had radioactive waste that the United States Department of Energy (DOE) is responsible for decontaminating and decommissioning. Boeing still uses radioisotopes for calibrating radiation detectors and counting equipment, but there is no surface water discharge associated with these activities. There is surface runoff from throughout the site, including areas subject to RCRA cleanup. The record shows that there are instances where runoff from SSFL has been contaminated with, or has the potential to be contaminated with, constituents associated with the historical activities at the site and the RCRA remediation. For example, the catchment area of Outfall 004 is comprised of a landscape with surface soil contaminated with mercury and other constituents from the former Sodium Reactor Experiment site. Until the contaminated soil is removed (a likely final remediation solution for this area), Boeing has covered the soil with an impermeable cover and, at the bottom of the catchment, implemented BMPs to treat the runoff. If the cover were compromised, discharges from the site could enter surface waters. There are also constituents that have been detected in runoff from the site that are associated with historic

[9] Dischargers must submit a report of waste discharge for any material change or proposed change in the character, location, or volume of their discharge. (Wat. Code, § 13260, subdivision (c).) The discharges characterized in the Permit generally occur only when there is wet weather runoff from the site. Thus, it is within Boeing's knowledge and control whether it will ensure that process water is not commingled with storm water in the future.

[10] 42 United States Code Annotated (U.S.C.A.) §§ 6901 et seq.

activities. For example, perchlorate, a chemical associated with rocket propellant testing, has been detected at an outfall near the rocket propellant testing area.

SSFL is situated in the Simi Hills. Because of its location and topography, and the large size of the facility, there is runoff from the site to several watersheds. Most of the runoff flows to Bell Creek, which is tributary to the Los Angeles River. There is also runoff into various drainages of Arroyo Simi and to Runkel, Dayton, and Woolsey Canyons. The Permit establishes eighteen outfalls.[11] Outfalls 001 and 002 are at the southerly perimeter of the SSFL, and approximately sixty percent of the runoff from the facility discharges through these two outfalls, which lead to Bell Creek, and then to the Los Angeles River. Outfall 008 discharges to Happy Valley, and ultimately to Bell Creek and the Los Angeles River. Discharges through Outfalls 003, 004, 005, 006, 007, 009, and 010 flow to small watersheds to the northwest of SSFL. These are not tributary to the Los Angeles River. Outfalls 011, 012, 013, 014, 015, 016, 017, and 018 each are sited near areas of specific activities on SSFL, including the two domestic sewage treatment plants, the groundwater treatment plant, and the rocket engine test stand. Outfalls 012-017 each discharge to waters that flow through Outfalls 011 or 018, which in turn flow through Outfalls 001 and 002, respectively. There are several points that are important to our deliberations regarding these outfalls: (1) Outfalls 001-010 are each situated along the perimeter of SSFL, while Outfalls 011-018 are situated in the interior of the site and discharge through perimeter outfalls; (2) Outfalls 001, 002, and 011-018 are authorized to discharge commingled storm water, industrial process water (from groundwater treatment and rocket engine testing) and domestic wastewater (from the sewage treatment plants); and (3) Outfalls 003-010 are the only outfalls designated in the Permit as discharging only storm water runoff.

The Los Angeles Water Board initially adopted the Permit that Boeing now challenges in July 2004. It amended the Permit in January and March 2006, adding and revising effluent limitations each time. In January 2006, the Los Angeles Water Board considered but refused to adopt a CDO, which would have included a time schedule and interim effluent limitations. Boeing filed a petition challenging the July 2004 Permit, but did not seek active review of its challenge to the Permit until February 21, 2006, when Boeing also challenged the January modification.[12] Boeing also challenged the failure to adopt the CDO.

[11] These are designated Outfalls 001 through 018.

[12] It later challenged the March modification also.

In addition to the Permit modifications, which generally made the Permit more stringent, there was also a significant physical event at SSFL that impacted permit compliance. Beginning on September 28, 2005, the Topanga Fire swept through the site and burned approximately seventy percent of the site. The fire destroyed numerous plants that had served as vegetative cover to control runoff. At the time, BMPs Boeing employed to minimize pollutants in runoff were largely vegetative cover, and the fire destroyed most of this cover. The fire also resulted in ash deposition throughout the site, the result of burned material from both the site and adjacent areas, which contained contaminants regulated by the Permit. Since the fire, Boeing has been engaged in stabilizing and restoring vegetative cover and also in building new structural BMPs at the site.

II. CONTENTIONS AND FINDINGS[13]

Contention: Boeing contends that most, if not all, of its discharge is storm water runoff and that it should be regulated in a similar manner as the State Water Board's General Permit for Industrial Activities.

Finding: The discharges from SSFL are unusual in many respects. SSFL is a very large industrial site in a remote area, with no other industrial sites nearby. It occupies a large area on hillsides, with runoff flowing into a number of different watersheds. There are vast areas of historical contamination and development, and also large areas of open space and native vegetation. Calculations show that SSFL has the potential, in a 24-hour 10-year storm, to discharge an estimated 272 million gallons of storm water runoff. It is the subject of ongoing RCRA cleanup and groundwater remediation. While greatly reduced from its peak activity, there are still ongoing industrial activities occurring. While it originally was situated in a remote location, there are now many residential developments nearby SSFL. The Permit allows Boeing to discharge not only storm water runoff from the site, but also industrial process water, wastewater from groundwater treatment facilities, and domestic wastewater from sewage treatment plants.

The conditions described above make SSFL a unique site, especially because of its size, the degree of historical contamination, and the site topography that results in large

[13] Boeing included various interrelated contentions in its 2004 Petition, its February 2006 Petition, and its March 2006 Petition. Each petition essentially restated and revised the grounds for the petition. Each petition also included a statement of points and authorities, which also stated the bases for the petition somewhat differently than the petition itself. The statement of contentions herein is an effort to summarize and articulate these various arguments, while not restating verbatim each of the contentions listed in the different documents.

amounts of runoff during storm events. The Permit regulates both storm water-only and commingled storm water, domestic, and industrial process water discharges. As will be described below, the legal requirements for the regulation of storm water-only discharges vary from those for the regulation of process water discharges. Wastewater that commingles storm water and process water is subject to the legal requirements for industrial process water. The Permit was based on Boeing's request, through its report of waste discharge, for authorization to discharge process water and storm water from several outfalls at SSFL. In its papers and testimony, Boeing states that it is no longer discharging process water from these facilities. If that is so, in order for its permit to be revised accordingly, it must file a report of waste discharge describing this change in its discharge.[14]

Eight of the eighteen outfalls at SSFL are storm water-only outfalls: Outfalls 003-010. These eight outfalls are all "perimeter" outfalls—flows through these outfalls leave SSFL through different watersheds. (The only other perimeter outfalls—Outfalls 001 and 002—receive all of the commingled flows and together discharge approximately sixty percent of the total flows from SSFL.) While these eight outfalls are designated as storm water-only, the record shows that they each have a significant potential to discharge water contaminated by the historical practices and remediation activities at SSFL. Each of these outfalls is associated with areas of the site with significant historical activities: Outfalls 003-007 receive runoff from past and existing radiological facilities; runoff to Outfall 003 is from the Radioactive Material Handling Facility, runoff to Outfall 004 is from the Sodium Reactor Experiment, runoff to Outfall 005 is from Sodium Burn Pit 1, runoff to Outfall 006 is from Sodium Burn Pit 2, and runoff to Outfall 007 is from Building 100. Outfall 008, which discharges to Happy Valley, is located near facilities that formerly used perchlorate, and that constituent has been found in the runoff. Outfall 009 receives WS-13 drainage and runoff to Outfall 010 is from Building 203, and these outfalls were added to the Permit based on monitoring in the areas.[15] There are numerous other operation areas at SSFL that do not have individual outfalls specifically assigned to them. Generally, the outfalls listed in the Permit are associated with operations over which the

[14] During the proceedings on the stay request, Boeing's attorney stated that the only process water currently discharged is well purge water, and that change in discharge would be raised to the Los Angeles Water Board when the Permit is modified or reissued. In any event, the Permit as adopted does regulate both process water and storm water, some of it commingled, and the evidence shows that Boeing requested such a permit.

[15] The specific activities and runoff potential are described in detail, *infra*.

Los Angeles Water Board, rather than DTSC, is the lead agency.[16] The outfalls along the perimeter of SSFL, however, do capture all of the runoff that is known to have the potential to contain contaminants associated with industrial activities.

Boeing argues that its site is comparable to other sites regulated by the General Permit for Industrial Activities. It contends that the Los Angeles Water Board was required to follow the assumptions contained in that permit, including the absence of numeric effluent limitations therein. We disagree with this premise.

SSFL is a unique site warranting thorough and detailed regulation. It is not at all the same as a typical facility subject to the General Permit for Industrial Activities. Moreover, it is not permitted as a storm water-only site, regardless of whether the vast majority of the runoff is storm water, rather than process water. The federal Clean Water Act requires that all discharges of wastewater containing pollutants from industrial sites must comply with the technology-based requirements of best practicable control technology currently available (BCT) and best available technology economically achievable (BAT) and with any more stringent limitations necessary to meet water quality standards. (33 U.S.C.A. § 1311(b).)[17] These same standards apply to discharges of storm water associated with industrial activities. (CWA § 402(p)(3)(A).)[18] While the same legal standards in section 301(b) apply to both industrial process water and industrial storm water, the decision whether to include numeric water effluent limitations varies depending whether the permit regulates process water (even if mixed with storm water) or storm water only[19]. The separate rules for storm water discharges apply only to discharges "composed *entirely* of storm water." (CWA § 402(p)(1) (emphasis added).) For this reason, the General Permit for Industrial Activities authorizes only storm water discharges. Only eight of the eighteen outfalls at SSFL (Outfalls 003-010) are composed entirely of storm water. The other ten outfalls, whether or not they may be composed of "mostly" or "almost entirely" of storm water, as Boeing contends, are subject to the same regulatory requirements as any other industrial process water. Thus, Boeing does not qualify for coverage under the General Permit.

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[16] The Fact Sheet to the Permit includes a thorough discussion of the location, operations, and constituents associated with each outfall.

[17] Clean Water Act (CWA) § 301(b). Hereafter, citations to the federal statute will refer only to the CWA citation.

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

[19] As discussed in detail below, process water permits must include numeric effluent limitations unless it is not "feasible" to include such limitations. Storm water-only permits are not required to include numeric effluent limitations, without the necessity of determining infeasibility.

The Permit must include appropriate requirements for both process water and storm water discharges. Boeing also contends that numeric effluent limitations are not appropriate for process water discharges from SSFL, pursuant to federal regulations.[20] We will discuss in detail the propriety of numeric effluent limitations for the various outfalls regulated in the Permit. In general, however, we reject Boeing's contention that the Los Angeles Water Board was required to regulate the various discharges from SSFL in a similar manner to the General Permit for Industrial Activities.

Contention: Boeing contends that the monitoring and compliance points are inappropriate.

Finding: The Permit lists eighteen outfalls. Each outfall has numerous numeric effluent limitations for constituents for which the Los Angeles Water Board determined that discharges had the reasonable potential to cause or contribute to exceedances of water quality standards in surface waters. Boeing points out that prior permits for SSFL had fewer points where monitoring was required and where effluent limitations applied. A brief history of the Los Angeles Water Board's permitting strategy is necessary in order to understand this contention.

Boeing challenges the 2004 Permit and modifications in January and March of 2006. The prior permit was adopted in 1998. (Waste Discharge Requirements Order No. 98-051; 1998 Permit.) The 1998 Permit regulated storm water runoff, industrial and domestic wastewater, and groundwater treatment discharges from SSFL. The 1998 Permit established as compliance points Outfalls 001 and 002, which are 6,000 feet south of the final retention ponds, and Outfalls 003-007 to the north.[21] The 1998 Permit also stated that the storm water discharges were "covered by" the General Industrial Storm Water Permit and that "its requirements are incorporated in [the 1998 Permit] by reference."[22] For Outfalls 001 and 002, the 1998 Permit listed numeric effluent limitations for 49 constituents. Outfalls 003-007 in the 1998 Permit have numeric effluent limitations for 25 constituents. Most effluent limitations were for daily maximum and not for monthly average.

The 2004 Permit added the three perimeter outfalls that were not listed in the 1998 Permit (Outfalls 008-010) and the eight interior outfalls (Outfalls 011-018). The 2004

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[20] 40 Code of Federal Regulations (C.F.R.) § 122.44(k)(3).

[21] Thus, the 1998 Permit did not list as separate outfalls three of the perimeter outfalls listed in the 2004 Permit (008-010) and the eight interior outfalls that lead to 001 and 002 (011-018).

[22] 1998 Permit, Finding 27.

Permit also discussed the reasonable potential for discharges through the various outfalls to cause or contribute to exceedance of criteria in the California Toxic Rule (CTR).[23] The 2004 Permit included numeric effluent limitations for 40 constituents for Outfalls 001 and 002, 19 numeric effluent limitations for Outfalls 003-007, 11 numeric effluent limitations for Outfalls 008-010, and 14 numeric effluent limitations for Outfalls 015-017. (There were no numeric effluent limitations assigned to Outfalls 011, 012, 013, 014, or 018.) A significant change from the 1998 Permit was that the 2004 Permit included maximum daily loads in addition to the maximum daily concentrations in the prior permit. In addition, some of the limitations were more stringent, reflecting the CTR criteria, and some constituents changed. Thus, the major changes from the 1998 Permit to the 2004 Permit were not the inclusion of numeric effluent limitations in the permit—these were already in the 1998 permit, including numeric effluent limitations for storm water-only discharges. The major changes were the addition of numeric effluent limitations for three perimeter outfalls and for three interior outfalls, tightening of some numeric effluent limitations to implement the CTR criteria, and the addition of maximum daily loading limitations.

In January of 2006, based on monitoring results in the interim, the Los Angeles Water Board modified the 2004 Permit, adding numeric effluent limitations for Outfalls 011 and 018[24] and for Outfalls 012, 013, and 014[25]. This permit modification occurred shortly after the Topanga Fire. Finally, in March of 2006, the Los Angeles Water Board again modified the 2004 Permit, this time revising numeric effluent limitations to reflect two Total Maximum Daily Loads (TMDLs) the Board had adopted.[26] The result was more stringent and new numeric effluent limitations for outfalls with discharges ultimately flowing to the Los Angeles River: Outfalls 001, 002, 011, and 018.[27]

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[23] 40 C.F.R. title 131.36. In the CTR, the United States Environmental Protection Agency (U.S. EPA) adopted water quality standards for priority pollutants in California. The State Water Board adopted the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Plan, or SIP) in order to implement the CTR in permits. The CTR and the SIP were each adopted in 2000.

[24] The numeric effluent limitations for Outfalls 001, 002, 011 and 018 are identical.

[25] There are 19 numeric effluent limitations listed for Outfalls 012, 013, and 014.

[26] The TMDLs were for metals and for nutrient loading in the Los Angeles River. TMDLs are required by § 303 of the CWA. NPDES permits must be consistent with the assumptions and requirements of TMDLs. (40 C.F.R. § 122.44(d)(1)(vii).)

[27] Some interior outfalls ultimately flowing to the Los Angeles River also have TMDL-based effluent limitations.

For each effluent limitation at each outfall, the 2004 Permit requires monitoring. Boeing challenges both the number of outfalls listed as compliance points and the breadth of the monitoring requirements. NPDES permits generally must require monitoring at each outfall for each constituent for which there are effluent limitations.[28] The federal regulations do not require analytical monitoring at facilities that discharge storm water associated with industrial activities,[29] but this relaxation of requirements is generally associated with the "nature of the permit conditions."[30] Thus, where a permit regulating storm water discharges associated with industrial activity does contain numeric effluent limitations, "sampling requirements will be appropriate,"[31] while permits that include BMPs in lieu of numeric effluent limitations, may require inspections and BMP evaluation rather than sampling.[32] Therefore, to the extent that outfalls are properly listed as compliance points and that numeric effluent limitations are appropriate, then the monitoring requirements are appropriate. We turn then to the propriety of listing eighteen outfalls as compliance points.

In reviewing the specific locations for sampling and compliance, it is true that the number of outfalls has grown, from the 1998 permit, which listed seven outfalls, to the 2004 Permit, which lists 18 outfalls. Moreover, when the 2004 Permit was adopted, it listed 13 outfalls as compliance points, and when it was modified in 2006, it listed 18 outfalls as compliance points. The actual activities at the SSFL did not vary greatly from 1998 until 2006, although the Los Angeles Water Board did obtain more detailed monitoring data over these years. The chief change in regulatory strategy that resulted in the addition of outfalls was the inclusion of "interior" outfalls as compliance points. There are seven outfalls that all drain to Outfalls 001 and 002.[33] In addition, the number of perimeter outfalls grew from seven to ten.[34] In reviewing the propriety of adding these outfalls as compliance points, we address the interior and perimeter outfalls separately.

We first consider the perimeter outfalls. The 2004 Permit added Outfalls 008, 009, and 010. Storm water runoff discharges from Outfalls 009 and 010 to Arroyo Simi to the

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[28] 40 C.F.R. § 122.44(i).

[29] 40 C.F.R. § 122.44(i)(2)(i)(4) and (5).

[30] Vol. 57 Federal Register 11394, 11402.

[31] *Ibid.*

[32] *Ibid.*

[33] Outfalls 011-018.

[34] Outfalls 008-010 were added.

north of SSFL. Storm water runoff at Outfall 008 discharges from Happy Valley to Dayton Canyon Creek, which ultimately flows to Bell Creek and then the Los Angeles River. Outfalls 001-007, which have all been compliance points with numeric effluent limitations since at least 1998, each discharge to different watersheds around the perimeter of the site.

The Fact Sheet to the 2004 Permit describes in detail each outfall, the locations of former and current industrial activities that are drained, and the constituents of concern. All of the perimeter outfalls are placed so that they would pick up pollutants associated with industrial activities. The industrial activities at the site, including the prior activities for which there are historic contaminants, are indeed potentially substantial contributors of pollutants to surface waters. Outfalls 001 and 002 receive the vast majority of the site's runoff, including treated wastewater, water from the groundwater treatment systems, excess reclaimed water, water from the engine test stands, and storm water. While the other perimeter outfalls have much less runoff, and do not receive process wastewater, they each drain areas that may contain pollutants from the numerous industrial activities conducted at the site. For example, Outfall 010 drains Building 203, which is subject to significant remediation measures under the direction of DTSC. The building was used for repair and calibration of instruments containing mercury. Currently, the building houses operations related to laser research, including polishing fibers, hand wipe solvent, and chemical cleaning, assembly and testing of components.[35] Should BMPs fail, these contaminants would pose significant risks to surface waters. We conclude that each of these perimeter outfalls is properly situated as a compliance point.[36] We also conclude that the 2004 Permit properly requires monitoring at each of these outfalls.

The interior outfalls[37] raise different issues concerning their propriety. Each of these outfalls is authorized to receive commingled process and storm water. Flows through Outfalls 012, 013, 016 and 017 discharge through Outfall 018, and thence through Outfall 002. Flows through Outfalls 014 and 015 discharge through Outfall 011, and thence through Outfall 001. Each of the six outfalls that flow to Outfalls 011 and 012[38] is located near areas of significant past and present industrial activity. While the effluent limitations for 012-017 vary depending on the contaminants present at the specific areas drained, the effluent limitations for 001, 002, 011, and 018 are identical, reflecting that each drains large areas of SSFL and that

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[35] All wastes are currently placed in containers and transported off-site for disposal.

[36] We will discuss separately, *infra*, the propriety of the numeric effluent limitations assigned to these outfalls.

[37] Outfalls 011-018.

011 and 018 drain to 001 and 002, respectively. The Fact Sheet for the January 2006 Permit states: "Discharges from Outfalls 011 and 018 receive no additional treatment or additional discharges prior to exiting Outfalls 001 and 002."[39]

In considering the decision by the Los Angeles Water Board to list Outfalls 011-018 as separate outfalls, each with numeric effluent limitations, we again consider the uniqueness of the SSFL site—its large size, its hilltop location, the significant chemicals used in the past, and to a lesser extent, in the present. We also note Boeing's argument that it no longer intends to discharge non-storm water flows, although it has not yet submitted a report of waste discharge for a permit that would prohibit all discharges of industrial process and domestic wastewater. Since the Permit currently regulates process water discharges at each interior outfall, it is appropriate to apply numeric effluent limitations at each of these outfalls. U.S. EPA regulations require this approach:

> All permit effluent limitations, standards, and prohibitions shall be established for each outfall or discharge point of the permitted facility, except as otherwise provided under §122.44(k) (BMPs where limitations are infeasible) . . . . (40 C.F.R. § 122.45(a).)[40]

It is possible that, even if Boeing continues to discharge commingled runoff, some of the numeric effluent limitations in the interior and the perimeter may, in fact, count the same violation twice in such a manner as to treat a single violation as multiple violations. In other words, if discharges are unchanged from an interior outfall to a perimeter outfall, and the same numeric effluent limitations are exceeded at each outfall, Boeing could be cited twice for the same violation. The ongoing monitoring results required by the Permit should disclose whether that is the case. Therefore, if Boeing does not submit a report of waste discharge limiting its discharges to storm water only, the Los Angeles Water Board must consider whether there is double counting for violations at more than one outfall and, if there is, avoid this. The Los Angeles Water Board should undertake this review when it reissues a permit.

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[38] Outfalls 012-017.

[39] Fact Sheet for January 2006 Permit, at p.35 accompanying Order No. R4-2006-0111. In its Response to Comments on the draft NPDES permit, the Los Angeles Water Board explains that the property between Outfalls 001 and 011 and between Outfalls 002 and 018 is undeveloped land where no industrial operations have occurred and that "staff will not oppose a decision to delete Outfalls 001 and 002 as compliance points or a decision to require monitoring only at these locations." (Fact Sheet, at p.34.)

[40] Thus, so long as numeric effluent limitations are appropriate, each outfall must be regulated as a compliance point. In the next Contention we discuss Boeing's contention that the Los Angeles Water Board erred in including numeric effluent limitations and that it should have instead used BMPs pursuant to 40 C.F.R. § 122.44(k).

Even before the Permit might be modified or reissued, we conclude that it was not appropriate for the 2006 Permit to establish compliance points at both Outfalls 001 and 011 and at both Outfalls 002 and 018. As is clear from the Fact Sheet and the Response to Comments, there is no evidence that there will be any change in pollutants discharged between Outfalls 011 and 001 or between Outfalls 018 and 002. According to the administrative record, there are no industrial operations or other potential contributors of pollutants between each of these points; the only rationale provided was that the decision was within the discretion of the Los Angeles Water Board. But in the exercise of discretion there must be rationale provided. Normally the State Water Board would not review the designation of specific outfall locations. In this case, because of the large number of effluent limitations and constituents regulated, adding Outfalls 011 and 018 will have the effect of doubling the number of any permit violations of effluent limitations at Outfalls 001 and 002 without any observable benefit to water quality. We conclude that the Permit should not have established effluent limitations for Outfalls 011 and 018.[41]

Contention: Boeing contends that the Permit inappropriately contains numeric effluent limitations for storm water-only discharges, that the numeric effluent limitations for commingled wastewater are improperly calculated, and that the Permit improperly determines that Boeing's discharges have the reasonable potential to cause or contribute to many of the water quality standards cited in the Permit.

Finding: Before addressing these contentions, we will point out that there are only eight outfalls that are currently authorized to discharge storm water only. While the other ten outfalls may discharge mostly or, as Boeing claims, "almost entirely" storm water, the fact that the Permit authorizes the discharge of industrial process and domestic wastewater from these outfalls raises different issues in evaluating the propriety of the process the Los Angeles Water Board followed in determining "reasonable potential" and in establishing numeric effluent limitations.

For the commingled discharges—Outfalls 001, 002, and 011-018—the Los Angeles Water Board was required to adopt numeric effluent limitations unless it was infeasible to establish such limitations.[42] In adopting numeric effluent limitations, it was required

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[41] We will leave to the sound discretion of the Los Angeles Water Board whether to delete the effluent limitations from Outfalls 001 and 002 or from Outfalls 011 and 018. Pending that determination, this Order will stay the effect of the effluent limitations for Outfalls 011 and 018.

[42] For process water discharges, 40 C.F.R. § 122.44(k)(3) permits non-numeric effluent limitations, generally in the form of BMPs, where numeric effluent limitations are not feasible. (*Communities for a Better Environment v. State Water Board* (2003) 109 Cal.App.4th 1089, 1105.)

to comply with the SIP for priority pollutants listed in the CTR. The SIP sets forth the methodology for determining which constituents exhibit "reasonable potential" and for calculating the numeric effluent limitations. In prior orders,[43] we have discussed in detail the requirements of the SIP and the required methodology for determining reasonable potential and calculating effluent limitations. We have reviewed the methodology employed by the Los Angeles Water Board and its explanation of its determinations and find these efforts to be exceptional.

We will address Boeing's contention that, in light of section 122.44(k)(3) allowing the use of BMPs in lieu of numeric effluent limitations where it is infeasible to establish numeric effluent limitations, the Los Angeles Water Board acted improperly or inappropriately in establishing numeric effluent limitations.[44] Boeing contends that it has proven that it cannot comply with numeric effluent limitations "immediately" and it claims that Los Angeles Water Board staff members concede "that Boeing cannot immediately comply" with the requirements.[45]

There is little precedent concerning the meaning of the term "infeasible" in section 122.44(k)(3). In *Communities for a Better Environment, Supra*, the court upheld the Boards' conclusion "that a numeric WQBEL was not feasible (i.e., 'not appropriate') . . . ." We view the issue of determining whether a numeric effluent limitation is "feasible" as concerning the ability or propriety of establishing such a limit, rather than the ability of the discharger to comply. In *Communities*, the court addressed the feasibility of a numeric effluent where the limitation implemented a narrative water quality objective, there was a need for ongoing study of the constituent, and there was an upcoming TMDL for the particular constituent. (Numerous other constituents were subject to numeric effluent limitations for the mixed storm water and process water discharge in that case.[46]) We disagree with Boeing's reading of the provision, i.e. that "feasibility" refers to its ability to comply with the limitations. Discharges of process

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[43] See, e.g., *In the Matter of Yuba City*, State Water Board Order No. WQO 2004-0013 and *In the Matter of County Sanitation District No.2* Order No. WQO 2003-0009.

[44] It is, frankly, difficult to determine whether Boeing does, in fact, make this contention. Because of its emphasis on commingled discharges being mostly (or perhaps, all) storm water and its use of the term "infeasible" to refer to the time in which it can achieve compliance (discussed below), it is not entirely clear that Boeing is challenging the use of numeric effluent limitations to regulate the commingled wastewater. Nonetheless, because it seeks to "vacate any new numeric effluent limits added to the 2004 or 2006 Permits applicable to combined storm water and wastewater dischargers" (Petition, 2/21/06), we will address this contention.

[45] Memorandum of Points and Authorities, 3/16/06, at p.23.

[46] See, also, *In the Matter of National Steel and Shipbuilding Company*, Order WQ 98-07 (approving numeric effluent limitations for facility discharging storm water along with some process water).

wastewater from industrial sites (and storm water only discharges associated with industrial activity) must comply with water quality standards.[47] Whether the permit limitations are written as BMPs or as numeric effluent limitations, the legal standard is the same. As we have stated before, programs of prohibitions, source control measures, and BMPs constitute effluent limitations and can be written to achieve compliance with water quality standards.[48]

In any event, Boeing does not clearly argue that, for its commingled wastewater discharges, it cannot achieve compliance with the numeric effluent limitations. Rather, it argues that it cannot achieve "immediate" compliance. Much of its argument refers to the impacts of the Topanga Fire and the need for time to come into compliance. This argument is relevant to the need for compliance schedules, rather than whether numeric effluent limitations should be employed. We are also cognizant that Boeing has been subject to numeric effluent limitations for discharges through 001 and 002, which drain all of the commingled wastewater outfalls, since at least 1998. Finally, the amount of toxic chemicals historically and currently used at the site, in addition to the site topography that results in large amounts of runoff, all lead to the conclusion that it is feasible, i.e. appropriate, to establish numeric effluent limitations for the commingled runoff from the site. We conclude that the Los Angeles Water Board did not act inappropriately or improperly in refusing to find that numeric effluent limitations were infeasible pursuant to 40 C.F.R. section 122.44(k)(3).

However, the Los Angeles Water Board must modify (or reissue) the permit so that either Outfalls 001 and 002 or Outfalls 011 and 018 are subject to numeric effluent limitations, but not all four outfalls.

There are eight outfalls that are currently permitted to discharge only storm water runoff.[49] These outfalls, except for Outfall 008, discharge to the northeast of SSFL, into different watersheds than the major Outfalls 001 and 002. Outfall 008 discharges through Happy Valley and eventually to the Los Angeles River, but not through Outfalls 001 or 002. All of these outfalls, except for Outfall 008, have been regulated with numeric effluent limitations at least since the 1998 Permit. Each outfall is positioned so as to receive runoff from specific areas associated with historic or existing areas with contamination from industrial activities.

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[47] CWA § 301(b).

[48] *In the Matter of Citizens for a Better Environment, et al.* Order WQ 91-3, at p.30-31.

[49] Outfalls 003-010.

Federal regulations do not require numeric effluent limitations for discharges of storm water.[50] The Water Boards can include numeric effluent limitations in individual storm water permits or can choose not to. The Water Boards are also not required to perform a reasonable potential analysis for each constituent.[51] We have long held that storm water permits issued in California need not always include numeric effluent limitations.[52] This is not to say that numeric effluent limitations cannot be included in storm water permits. In adding subsection (2) to section 122.44(k), the U.S. EPA explained that it was employing the Interim Permitting Policy for Water Quality-Based Effluent Limitations in Storm Water Permits (Interim Permitting Policy).[53] (Vol. 64 Fed. Reg. 68722, 86788-9.) The Interim Permitting Policy generally endorses narrative effluent limitations based on BMPs, but it also supports numeric effluent limitations where either there is adequate information or the facility has long been subject to numeric effluent limitations:

> "In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate. This interim permitting approach is not intended to affect those storm water permits that already include appropriately derived numeric water quality-based effluent limitations." (Vol. 61 Fed. Reg. 43761; repeated at Vol. 64 Fed. Reg. 68788.)

U.S. EPA explains that the Interim Permitting Policy does not explicitly apply to states and that states are encouraged to adopt similar policies. (*Ibid.*) As Boeing points out in its papers, the State Water Board is currently reviewing the issues concerning whether storm water permits should, as a general matter, contain numeric effluent limitations. To assist us in this task, we appointed a Blue Ribbon Panel and recently received their report and recommendations.[54] The Panel was asked to address the feasibility of numeric effluent

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[50] 40 C.F.R. § 122.44(k)(2).

[51] *Divers' Environmental Conservation Organization v State Water Resources Control Board* (2006) ___ Cal.Rptr.3d ___, 2006 WL 3423150.

[52] See, e.g., *In the Matter of Citizens for a Better Environment, et al.* Order WQ 91-3, at p.30-31. Note that prior to 1999, there was no separate exemption for storm water discharges apart from the general rule requiring numeric effluent limitations except where infeasible. Thus, our older decisions and general permits made determinations regarding feasibility. In 1999, § 122.44(k) was amended to add the subsection (2), which authorizes the permitting authority to include BMPs in lieu of numeric effluent limitations in storm water permits, without the necessity of making a determination of infeasibility. (Vol. 64 Fed. Reg. 68722, 68847.)

[53] U.S. EPA issued the Interim Permitting Policy was issued on August 1, 1996. (Vol. 61 Fed. Reg. 43761.)

[54] The report is available at http://www.waterboards.ca.gov/stormwtr/docs/numeric/swpanel_final_report.pdf.

limitations in general industrial permits, general construction permits, and area-wide municipal permits.[55] Thus, while the report will help the State Water Board and Regional Water Boards to design these new permits, the purpose of the Report was never specifically intended to address individual storm water permits.[56] The issues explored by the Panel are not directly applicable to this permit and our decision here does not reflect or presage our future actions and policies on the Panel report and the general question of numeric effluent limitations for storm water permits.

We conclude that the Boeing site is unique both from a physical standpoint–the immense area covered, the extensive past contamination, existing activities, and the amount of runoff from the steep terrain–and from a regulatory standpoint, since it has been subject to individual permits with numeric effluent limitations for storm water discharges for many years. The runoff from remediation areas has the potential to contain contaminants from the historic industrial activities. For example, the catchment area of Outfall 004 is comprised largely of a landscape whose surface soil is contaminated with mercury and other contaminants from the former Sodium Reactor Experiment site. Boeing is remediating this site and may ultimately remove the contaminated soil and dispose of it off-site. Until DTSC authorizes such a final solution, the contaminated soil is covered and Boeing uses BMPs at the bottom of the catchment to treat the runoff. It was appropriate and proper for the Los Angeles Water Board to continue to apply numeric effluent limitations at the storm water-only outfalls (including the addition of Outfall 008) in the 2004 Permit and in its modifications.

Boeing also contends that the Los Angeles Water Board was prohibited from applying the SIP when it decided to establish numeric effluent limitations for the storm water-only outfalls. We disagree. U.S. EPA adopted water quality criteria for priority pollutants in California in the CTR. (40 C.F.R. Part 131.36.) In 2000, the State Water Board adopted the SIP to implement the CTR. The SIP includes instructions on determining "reasonable potential" and in calculating numeric effluent limitations for priority pollutants. Thus, the SIP is legally applicable only to priority pollutants listed in the CTR.

The SIP is also not legally applicable to storm water discharges. In footnote 1 of the SIP, we stated: "This Policy does not apply to regulation of storm water discharges. The [State Water Board] has adopted precedential decisions addressing regulation of municipal

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[55] *Ibid.*

[56] It is, of course, possible that some of the policy decisions we will make regarding whether and how to use numeric effluent limitations in general and area-wide storm water permits could ultimately impact our review of individual permits, but we have not even acted upon the report's recommendations yet. Moreover, the permit at issue is an individual permit that is a reissuance of a permit that for almost 10 years has always included numeric effluent limitations for its storm water-only discharges.

storm water discharges in Orders WQ 91-03, 92-04, 96-13, 98-01, and 990-05. The [State Water Board] has also adopted two statewide general permits regulating the discharge of pollutants contained in storm water from industrial and construction activities." All of the references in this footnote refer to area-wide municipal permits and general permits that do not include numeric water quality-based numeric effluent limitations. Thus, by this footnote, we made clear our policy that such permits are not *required* to determine reasonable potential for each constituent or to include numeric effluent limitations.

While the SIP does not legally apply to storm water discharges, that is not to say that if, in an appropriate case, a storm water permit includes numeric effluent limitations, the SIP procedures cannot be employed to determine reasonable potential and to calculate effluent limitations. We have already addressed the use of the SIP for non-priority pollutants.[57] Where a regional water board makes determinations concerning "reasonable potential" and calculating numeric effluent limitations for constituents not subject to the CTR, the regional water board must articulate the bases for its determinations.[58] In *Yuba City*, we found that the regional board properly relied on both the SIP and U.S. EPA's Technical Support Document for Water Quality-Based Toxics Control (TSD) in establishing numeric effluent limitations for non-priority pollutants.[59] This is precisely what the Los Angeles Water Board did in this case. Just as the SIP can be used for non-priority pollutants, it can also be used for storm water discharges, so long as the methodology is explained and justified. We conclude that the Permit appropriately relied on the SIP, the TSD, and also the California Permit Writers Training Tool in developing the numeric effluent limitations. Because none of these documents are required by a formal Policy or a regulation to be used to determine "reasonable potential" and to calculate numeric effluent limitations for storm water discharge, the Los Angeles Water Board was required to explain fully its procedures.[60] We conclude that the Los Angeles Water Board met that burden.

Contention: Boeing claims that the Los Angeles Water Board erred in refusing to issue a cease and desist order with a four-year compliance schedule and interim effluent limitations in 2006.[61]

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[57] See, e.g. *In the Matter of Napa Sanitation District*, Order WQO 2001-16 and *In the Matter of Yuba City*, Order WQO 2004-0013.

[58] *Ibid.*

[59] EPA/505/2-90-001, March 1991.

[60] See requirements for calculating numeric effluent limitations in 40 C.F.R. title 122.44(d).

[61] Boeing refers to draft Order No. R4-2006-0YYY, which was prepared by staff from the Los Angeles Water Board.

Finding: The request for a CDO with a compliance schedule raises different issues than Boeing's claims that numeric effluent limitations were inappropriate because compliance with those limitations was "infeasible." As we discussed, above, the issue regarding feasibility for inclusion of numeric effluent limitations pursuant to 40 C.F.R. section 122.44(k)(3) concerns whether it is "appropriate", or feasible from a regulatory perspective, to establish numeric effluent limitations. In any event, the discharge is subject to the strict requirements of compliance with water quality standards. The propriety for an enforcement action that includes a time schedule to come into compliance with the permit's effluent limitations does turn on the specific discharger's ability to comply.[62]

The permitting history alone does not appear to justify the need for additional time to comply with the Permit. Permits for SSFL have included numeric effluent limitations since at least 1998. The vast majority of new and revised effluent limitations were added in July 2004. When Boeing filed a petition in August 2004, it asked that the petition remain in abeyance and it did not allege that it had been improperly denied a compliance schedule and interim limits. These issues were raised in its appeals of the 2006 Permit modifications. The 2006 modifications, however, were generally limited to adding effluent limitations to the interior Outfalls 012-014 and 015-017. Thus, on the face of the permitting actions alone, it is difficult to justify the need for a compliance schedule and interim limitations, especially Boeing's request that these revisions be retroactive to July 2004.

Boeing also points out, however, the devastating effects of the Topanga Fire as a basis for a compliance schedule and interim limits. The record includes ample evidence that the Topanga Fire, which destroyed vegetation through 70 percent of SSFL, was indeed a major incident that would significantly affect its ability to comply with the numeric effluent limitations in the Permit. The photographs and testimony in the record provide strong evidence that the BMPs in place prior to the September 2005 fire were substantially destroyed and that, in addition, ash from the fire likely contains additional contaminants regulated by the Permit. In light of the large size of SSFL and the fact that most of the volume of discharges are associated with storm water runoff,[63] the natural landscape has been used as the major component in the treatment system. Thus, vegetation is used to prevent and remove pollutants from moving off-

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[62] *City of Sacramento v. State Water Resources Control Board* (1992) 2 Cal.App.4th 960, 965.

[63] While commingling of process water and storm water result in the legal treatment of the wastewater as process water, in reviewing the *factual* issues, such as whether a fire resulted in the need for a compliance schedule, it is relevant that the wastewater discharges are largely composed of storm water runoff.

site in storm water flows. Commenters including CBG contend that prior to the Topanga Fire Boeing's BMPs were inadequate and that a compliance schedule would, in effect, reward Boeing for past inadequacies. We do not find that argument persuasive. First, regardless of how effective the BMPs and treatment used prior to the fire, all would still be burned and unusable after the fire. Second, while we agree that some of the BMPs most recently installed do surpass the prior BMPs,[64] we find that these new systems are state of the art and their absence prior to the fire does not necessarily indicate that the prior BMPs were inadequate. As to the list of violations throughout the several years prior to the fire, while we do not in any way condone permit violations, the number of individual permit violations at a site the size and complexity of SSFL does not necessarily mean that the BMPs were wholly inadequate.

The record shows that on January 19, 2006, the Los Angeles Water Board considered whether to issue a cease and desist order. A CDO is an enforcement order. Water Code section 13301 provides that when a regional board finds that a discharge of waste is taking place, or threatening to take place, in violation of a permit, "the board may issue an order to cease and desist" and may issue an order requiring immediate compliance, compliance in accordance with a time schedule, and appropriate remedial activities. The State Water Board's Water Quality Enforcement Policy explains the use of cease and desist orders:

> "Cease and Desist Orders (CDOs) are adopted pursuant to California Water Code sections 13301-13303. CDOs may be issued to dischargers violating or threatening to violate WDRs or prohibitions prescribed by the RWQCB or the SWRCB. CDOs are often issued to dischargers with chronic non-compliance problems. These problems are rarely amenable to a short term solution. Often, compliance involves extensive capital improvements or operational changes. The CDO will usually contain a compliance schedule, including interim deadlines (if appropriate), interim effluent limits (if appropriate), and a final compliance date. CDOs may also include restrictions on additional service connections to community sewer systems and combined stormwater/sewer systems."[65]

In light of the circumstances of the Topanga Fire, the nature of the site, including its topography, the fact that most of the discharges consist of runoff, the difficulty of ensuring compliance at numerous outfalls that receive discharges from many sources, and the ensuing impact on Boeing's ability to comply with the permit terms, we conclude that the Los Angeles

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[64] For example, at the stay hearing, Boeing presented evidence of a carbon filtration system now employed at some outfalls.

[65] Water Quality Enforcement Policy, at p.20.

Water Board acted inappropriately in refusing to issue an enforcement order with a compliance schedule and interim effluent limitations based on the impacts from the Topanga Fire.

We have stated above that the Permit appropriately required strict compliance with water quality standards through numeric effluent limitations. Our findings in this section do not take away from that conclusion. They address, instead, whether the Los Angeles Water Board acted inappropriately and improperly by refusing to issue an enforcement action with a time schedule where the site was subject to a fire that destroyed its control structures. We find that it was not justifiable to demand immediate compliance by Boeing. In view of the impacts of the fire, a time schedule was warranted based on the specific situation that Boeing faced. We note that, as an enforcement action, a CDO does not condone permit violations. Rather, it constitutes a finding of violation or impending violation of an order and it carries with it the potential for higher fines should it be violated.[56] On the other hand, there is no justification to make the compliance schedule retroactive to July 2004, before the fire and before Boeing even pressed its claim that it needed a compliance schedule. We will remand this issue to the Los Angeles Water Board to issue a CDO. Any CDO should include a compliance schedule that is as short as possible. The order should be retroactive to January 19, 2006, when the matter was considered.

III. CONCLUSIONS

1. The Boeing Permit is an individual permit for commingled storm water and industrial process water and should not be regulated the same as sites subject to the General Permit for storm water discharges associated with Industrial Activities.
2. The monitoring requirements in the Permit are appropriate.
3. Outfalls 001–010, which are situated on the perimeter of the property, are properly situated as compliance points.
4. Outfalls 012-017, which are situated in the interior of the property, are properly situated as compliance points, at least while Boeing is authorized to discharge industrial process water, treated groundwater, and domestic wastewater. But in any event, it is inappropriate to count the same violation twice in such a manner as to treat a single violation as multiple violations.
5. Outfalls 001 and 011 and Outfalls 002 and 018 are duplicative because Outfalls 011 and 018 flow directly to Outfalls 001 and 002, respectively, without any change in flows or discharge in the interim and with only open space between them. The Permit should

[56] Wat. Code, § 13385, subdivision (e) requires consideration of prior history of violations in establishing administrative liability for permit violations.

include only one set of these outfalls as compliance points subject to numeric effluent limitations.

6. The Permit appropriately contains numeric effluent limitations and these were properly calculated based on determinations of "reasonable potential" to cause or contribute to exceedance of water quality standards.
7. The Los Angeles Water Board properly used the SIP and federal guidance materials to calculate numeric effluent limitations for storm water discharges by explaining and justifying its methodology.
8. The Los Angeles Water Board acted inappropriately in refusing to issue Boeing a CDO, with a compliance schedule and interim effluent limitations, when it modified the Permit in 2006, based on the effects of the Topanga Fire.
9. Nothing in this Order prevents enforcement of the Permits, except insofar as the Los Angeles Water Board adds a compliance schedule in a CDO, which compliance schedule shall not be effective until January 19, 2006. Also, the CDO does not operate to excuse violations of any Permit.

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IV. ORDER

The Permit is remanded to the Los Angeles Water Board to revise the provisions concerning Outfalls 001, 002, 011, and 018, consistent with this Order. The effluent limitations from Outfalls 011 and 018 are stayed, pending a determination by the Los Angeles Water Board deleting either Outfalls 011 and 018 or Outfalls 001 and 002 as compliance points. The Los Angeles Water Board is also instructed to issue a CDO with the shortest possible compliance schedule, which shall be based on the impacts from the Topanga Fire, with interim effluent limitations, and which shall be effective January 19, 2006. The Los Angeles Water Board is instructed to review the Permit to ensure that numeric effluent limitations for different outfalls do not count the same violation twice in such a manner as to treat a single violation as multiple violations. In all other respects, the petitions are DENIED.

CERTIFICATION

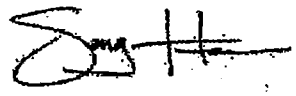
The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on December 13, 2006.

AYE: Tam M. Doduc
Arthur G. Baggett
Charles R. Hoppin
Gary Wolff, P.E., Ph.D.

NO: None

ABSENT: None

ABSTAIN: None



Song Her
Clerk to the Board

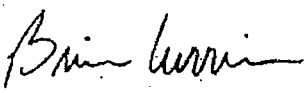
EXHIBIT "10"

Storm Water Panel Recommendations to the
California State Water Resources Control Board

The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities

June 19, 2006

Panelists:



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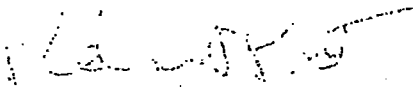

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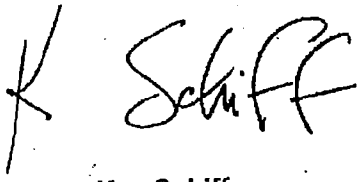

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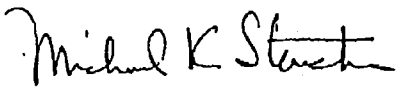

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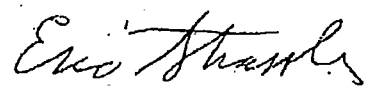

"The opinions I express are my own and do not represent official US EPA policy."

Eric Strassler
Senior Policy Analyst, Office of Water, US USEPA
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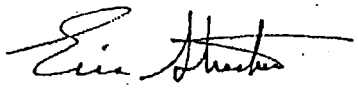

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Background

The NPDES storm water permit program came into being as a result of the 1987 amendments to the federal Clean Water Act and its implementing regulations. In California, the State Water Resources Control Board (State Water Board) and the nine Regional Water Quality Control Boards (Regional Water Boards) implement the NPDES storm water program.

The Clean Water Act amendments, Section 402(p) require that discharges of storm water from large and medium municipal separate storm sewer systems (MS4s) and discharges of storm water associated with industrial activities be in compliance with NPDES permits. MS4 permits require that the discharge of pollutants be reduced to the maximum extent practicable (MEP). Discharges associated with industrial activities, were required to meet the technology based standards of best available technology economically achievable (BAT) or best conventional pollutant control technology (BCT), and to meet water quality standards.

In 1990, USEPA promulgated regulations (40 CFR Part 122.26) for the NPDES storm water program. These regulations clarified what industrial activities were subject to storm water permit. Construction that resulted in a land disturbance of five or more acres was included as an industrial activity subject to NPDES storm water permit. The regulations also delineated what was to be included in permit applications and the programmatic elements that were to be in a permit and storm water management program for MS4s or storm water pollution prevention plan for industrial activities.

California's Permits

In 1990, MS4 permits were issued to Santa Clara County by the San Francisco Bay Regional Water Board and to Los Angeles County by the Los Angeles Regional Water Board. These permits were appealed to the State Water Board. The primary basis of the appeals was the lack of numeric limits in the permits. The entities that brought the appeals argued that the permits needed to include numeric limits, as the discharges of pollutants must not only be reduced to the MEP, but they must also meet water quality standards. The State Water Board, in hearing these appeals, determined that it was not feasible at the time to develop numeric limits for MS4 permits, and that water quality standards could and should be achieved through the implementation of best management practices (BMPs). Since this ruling, the Regional Water Boards have typically not included numeric limits in storm water permits.

The State Water Board has adopted NPDES General Permits for the Discharge of Storm Water Associated with Industrial Activities and for the Discharge of Storm Water Associated with Construction Activities. Both of these permits contain language stating that developing numeric limitations is infeasible.

Court Decisions

In addition to these actions on MS4 permits at the State level, there have been a number of rulings from the federal courts regarding the NPDES Storm Water program.

One of the most significant is from the federal court, 9th District Court of Appeals from 1999. In its published opinion on Defenders of Wildlife vs. Browner, the Court held that MS4 permits need not require strict compliance with water quality standards. Rather, compliance was to be based upon the MEP standard. However, the permitting authority (the State Water Board/Regional Water Boards for California) could at their option require compliance with standards. The State Water Board through the permit and appeals process has in fact required that the discharges from MS4s meet water quality standards, but has stated that compliance with numeric standards can be achieved through the implementation of BMPs in an iterative fashion.

The Browner decision also found that discharges of storm water associated with industrial activities must be in strict compliance with water quality standards.

In 2004 the State Water Board conducted a public hearing on a draft General Industrial Storm Water permit. This draft permit met with significant opposition from non-government or non-industrial organizations (NGOs) due to the absence of numeric limits. Staff revised the draft permit to include the benchmarks contained in the USEPA multi-sector general permit. This change resulted in strong opposition from the regulated community.

The concerns that have been raised by the NGOs and the regulated community are similar, though they do not necessarily agree on the best way to address them. Both believe that permitting has become overly complex, and that it is extremely difficult, if not impossible to objectively determine if a facility, operation or municipality is in compliance with its permit requirements. The NGOs argue that requiring storm water permittees to comply with numeric effluent limits will result in an easier way to measure compliance. The regulated community agrees, to a degree, but they argue that it is not simply a matter of selecting a number that is suitable for a POTW or industrial waste discharge. Due to the unique nature of storm events and storm water discharges, any numeric limit that is placed in a storm water permit must take into consideration the episodic nature of storm events and be truly representative of storm water discharges. In addition, the regulated community has argued that there are going to be pollutants in storm water discharges that did not originate in the MS4 (run on) or that they do not have the means to control, and therefore should be given special consideration.

In response to these arguments, State Water Board directed staff to convene a panel of storm water experts to examine the feasibility of developing numeric

limits for storm water permits. Specifically, this panel of experts was asked to consider the following:

> "Is it technically feasible to establish numeric effluent limitations, or some other quantifiable limit, for inclusion in storm water permits? How would such limitations or criteria be established, and what information and data would be required?"
>
> "The answers should address industrial general permits, construction general permits, and area-wide municipal permits. The answers should also address both technology-based limitations or criteria and water quality-based limitations or criteria. In evaluating establishment of any objective criteria, the panel should address all of the following:
>
> (1) The ability of the State Water Board to establish appropriate objective limitations or criteria; (2) how compliance determinations would be made; (3) the ability of dischargers and inspectors to monitor for compliance; and (4) the technical and financial ability of dischargers to comply with the limitations or criteria."

Staff invited 10 individuals from the academic and scientific community to participate on the panel. Of the 10, eight agreed to participate. These eight met in a public session on September 14, 2005 and heard presentations from the regulated and NGO communities. They also heard comments from the public at large. They met again on September 15, 2005 to discuss the public comments and to begin to formulate a response. It was also decided at this meeting that they would form sub-committees to address municipal (MS4), industrial and construction discharges separately. These sub-committees worked on drafts statements for each of these, circulating them over the course of a number of months.

The panel met again in private session on April 3 and 4, 2006. The purpose of these meetings was to address unresolved issues and to develop the final response to the State Water Board. It was also decided to combine the three working statements into one Statement of Findings. The following discussion is the panel's findings and is broken into three program element areas: municipal, construction, and industrial.

Panel's Findings on Feasibility of Numeric Effluent Limits Applicable to Municipal Activities

Municipal Observations

1. The current practice for permitting, designing, and maintaining municipal stormwater treatment facilities (called BMPs herein) on the urban landscape does not lend itself to reliable and efficient performance of the BMPs because:

   - Permitting agencies, including EPA, States, and local governments, have rarely developed BMP design requirements that consider the pollutants and/or parameters of concern, the form(s) that the pollutants or parameters are in, the hydrologic and hydraulic nature of how they pollutants and flow arrive, and then the resulting unit processes (treatment and/or flow management processes) that would be required to address these pollutants or parameters.
   - The permitting agencies generally are not accountable for the performance of the BMP, and thus give much leeway to the developer with respect to the type of BMPs to be constructed, and to the details of the design, although some states do have detailed design standards and have conducted performance tests to identify acceptable devices for their area.
   - The developer is not responsible in most all cases for the performance of the BMP, so the treatment facilities are designed to minimize the cost and/or area of the facility and/or ease of permitting, not maximize the pollutant removal efficiency and/or flow management of the BMP
   - Because BMPs are not held to any, or very few, long-term performance criteria, they are typically not maintained except for aesthetic purposes. Very few stormwater agencies are responsible for BMP maintenance on private property, and public facilities are maintained mostly in response to clogging and/or resultant drainage or aesthetic problems. Even for stormwater agency facilities, maintenance is often limited.

2. The principal reasons for the failure of BMP performance is improper BMP selection, design and/or lack of maintenance.

   - The California BMP Handbooks and other local requirements leave too much of the BMP selection and design to the discretion of the designer, and thus do not address many if not all of the receiving water quality issues

- BMPs need to be *designed to facilitate maintenance*; this is rarely done because it costs the developer money and the BMP designer is rarely responsible for the maintenance.

- Given the amount of debris in urban runoff, and the fact that the hydraulic capacity of many BMPs may be exceeded several to many times per year, BMPs require more maintenance than other types of stormwater control facilities. Since urban BMP maintenance is generally left to untrained homeowner associations and maintenance personnel for commercial properties, inadequate maintenance is a near certainty. Even stormwater agencies often do not have and/or apply the resources necessary to maintain agency owned BMPs.

3. Improvements in the design of municipal BMPs, including residential and commercial as well as municipally owned facilities are necessary to ensure better performance (i.e. sizing, geometry, inlet and outlet design, etc.) and to specifically target receiving water quality issues.

<u>The Problem with Existing Effluent Limit Approaches</u>

Effluent limit approaches usually focus only on conventional water quality constituents that may not be solely or at all responsible for the receiving water beneficial use impairments in urban receiving waters. The important stressors that affect many use impairments can include one or more of the following and may vary in importance from system to system:

- The effect of increased flows and/or volumes (i.e. hydromodification) that can lead to stream channel erosion/sedimentation with resulting habitat destruction

- Sediment contamination (such as enrichment of urban stream sediments with fine-grained heavily polluted particulates; large organic debris masses causing low sediment DO; settled bacteria causing large bacteria gradients with sediment depth etc.)

- Impaired aesthetic value (caused by gross floatables, noxious sediments, etc.)

- Unsafe conditions (caused by dangerous debris, highly fluctuating stream flows and stages, etc.)

- Dissolved and suspended pollutants that are bioavailable in the water column and/or result in downstream sediment contamination

- Elevated temperatures from urban heating effects on runoff and on open conveyances and permanent pool BMPs

It is very difficult to determine specific causative agents or the level of control needed, for a specific beneficial use impairment in a receiving water body. The *Stormwater Effects Handbook: A Tool Box for Watershed Managers, Scientists, and Engineers* (Burton, G.A. Jr., and R. Pitt, ISBN 0-87371-924-7. CRC Press, Inc., Boca Raton, FL. 2002. 911 pages) was written to be used as a guide for stormwater managers to identify their local receiving water problems and to assist in identifying the causative factors. The methods described would need to be applied to a specific area or region to obtain an understanding of local conditions and problems. Although expensive, comprehensive investigations such as these should be considered an investment to help minimize wasteful expenditures due to the application of inappropriate control practices in a watershed.

Monitoring for enforcement of numeric effluent limits would also be challenging. While spot checks could be made at some of the many outfalls in an area, there is wide variation in stormwater quality from place to place, facility to facility, and storm to storm. Coefficients of variation approaching 1 or higher are not uncommon and there are few factors that can be used to significantly reduce this variation. Analysis of the National Stormwater Quality Database indicates that geographical location and land use are the most important factors affecting stormwater quality for most constituents. Some are also affected by the antecedent dry period before the rain and more highly developed watersheds (containing large fractions of impervious areas) often show elevated "first-flush" concentrations in the first portion of the storms for some, but not all pollutants. Since the storm-to-storm variation at any outfall can be high, it may be unreasonable to expect all events to be below a numeric value. In a similar circumstance, there are a number of storms each year that are sufficiently large in volume and/or intensity, to exceed the design capacity volume or flow rates of most BMPs. Assessing compliance during these larger events represents yet another challenge to regulators and the regulated community.

Technical Issues

Even for conventional pollutants, there presently is no protocol that enables an engineer to design with certainty a BMP that will produce a desired outflow concentration for a constituent of concern. A possible exception is removal of Total Suspended Solids in extended detention basins, and some types of media filters. The typical approach for evaluating BMP pollutant removal efficiency has been *percent removal*; but observed removal efficiencies vary greatly from facility to facility and it has been demonstrated that percent removal varies directly with the inflow concentration.

Few, if any, BMPs are designed using the first principles laws of physics, chemistry and/or biology for pollutant removal and/or flow-duration control. It will

take a substantial research effort, including data gathering on well-designed BMPs, to develop design criteria for the removal of pollutants with confidence intervals that enable us to make reliable estimates of the median and variance of the effluent concentrations to be expected from the various types of BMPs. Until this is done, it will be very difficult to assign legally enforceable numerical effluent limitations to any particular BMP.

Drawing upon the body of knowledge that currently exists regarding pollutant removal efficiency, it is possible to estimate mean effluent concentrations and variances for a number of constituents for different types of BMPs, albeit not in a legally enforceable sense. Effluent concentration distributions for a number of BMPs are available in the International BMP Database (www.bmpdatabase.org) from more then 250 studies throughout the US. The following outlines key issues that have been identified regarding the technical feasibility of setting objective criteria for both existing areas and new or redeveloping areas:

- Effluent concentration estimates could be made for a given constituent and a particular BMP from a larger number of BMPs than available in the BMP Database using literature values of percent removal and local or national data on stormwater runoff EMC data. However, the results from this work would be significantly less reliable then the BMP Database data as it could be biased if the influent concentrations for the studied BMP types did not match general urban runoff.
- Designing the facility more rigorously with respect to the physical, chemical and biological processes (e.g. unit processes) that are active in the BMP would give confidence that the BMP would perform at least as well, if not better than the average performance determined from the literature. A WEF/ASCE task force is currently updating their Urban Runoff Quality Management Manual of Practice; design guidance of BMPS will make better use of the physical, chemical, and biologic processes taking place in the BMP before, during and after a storm event. This manual will build upon recent research efforts employing a unit process based approach for BMP design and selection. These research efforts were supported by the Water Environment Research Foundation (WERF) and the National Cooperative Highway Research Program (NCHRP).
- A BMP *designed* and *constructed* according to a set of criteria described above, could be ***presumed*** to deliver an effluent with a mean constituent concentration and variance similar to the performance numbers developed from the literature ***if it is properly maintained***. Enforcement would comprise periodic inspection of the facility using a checklist of items to be inspected. While not an effluent limit, this seems practical and quantifiable.

- Most all existing development rely on non-structural control measures, making it difficult, if not impossible to set numeric effluent limits for these areas because little is known about the quantity and quality performance of non-structural controls. However, certain development characteristics in some existing development areas that minimize the amounts of impervious areas in a drainage area have been shown to be quite effective in reducing adverse hydromodifications in the receiving waters, and should be encouraged.

Municipal Recommendations

It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges. However, it is possible to select and design them much more rigorously with respect to the physical, chemical and/or biological processes that take place within them, providing more confidence that the estimated mean concentrations of constituents in the effluents will be close to the design target. Moreover, with this more rigorous design and an enforceable maintenance program, it can be presumed that these facilities will continue to deliver effluent qualities that are reasonably close to the design effluent concentrations over the life of the facility. And if proper maintenance is performed (enforced), the facilities can be expected to perform throughout their design life at the same or better efficiency as when newly constructed. Depending on the pollutants and parameters of concern and BMP choices, it is very likely that treatment trains of structural BMPs will be required in many cases.

For catchments not treated by a structural or treatment BMP, setting a numeric effluent limit is basically not possible. However, the approach of setting an "upset" value, which is clearly above the normal observed variability, may be an interim approach that would allow "bad actor" catchments to receive additional attention. For the purposes of this document, we are calling this "upset" value an ***Action Level*** because the water quality discharged from such locations are enough of a concern that most all could agree that some action should be taken. Action Levels could be developed using at least three different approaches. These approaches include: 1) consensus based approach; 2) ranked percentile distributions; 3) statistically-based population parameters.

The consensus-based approach would be to agree upon effluent concentrations that all parties feel are not acceptable. For example, most parties would likely agree that an average concentration of dissolved copper above 100 ug/l from an urban catchment would not be acceptable. This would be an Action Level value that would trigger an appropriate management response. This approach may not directly address the issue of establishing numeric effluent criteria and achieving desired effluent quality, but the consensus-based approach would ensure that the "bad actor" watersheds received needed attention.

The ranked percentile approach (also a statistical approach) relies on the average cumulative distribution of water quality data for each constituent developed from many water quality samples taken for many events at many locations. The Action Level would then be defined as those concentrations that consistently exceed some percentage of all water quality events (i.e. the 90th percentile). In this case, action would be required at those locations that were consistently in the outer limit (i.e. uppermost 10th percentile) of the distribution of observed effluent qualities from urban runoff.

The statistically based population approach would once again rely on the average distribution of measured water quality values developed from many water quality samples taken for many events at many locations. In this case, however, the Action Level would be defined by the central tendency and variance estimates from the population of data. For example, the Action Level could be set as two standard deviations above the mean, i.e. if measured concentrations are consistently higher than two standard deviations above the mean, an Action situation would be triggered. Other population based estimators of central tendency could be used (i.e. geomean, median, etc.) or estimates of variance (i.e. prediction intervals, etc.). Regardless of which population-based estimators are used (or percentile from above), the idea would be to identify the [statistically-derived] point at which managers feel concentrations are significantly beyond the norm.

The ranked percentile and population-based estimators are highly dependent upon the data sets used to calculate them. There are a number of options that were considered by the Panel, but ultimately they were broken into two distinct categories. The first category was for new development/redevelopment and the second was for built out urban environments. For new development/redevelopment, the panel recommends using the data set associated with the international BMP database (www.bmpdatabase.org). This data set represents the variety of water quality from the most up to date, best conducted and reported BMP studies. The database effort does not limit itself to BMPs types or designs; it focuses on technically sound monitoring studies and reporting information. Therefore there could be some screening of studies to those thought to be well designed BMPs to then develop effluent quality distributions and statistics on performance. Certainly, there is no expectation that urban stormwater managers could improve water quality beyond what would be reported in this dataset.

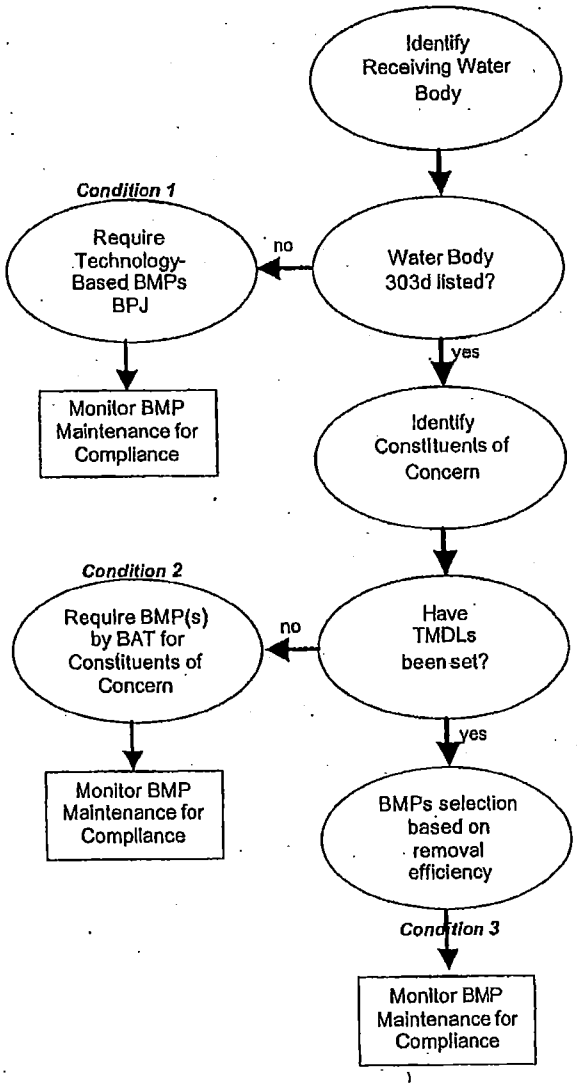
In built-out urbanized environments, there are greater opportunities to examine various data sets for setting Action Levels. For the Panel, these opportunities were a function of spatial scale. The first opportunity would be at the local scale. Some urban stormwater monitoring programs have been in existence for 10 years or longer. Examples include the Los Angeles County Department of Public Works, City of Sacramento, Orange County, San Diego County, amongst others. Using permit specific data sets may make sense if issues of climatic variability or

localized geomorphology are important. The next scale would be to combine these California municipal permit monitoring data sets, especially if lack of data for specific constituents of concern in any one location or region is an important issue. The largest scale would be the National Stormwater Quality Database (NSQD) from municipal monitoring programs across the nation (http://unix.eng.ua.edu/~rpitt/Research/ms4/Paper/Mainms4paper.html). This data set includes monitoring data from urban areas such as residential, commercial, industrial, freeway, institutional, and mixed use which is especially useful if small sample size limits the use of local data. One advantage of using smaller (and local), rather than larger, spatial scales is the ability to update data sets for revising Action Levels. The NSQD may not be updated for quite some time, but local data sets can be updated periodically (annual amendments, 10-year rolling averages, every permit cycle, etc). Ultimately, Action Levels would be expected to become lower as outliers are removed from data sets and as improved water quality data are collected through targeted management actions. It may be appropriate to eliminate older data sets as well over time.

One element to consider when comparing monitoring data to Action Levels is the concept of a design volume for water quality (also known as the Water Quality Capture Volume – WQCV, WEF #23 and ASCE publication #87, 1998) or a design flow rate. The WERF and NCHRP efforts mentioned above include recommendations regarding design sizing using continuous simulation techniques for both volume-based and rate-based BMPs. The Panel acknowledged that several to more times each year, the runoff volume or flow rate from a storm will exceed the design volume or rate capacity of the BMP. Stormwater agencies should not be held accountable for pollutant removal from storms beyond the size for which a BMP is designed.

A Technically Sound and Pragmatically Enforceable BMP Design and the Permit Process

The diagram below provides guidance for determining what BMPs are required in a newly developing watershed. Under ***Condition 1*** where the receiving water quality is not impaired, determination of the appropriate BMP would be by Best Professional Judgment (BPJ). Any of the "state approved" BMPs could be used. The permittee would be required to design the treatment facilities in accordance with the California BMP Handbook, ***which should be revised as a criteria manual***, rather than a guidance manual *and include more physiobiochemically based design criteria designed to address an agreed upon set of "Pollutants and Parameters of Concern" based upon knowledge of the pollutants and parameters that generally are of concern in urban runoff, with perhaps some differences on receiving water type.*



A detailed maintenance plan and schedule would be required that includes:

1. Actions to be taken and when,
2. Designation of the party legally accountable for the facility maintenance, and
3. A whole-life cost estimate for the facility that include maintenance.

Compliance with the design criteria and the maintenance plan and schedule would constitute achievement of the design effluent criteria. In the event of failure by the responsible party to perform the required maintenance and/or to perform it to the required level of quality, the whole-life cost schedule could be used to determine the consideration that the defaulting responsible party would pay to the new responsible party that takes over the maintenance.

Under ***Condition 2*** where water quality impairment exists but a TMDL has not yet been performed, BAT would be required, which means applying the BMPs that can practicably (to be defined) be employed to produce the lowest effluent concentrations (e.g. the lower grouping of BMP effluent quality) of the constituent(s) of concern. Several types of BMPs may fulfill the BAT standard if these BMPs have performance that is not statistically or practically differentiable. This case will allow flexibility in choosing among that sets of BMPs that demonstrate superior performance. As in the case of C*ondition 1*, compliance with the maintenance plan and schedule would constitute compliance with the design effluent criteria.

Condition 3, which occurs when a TMDL has been specified for the BMP or for the tributary watershed, may (or may not be) actually be less stringent that *Condition 2* if the TMDL allows for a higher effluent concentration of the constituents of concern than that discharged by a BAT facility. The same requirements would apply for the design criteria, and the maintenance plan and schedule would constitute the guarantee of design effluent concentrations from the BMP.

Strategies for Stormwater Management to Protect Urban Water Environments

Stormwater effluent limits can become very complex if all the issues are to be directly addressed. If complex, they are not likely to be workable. However, too much simplification can also lead to ineffective programs. Therefore, a reasonable first step is needed, based on local data. Compliance monitoring (e.g. BMP inspections) is also needed to ensure that the goals are likely to be met. Most likely goals will have to be revised over time. The overall strategy should contain these objectives:

- Effectiveness
- Affordability
- Enforceability, and
- Flexibility

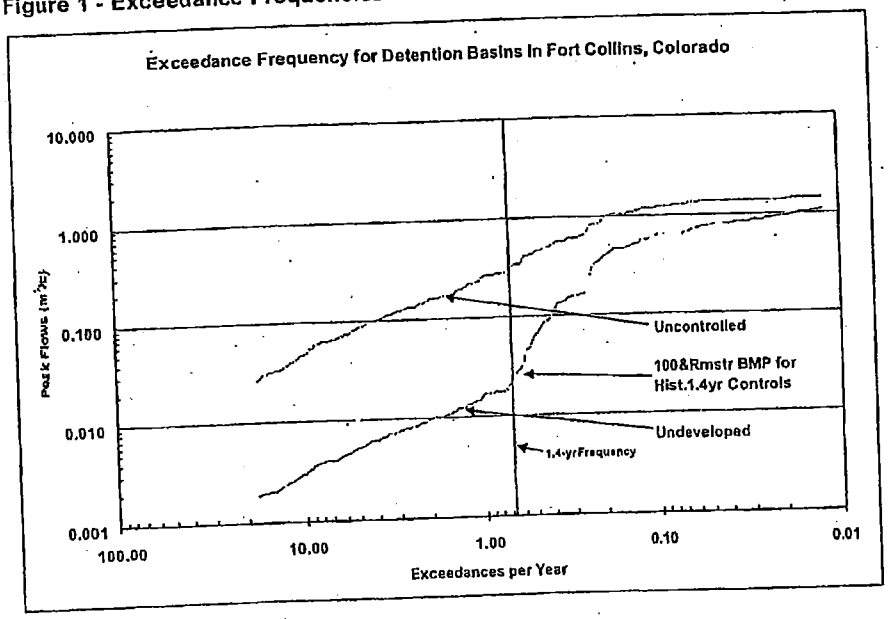
Table 1 - Effects of Urbanization on Hydrologic Regime in Colorado and Georgia

Location	Annual Precipitation	Mean Storm Depth*	Runoff Events per Year		Annual Runoff (mm)	
	Millimeters per Year	Millimeters	Undeveloped	Developed	Undeveloped	Developed
Fort Collins, CO	335	11	27	47	12	124
Atlanta, GA	1262	18	48	78	36	500

* Values obtained from Fig. 5.3 ASCE MOP (1998)

Runoff volume and peak flows have been recognized as two of the most important stormwater factors needing control. **Table 1** (Roesner and Nehrke) shows that urbanization dramatically changes the hydrologic regime of urban waterways. In both Atlanta (a higher rainfall area) and Fort Collins (a semiarid area), the number of runoff events per year on developed land increases by a factor of 2 times the number of runoff events that occur in the undeveloped state; and the runoff volume increases by a factor of ten! The peak flows also increase dramatically as shown in **Figure 1** below, but as also seen on the figure, the peak flow frequency curve can be adjusted back to its predevelopment character by the proper application of runoff controls. But while these controls restore the peak flow frequency to its natural regime, the duration of flows at the low end (but still channel "working") of the flow frequency curve is greatly increased, which raises potential for channel scour in stream channels with erosive soils.

Figure 1 - Exceedance Frequencies for Detention Basins in Fort Collins, Colorado



Since many of the stormwater pollutants are strongly associated with particulates, stormwater particulate control is also often a component of stormwater control programs. Therefore, an effective stormwater control strategy that could be encouraged is a combination of several practices, listed below in the order of increasing events:

- On-site stormwater reuse, evapotranspiration and infiltration for the smallest storms and up to specific targeted events, depending on site limitations (soil characteristics and groundwater contamination potential) (usually by conservation design emphasizing infiltration, disconnecting paved areas, etc.)
- Treatment of excess runoff that cannot be infiltrated, again, up to a specific targeted runoff volume (usually by sedimentation or filtration) For pollutants of concern, it should be demonstrated that the BMP(s) need to include the physical, biological, and/or chemical treatment processes that address the typical pollutants of concern and/or specific pollutants in the case of 303D listed water bodies or those with established TMDLs.
- Control of energy discharges for the channel forming events (such as through storage-release, focusing on flow-duration analyses and peak flow frequency analyses). To be most effective, this should to be completed under a watershed management plan and not site-by-site.
- Provide safe drainage for damaging events (conventional drainage, plus secondary drainage systems)
- In watersheds that are already experiencing damaging flow impacts to streams, it could be in many circumstances much more cost-effective (and effective period) to develop through a watershed plan a natural stream stabilization approach that could address both the existing development and the remaining smaller infill or otherwise smaller new development. In these cases, requiring the remaining new development to implement flow-duration control would not solve the issue in a measurable way and resources would be better spent restoring the functions of the creek with instream enhancements.

Panel's Findings on Feasibility of Numeric Effluent Limits Applicable to Construction Activities

Construction Observations

Regarding the question of the technical feasibility of Numeric Limits for stormwater discharges from construction activities, the Panel bases its recommendations on the following observations.

1. Limited field studies indicate that traditional erosion and sediment controls are highly variable in performance, resulting in highly variable turbidity levels in the site discharge.
2. Site-to-site variability in runoff turbidity from undeveloped sites can also be quite large in many areas of California, particularly in more arid regions with less natural vegetative cover and steep slopes.
3. Active treatment technologies involving the use of polymers with relatively large storage systems now exist that can provide much more consistent and very low discharge turbidity. However, these technologies have as yet only been applied to larger construction sites, generally five acres or greater. Furthermore, toxicity has been observed at some locations, although at the vast majority of sites, toxicity has not occurred. There is also the potential for an accidental large release of such chemicals with their use
4. To date most of the construction permits have focused on TSS and turbidity, but have not addressed other, potentially significant pollutants such as phosphorus and an assortment of chemicals used at construction sites.
5. Currently, there is no required training or certification program for contractors, preparers of soil erosion and sediment control Stormwater Pollution Prevention Plans, or field inspectors.
6. The quality of stormwater discharges from construction sites that effectively employ BMPs likely varies due to site conditions such as climate, soil, and topography.
7. The States of Oregon and Washington have recently adopted similar concepts to the Action Levels described earlier.

Construction Recommendations

It is the consensus of the Panel that active treatment technologies make Numeric Limits technically feasible for pollutants commonly associated with stormwater discharges from construction sites (e.g. TSS and turbidity) for larger construction sites. Technical practicalities and cost-effectiveness may make these technologies less feasible for smaller sites, including small drainages within a larger site, as these technologies have seen limited use at small construction sites. If chemical addition is not permitted, then Numeric Limits are not likely feasible. Whether the use of Numeric Limits is prudent, practical or necessary to more effectively achieve nonpoint pollution control is a separate question that

needs to be answered, but is outside the scope of this Panel. However, Action Levels are likely to be more commonly feasible. For small sites or smaller drainages within larger sites, or where chemicals cannot be used, the Panel recommends that Action Levels be specified.

Advanced systems lend themselves to Numeric Limits because of historically reliable treatment, while non-active controls are less predictable. Advanced systems have been in use in some form since the mid-1990s. At this time, there are two general types of systems. With each general system the stormwater is retained on-site, treated, and released more slowly. One system employs polymer coagulation and sedimentation. The second system employs polymer coagulation with direct filtration. Both types of systems are considered reliable, and can consistently produce a discharge less than 10 NTU. These systems have been used successfully at many sites in several states since 1995 to reduce turbidity to very low levels. Non-active erosion and sediment control BMPs, while effective when applied and adequately maintained, produce more highly variable in effluent quality, making setting Numeric Limits difficult, if not impossible.

An important consideration in setting Numeric Limits or Action Levels is that in many locations in California the natural background turbidity and/or TSS levels in stormwater runoff are quite high. This is particularly true in semi-arid or arid regions, which tend to have less vegetative cover. For example, natural runoff concentrations in Emerald Creek, on the Newport Coast, above any developed areas have been over 5,000 mg/l during runoff events. The Los Angeles County Monitoring Data sets included an open land use watershed that also showed TSS levels significantly above other types of urban land uses. Therefore, it is important to consider natural background levels of turbidity or TSS in setting Numerical Limits or Action Levels for construction activities. The difficulty in determining natural background concentrations/levels for all areas of the state could make the setting of Numeric Limits or Action Levels impractical from an agency resource perspective.

While the Panel concludes that Numeric Limits or Action Levels are technically feasible, the Panel has several reservations and concerns.

1. The active treatment systems have generally been employed on sites five acres or larger. While the systems are technically feasible for sites of any size, including sites or drainages as small as an acre or less, the cost may be prohibitive. The cost-effectiveness of active treatment systems is greatly enhanced for large drainage areas, at which construction occurs for an extended period of time, over one or more wet season. There is also a more "passive" active system that is employed in New Zealand that uses captured rainfall to release the chemical into flows entering a detention system that requires less instrumentation and flow measurement infrastructure. Even more passive systems such as the use of polymer

logs and filter bags are currently under development for small sites. Regardless, the Panel recommends that the Board give particular attention to improving the application of cost-effective source controls to small construction sites.

2. In considering widespread use of active treatment systems, full consideration must be given to whether issues related to toxicity or other environmental effects of the use of chemicals has been fully answered. Consideration should be given to longer-term effects of chemical use, including operational and equipment failures or other accidental excess releases.
3. Consideration should be given to the seasonality of applying Numerical Limits. There may be sites where summer only construction that complies with Action Levels may be preferred to year-round that sites that include winter construction that complies with Numeric Limits. In such cases, applying Numeric Limits to summer construction may be a disincentive to scheduling active grading during dry periods. Allowing summer only construction sites to comply with action levels would discourage winter construction activities.
4. Consideration should be given to whether Numeric Limits would apply to all construction sites or only those with significant disturbed soil areas (e.g. active grading, un-vegetated and/or un-stabilized soils). A site could meet certain conditions to be considered "Stabilized" for the runoff season.
5. Where Numeric Limits are not feasible or where they would not apply during designated seasons or site conditions, the Panel recommends that the Board consider the concept of Action Levels for sites where only traditional erosion and sediment controls are applied or construction sites that are considered "stabilized" for the runoff season. An Action Level indicates a failure of BMPs (within some storm size limits).
6. The Board should consider Numeric Limits or Action Levels for other pollutants of relevance to construction sites, but in particular pH. It is of particular concern where fresh concrete or wash water from cement mixers/equipment is exposed to stormwater.
7. The Board should consider the phased implementation of Numeric Limits and Action Levels, commensurate with the capacity of the dischargers and support industry to respond.
8. The Panel recommends that a Numeric Limit or Action Level should be compared to the average discharge concentration. The minimum number of individual samples required to represent the average discharge concentration for a storm will need to be defined.
9. The Board should set different Action Levels that consider the site's climate region, soil condition, and slopes, and natural background conditions (e.g. vegetative cover) as appropriate and as data is available. With active treatment systems, discharge quality is relatively independent of these conditions. In fact, active treatment systems could result in turbidity and TSS levels well below natural levels, which can also be a problem for receiving waters.

10. The Board should consider whether the Numeric Limits or Action Levels should differ between receiving waters that are water quality limited with respect to turbidity, sediment or other pollutants associated with construction, from those water bodies that are not water quality limited.
11. The Panel recommends that Numeric Limits and Action Levels not apply to storms of unusual event size and/or pattern (e.g. flood events). The determination of Water Quality Capture Volume should consider the differing climate regions to specify these events.
12. The Board should set Numeric Limits and Action Levels to encourage loading reductions as appropriate as opposed to only numeric concentrations. Examples include phased construction (e.g. limited exposed soil areas or their duration), infiltration, and spraying captured runoff in vegetated areas as means to reduce loading.
13. The Panel is concerned that the monitoring of discharges to meet either the Action Levels or Numeric Limits may be costly. The Panel recommends that the Board consider this aspect.

Panel's Findings on Feasibility of Numeric Effluent Limits Applicable to Industrial Activities

Industrial Observations

The Panel believes that Numeric Limits are feasible for some industrial categories. Industries have control over their facilities. They control access, construction practices, product substitution to affect pollution prevention and the types of treatment systems to be used to mitigate stormwater runoff. There are many treatment systems or prevention practices that have been in place for lengthy periods, extending back to the 1980s in many cases. For example, there is much known today about construction materials, such as roofing materials (roofing composition, gutters, paints and coatings, products that abrade or tend to create solids or litter, etc). Other examples include development of pervious surfaces, or infiltration methods.

The decision for the value of Numeric Limits should be made in one of two ways. When there is a TMDL that defines the permissible load for a watershed, the Numeric Limits should be set to meet the TMDL. Consideration must be given for both the pollutant concentration as well as the volume of runoff, since both contribute to the impacts that required the TMDL to be implemented.

When there is no TMDL, the Numeric Limits should be based upon sound and established practices for storm water pollution prevention and treatment, using an approach analogous to that used in the NPDES wastewater process in the 1970s. In this approach phased, Numeric Limits were first set that were based upon the use of best currently available technology, and permittees were given a defined period for compliance. Permits were established based upon industry types or categories, with the recognition that each industry has its own specific problems and financial viability.

To establish Numeric Limits for industrial sites requires a reliable database, describing current emissions by industry types or categories, and performance of existing BMPs. The current industrial permit has not produced such a database for most industrial categories because of inconsistencies in monitoring or compliance with monitoring requirements. The Board needs to reexamine the existing data sources, collect new data as required and for additional water quality parameters (the current permit requires only pH, conductivity, total suspended solids, and either total organic carbon or oil and grease) to establish practical and achievable Numeric Limits.

In cases where the industrial activity is similar to activities covered by the MS4 permit (roofs, parking lots, etc), the approach or limits for industries should be the same as for MS4 permittees. In cases where the industrial activity is similar to land disturbance activities (e.g. landfills, gravel mines, etc.), there exists data and design experience with runoff control, capture and advanced treatments systems (e.g. systems using polymer to enhance total suspended solids removal – see

the construction section) that may make Numeric Limits feasible for new facilities, and the approach and limits should be the same as for construction permittees. The same conditions and issues related to active treatment discussed in the construction section apply here.

In cases where there is less certainty in the data for both stormwater characterization or BMP performance to establish Numeric Limits, there maybe sufficient data to establish Action Levels. Action Levels set for industrial sites that discharge to MS4s should not exceed those set for MS4 permittees.

The Panel recognizes that existing and new facilities may have to be treated differently and recommends the approach in **Table 2.**

Table 2- Approach to Establish Numeric Limits or Action Levels at Existing or New Facilities

		Numeric Limits	Action Levels	Notes
Existing Facility	Indoor	No	Yes, similar to MS4	
	Outdoor	Yes if data are adequate for the specific industrial activity and BMP	Yes, using industrial database	Action Levels should approach MS4 action levels.
New Facility	Indoor	Yes – BMP Database		Technology based, similar to MS4 New Development
	Outdoor	No, unless sufficient data exist for the specific industrial activity and BMP	Yes when sufficient data are available	

Industrial Recommendations

The Panel has several reservations and concerns:

- The Panel recognizes the inadequacy of current monitoring data sets and recommends improved monitoring to collect data useful for establishing Numeric Limits and Action Levels.
- Required parameters for future monitoring should be consistent with the type of industrial activity instead of the current parameters (i.e., monitor for heavy metals when there is reasonable expectation that the industrial activity will cause greater heavy metals concentrations in the storm water).
- Insofar as possible, the Panel prefers the use of California data (or National data if it can be shown to be applicable to CA) in setting Numeric Limits and Action Levels.
- The Panel recognizes that economies of scale exist for large facilities and large groups of single facilities.
- Industrial facilities that do not discharge to MS4s should have to implement BMPs for their non-industrial exposure (e.g., parking lots, roof runoff) similar to commercial facilities in MS4 jurisdictions.
- Regardless of Action Levels or Numeric Limits, the permittees should implement a suite of minimum BMPs – good housekeeping, employee training, preventing materials from exposure to rain, etc.
- SIC categories are not a satisfactory way of identifying industrial activities at any given site. The Board should develop a better method of characterizing industrial activities that can impact storm water.
- The Panel recognizes this is a large task and recommends prioritizing the implementation of this approach to achieve the greatest reduction of pollutants statewide.
- Increasingly, a number of industries have moved industrial activities indoors, preventing storm water pollution. The Panel recognizes that these facilities should be granted some sort of regulatory relief from industrial Numeric Limits or action levels, but should still be required to comply with MS4 permit requirements.

The Panel recognizes the need to make progress in monitoring and reducing storm water discharge from industrial facilities, but urges the Board to consider the total economic impact and not unduly penalize California industries with respect to industries outside of California.

EXHIBIT "11"

Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

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Arnold Schwarzenegger
Governor

April 18, 2008

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

Dear Ms. Higashi:

STORM WATER POLLUTION CONTROL REQUIREMENTS, FILES 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21: RESPONSE TO TEST CLAIMS 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21

The State Water Resources Control Board ("State Water Board") and the Los Angeles Regional Water Quality Control Board ("Los Angeles Water Board") jointly file this opposition to Test Claims 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21. All of these test claims arise from a single permit that was issued by the Los Angeles Water Board as Order No. 01-182, Waste Discharge Requirements for Municipal Storm Water and Urban Runoff Discharges within the County of Los Angeles, and the Incorporated Cities therein, Except the City of Long Beach ("the Permit").[1] The requests for reimbursement in the test claims arise almost entirely from two requirements in the Permit and consolidation is therefore proper.

The Permit was issued by the Los Angeles Water Board pursuant to requirements in the federal Clean Water Act ("CWA").[2] The State Water Board and Los Angeles Water Board have been authorized by the United States Environmental Protection Agency ("U.S. EPA") to issue NPDES permits—which are mandated by the CWA—in lieu of issuance of these permits by U.S. EPA. The Permit regulates the discharge of storm water runoff from the municipal separate storm sewer system (MS4) of 84 cities and County of Los Angeles to rivers and the Santa Monica Bay.

The federal Clean Water Act mandates that municipalities must apply for and receive permits regulating discharges of pollutants from their MS4s 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). These test claims, filed by 20 cities and the County, seek reimbursement by the State of California for expenses they incur in implementing two of the requirements of the Permit: (1) Inspections of commercial and industrial facilities; and (2) Placement of trash receptacles at transit sites.

[1] The Permit serves as National Pollutant Discharge Elimination System permit (NPDES) No. CAS004001. It was issued by the Los Angeles Water Board on December 13, 2001.

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

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

The Permit as a whole, and including the inspection and trash receptacle provisions, is mandated on the local governments by federal law. The federal mandate applies to many dischargers of storm water, both public and private, and is not unique to local governments. The federal mandate requires that the Permit be issued to the local governments; it is not a question of "shifting" the costs from the state to the local governments. The specific requirements challenged are consistent with the minimum requirements of federal law. Even if the Permit were to be interpreted as going beyond federal law, any additional state requirements are *de minimis*. Moreover, 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 comply with these requirements through charges and fees, and are not required to raise taxes. The U.S. EPA has submitted a letter to the State Water Board dated April 10, 2008, in agreement with this position.[3]

Description of the Test Claims

The test claims focus on two discrete requirements in the Permit: the requirement to inspect certain industrial and commercial facilities that discharge into the MS4 and the requirement for some of the permittees to place and maintain trash receptacles at transit stops.

Industrial and Commercial Facilities Control Program (Part 4.C.)

Test claims 03-TC-19, 03-TC-20, and 03-TC-21 claim subvention for costs of complying with permit requirements to reduce pollutants from industrial and commercial facilities. Test claims 03-TC-19 and 03-TC-20 are limited to Part 4.C.2.a. and b., the requirements to inspect industrial and commercial facilities. Test Claim 03-TC-21 refers broadly to Part 4.C., the entire industrial and commercial facilities control program, but the costs discussed in the test claim are those associated with inspections. (See, Declaration of Richard Montevideo, No. 4.) Therefore, the Boards' analysis of the subvention claims for Part 4.C. is generally limited to the inspection requirements.

Part 4.C. of the Permit requires permittees to implement pollutant reduction and control measures at industrial and commercial facilities within their jurisdictions. Permittees may choose from various pollutant reduction and control measures, alone or in combination and

[3] Letter dated April 10, 2008, from Alexis Strauss, Director, Water Division, U.S. EPA to Tam M. Doduc, Chair, and Dorothy R. Rice, Executive Director, State Water Board, Attachment 3.

before, during, or after the activities that generate pollutants. The permittees are required to track, inspect, and ensure compliance at those facilities that are critical sources of pollutants in storm water.

Critical sources are specified commercial facilities (restaurants and automobile-related businesses), and industrial facilities that are required by federal regulations to obtain their own NPDES storm water permits.

Part 4.C.2.a. and b. contain inspection requirements, which are generally to conduct two inspections of facilities over a 5-year period. The Permit describes what the inspector must look at. (For example, inspectors at restaurants must see if operators pour grease into the street, and gas station inspectors must observe whether fuel-dispensing areas are swept.) The Permit states that for industrial sites, inspection requirements do not apply if the Los Angeles Water Board conducted an inspection of the site within two years.

Trash Receptacle Requirements (Part 4.F.5.c.3)

Test claims 03-TC-04, and 03-TC-20, and 03-TC-21 claim subvention for costs of complying with permit requirements for some of the permittees to place trash receptacles at public transit stops. Claim 03-TC-21 states that it challenges the entirety of the storm drain operation and maintenance and streets and road maintenance requirements, but the only costs in these sections for which it seeks reimbursement are for the placement and maintenance of trash receptacles. The claims are limited to the trash receptacle requirements for those municipalities that are not subject to a separate federal requirement, the "trash TMDL."[4] The requirements are to place trash receptacles at all transit stops and to maintain these receptacles.

Discharge Prohibitions and Receiving Water Limitations (Parts 1 and 2)

Test claim 03-TC-21 appears to claim subvention for costs associated with Parts 1 and 2 of the Permit, which include general prohibitions and requirements to protect water quality. The claim itself fails to specify any particular costs associated with this claim, other than a general study that considers a hypothetical treatment plant. As discussed below, storm water permits are written with the assumption that there will be no treatment plant and the permit certainly does not require one. In any event, there are no signed declarations to support this claim and no estimate of costs to the specific claimants.

Background of Federal Law Requirements for Storm Water Permits

In order to understand the federal mandate that required this permit, some background of the federal law and of MS4s is necessary. In 1972, the federal Clean Water Act was extensively amended to implement a permitting system for all discharges of pollutants from "point sources"

[4] As will be explained below, the Los Angeles Water Board has also adopted a federally-mandated total maximum daily load ("TMDL") for the deposition of trash into rivers and the Bay. The claimants do not claim subvention for the trash receptacle requirements for those cities and portions of the County subject to the TMDL, presumably conceding that those requirements are not reimbursable.

to waters of the United States.[5] The permits are issued pursuant to the national pollutant discharge elimination system, and are known as "NPDES permits." The 1972 amendments allowed U.S. EPA to authorize states to issue these permits.[6] California was the first state in the nation to obtain such authorization. In order to obtain this authorization, the California Legislature amended the Water Code, finding that the state should implement the federal law in order to avoid direct regulation by the federal government.[7] The California legislature mandated that California's permit program must ensure consistency with federal law.[8] The Water Boards are the state agencies charged with implementing the federal program.[9] The State Water Board incorporates the U.S. EPA regulations for implementing the federal permit program.[10] Therefore, both the CWA and U.S. EPA regulations are applicable to the permit program in California.[11] In California, permits to allow discharges into state waters are termed "waste discharge requirements."[12] The term "waste discharge requirements" is equivalent to the term "permit" in the CWA, when the waste discharge requirements are issued to comply with the CWA.[13] Thus, waste discharge requirements that the Water Boards issue to comply with the CWA are NPDES permits under federal law. When the Los Angeles Water Board, a state agency, adopts an NPDES permit in lieu of U.S. EPA, it must adopt as stringent a permit as the federal agency would have.[14]

The discharge of pollutants from point sources to waters of the United States is illegal, except in compliance with an NPDES permit.[15] In 1973, U.S. EPA issued regulations that exempted certain types of discharges it determined were administratively infeasible to regulate, including storm water runoff. The reason that such regulation is difficult, as will be more fully explained below, is that storm water runoff generally is not subjected to any treatment. Instead, it simply runs off urban streets, into gutters and drainage ways, and flows directly into streams, lakes, and the ocean.[16] This exemption was overruled in *Natural Resources Defense Council v. Costle* (1977) 568 F.2d 1369, which held that the exemption was illegal, and ordered U.S. EPA

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[5] CWA §§ 301 and 402.

[6] CWA § 402(b).

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

[8] Wat. Code, § 13372.

[9] Wat. Code, § 13370.

[10] Cal. Code of Regs., tit. 23, (C.C.R.) § 2235.2.

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

[12] Wat. Code, § 13263.

[13] Wat. Code, § 13374.

[14] CWA § 402(b).

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

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

to require NPDES permits for storm water runoff. In *Costle*, the court suggested innovative methods for permitting, including using general permits for numerous sources and issuing permits that "proscribe industry practices that aggravate the problem of point source Pollution."[17] Where permits proscribe actions that dischargers must implement, these requirements are commonly called "best management practices" ("BMPs").

Despite the *Costle* decision, U.S. EPA had not adopted regulations implementing a permitting program for storm water runoff by 1987. That year, Congress amended the CWA, specifically requiring storm water permits for industrial and municipal storm water runoff.[18] The amendments require NPDES permits for "[a] discharge from a municipal separate storm sewer system ["MS4"] serving a population of 250,000 or more."[19] The CWA contains three provisions specific to permits for MS4s: (1) Permits may be issued on a system- or jurisdiction-wide basis; (2) Permits must include a requirement to effectively prohibit non-storm water discharges into storm sewers; and (3) Permits must require controls to reduce the discharge of pollutants to the maximum extent practicable ("MEP").[20] In describing the controls that permits must include, the statute states that the controls shall include: "management practices, control techniques and system, design and engineering methods, and such other provisions as the [permit writer] determines appropriate for the control of such pollutants."[21] Thus, the federal law mandates that permits issued to MS4s must require management practices[22] that will result in reducing pollutants to the MEP. The state is required, by federal law, to select the BMPs.[23]

In 1990, U.S. EPA adopted regulations to implement section 402(p).[24] The regulations define which entities need to apply for permits and also the information they must include in permit applications. The regulations define "industrial activity" to include numerous categories of manufacturing, construction, and other typically private enterprises.[25] The regulations define MS4s as storm sewer systems operated by numerous public agencies, including cities, counties, states, and the federal government.[26] While both industrial activities and MS4s must

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[17] *Costle, supra*, at 1380.

[18] CWA § 402(p).

[19] CWA § 402(p)(2)(C). U.S. EPA defines municipal separate storm sewer systems (MS4s) that serve a population over 250,000 as "large" MS4s. The population of the County of Los Angeles is approximately 9.5 million. (Permit, D.1.)

[20] CWA § 402(p)(B).

[21] *Ibid.*

[22] These are commonly referred to as "best management practices," or "BMPs."

[23] *NRDC v. USEPA* (9th Cir. 1992) 966 F.2d 1292.

[24] Vol. 55, Federal Register (Fed.Reg.) 47990 and following.

[25] 40 C.F.R. § 122.26(b)(14).

[26] 40 C.F.R. § 122.26(b)(8).

obtain permits, the requirements in the industrial permits must be more stringent than in MS4 permits.[27]

In order to obtain coverage under an NPDES permit, as required by the CWA, entities seeking coverage file an application with the permitting authority and the permitting authority holds a public hearing on contested permits.[28] U.S. EPA regulations specify the information that applicants for MS4 permits must include in their applications.[29] For large and medium MS4s, the application requirements are extensive.[30] Some of the application requirements relevant to these Test Claims are: management programs including procedures to control pollution resulting from construction activities (at § 122.26(d)(1)(v)), legal authority to control the contribution of pollutants associated with industrial activity (at § 122.26(d)(2)(i)(A)), programs to control illicit discharges to the MS4 (at § 122.26(d)(1)(v)), and conducting inspections to determine compliance with permit conditions (at § 122.26(d)(2)(i)(F)). The permit applicants must propose management programs that the permitting authority will consider in adopting the permit.[31] The management programs must address oversight of discharges into the system from the general population and from industrial and construction activities within its jurisdiction, and also maintenance and control activities by the permittees.[32]

Most NPDES permits are largely comprised of numeric limitations for pollutants. Compliance is measured by sampling the treated effluent, which is discharged from a treatment plant into surface waters. These permits are written assuming that an engineered treatment plant can be built and operated to obtain a specified effluent. Storm water permits, on the other hand, usually require dischargers to implement BMPs that will result in lessening the pollutants in the runoff, since without a treatment plant the pollutants can flow directly into surface waters. Storm water permits apply to several types of entities—industries, construction, and municipalities—and all usually mandate BMPs. For municipalities that operate MS4s, the BMPs require the municipalities take actions that will lessen the incidence of pollutants *entering* storm drains by regulating the *behavior and practices* of the municipalities, their residents, and their businesses.[33]

U.S. EPA has issued regulations and guidance documents that discuss the types of BMPs that must be included in storm water permits in order to reduce the discharge of pollutants in storm

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

[28] CWA § 402(b)(3).

[29] 40 C.F.R. § 122.26(a)(4). The U.S. EPA regulations have varied requirements depending on the size of the population served by the MS4. A "large" MS4 serves a population of 250,000 or more. (40 C.F.R. § 122.26(b)(4).) Los Angeles County and the 84 cities regulated by this permit far exceed the minimum population for a large MS4.

[30] 40 C.F.R. § 122.26(d).

[31] 40 C.F.R. § 122.26(d)(2)(iv).

[32] *Ibid.*

[33] There may also be engineered solutions, and there are some in Los Angeles, but it is important to keep in mind that there is no single engineered storm sewer treatment plant as there is for sanitary sewage.

water to the "maximum extent practicable." Numerous guidance documents point to inspections of businesses and proper trash collection as important parts of an effective BMP program.[34] U.S. EPA has issued an MS4 Program Evaluation Guide, which includes a lengthy process for conducting inspections of businesses. This Guide makes clear that inspections of businesses are mandatory:

> Inspections
> Most effective industrial/commercial inspection programs maintain a complete facility inventory and group them according to priorities established by the permittee. An inspection frequency is determined based on priority, and a database is used to manage such information as inspection findings, enforcement actions, and required follow-up activities. Many permittees use and cross-train existing staff to perform industrial/commercial inspections, but some permittees may need to maintain an exclusive stormwater inspector due to a potentially large number of high-priority facilities. There should be an inspection standard operating procedure that has been formalized and documented. It should include a checklist to be used during the inspection and possibly a report format. Inspectors should be aware of federal, state, and local stormwater regulations that may apply to industrial/commercial facilities. Inspectors should be familiar with various types of BMPs commonly used at the types of facilities typically found in the permit area and should be able to educate facility operators about such BMPs. In addition, inspectors should understand and use the permittee's established enforcement escalation response plan to gain compliance as necessary. The inspection staff should be proficient in the enforcement escalation procedure and should properly document all enforcement actions accordingly. Inspections should be used not only to identify non-compliance issues, but as an opportunity to educate facility operators about proper stormwater BMPs.[35]

The Guide also states that MS4 programs must address trash and litter.[36]

Adoption of the Los Angeles MS4 Permit

Starting in 1990, pursuant to the CWA amendments of 1987, the Los Angeles Water Board issued storm water permits to the County of Los Angeles and to the cities therein.[37] Without such a permit, the cities would be discharging pollutants in violation of federal law.[38] The permit

[34] See, e.g., Guidance documents at http://cfpub.epa.gov/npdes/docs.cfm?document_type_id=1&view=Policy%20and%20Guidance%20Documents&program_id=6&sort=name , including http://www.epa.gov/npdes/pubs/owm0233.pdf (citing examples from MS4 permits throughout the country).

[35] MS4 Program Evaluation Guidance, at pp. 77-78.

[36] *Id.* at 79.

[37] For reasons not relevant to this matter, one city—Long Beach—has a separate permit. The current permit covers 84 cities.

[38] CWA §§ 301(a), 402(p)(3)(B).

that is the subject of these test claims is the third such permit, and was adopted December 13, 2001.[39] It is largely comprised of requirements to implement BMPs, most of which were proposed by the permittees.[40] The County and thirty-two of the cities challenged numerous aspects of the permit and the process by which it was issued, culminating in a court of appeal decision upholding the permit in its entirety.[41]

On February 1, 2001, the County, on behalf of all permittees,[42] submitted a Report of Waste Discharge (permit application), including a Stormwater Quality Management Plan (SQMP). The SQMP constituted the permittees' proposal for the BMPs that would be required in the permit.[43] (Permit C.) The permit that was ultimately adopted was based on the SQMP, with some revisions and additions necessary to meet minimum federal requirements. (*Id.*) The SQMP prepared by the County included several proposed BMPs that relate to inspections of commercial and industrial facilities and placement and maintenance of trash receptacles:

> (1) Municipalities must conduct site visits to industrial and commercial facilities, including automotive service businesses and restaurants, which must include, "a site walk-through to verify for, at a minimum, evidence of BMP implementation," and shall revisit facilities and take enforcement where illicit discharges are found;[44]
>
> (2) Municipalities will maintain a database of automotive and food service facilities, including whether they have "NPDES stormwater permit coverage;"[45] and
>
> (3) Municipalities must minimize trash from entering recreational water bodies,[46] remove trash from open channels;[47] and control litter and debris in streets.[48]

The SQMP included detailed requirements for municipalities to implement at construction sites, including inspections by the municipality.[49] The SQMP proposed that all municipalities be

[39] NPDES permits generally expire after 5 years, and must be reissued thereafter.

[40] A single permit applies to the County and 84 cities. Thus, while some entities may disagree with some provisions, other entities will agree and the entire group may propose permit terms that some cities oppose. The entire group submits a single proposed storm water management plan.

[41] *County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985; referred to hereafter as *County of Los Angeles*.

[42] All permittees include the County and 84 cities. The County and the 21 cities that filed these Test Claims participated jointly with the application and permitting procedures with the remaining 63 cities who did not file Test Claims.

[43] The SQMP is several hundred pages. Relevant sections are attached; the entire SQMP is available should the Commission request it.

[44] SQMP, pp. 22-23 and 28.

[45] *Ibid.*

[46] SQMP, ES-6

[47] SQMP, ES-7

[48] *Ibid.*

[49] SQMP, pp. 24-26.

required to collect trash along open channels and encourage voluntary trash collection in natural stream channels.[50] The SQMP contains an Illicit Connection and Illicit Discharge Elimination Program, which includes education of inspectors employed by the permittees who will investigate businesses.[51]

Following adoption of the permit and a petition to the State Water Resources Control Board ("State Water Board"), the County, 32 cities,[52] the Los Angeles County Flood Control District and industry groups representing builders filed suit challenging numerous provisions in the Permit. The Superior Court upheld the Permit, and the Court of Appeal affirmed the judgment in its entirety.[53] First, the court held that the permit as a whole "imposes reasonable pollutant discharge requirements." Because the minimum federal requirement is that the permit require the municipalities to reduce pollutants to the maximum extent practicable, the court clearly determined that the permit's requirement are MEP. In its discussion of the consideration of costs to the municipalities, the court found that the permit did not exceed any federal requirements:

> "The permit explicitly states it is intended to provide a cost-effective storm water pollution program to the maximum extent possible. The permit applies the same cost-effective analysis to efforts to reduce the flow of pollutants into receiving waters. Moreover, the [Los Angeles Water Board] in its finding referred to a report specifying how the 'maximum extent practicable' requirement includes considerations of costs and benefits."[54]

The court also discussed various cost analysis reports and U.S. EPA Guidance. It rejected the claim that the permit's requirements exceeded the federal mandatory standard. The court specifically upheld the inspection requirements, stating: "there is federal regulatory authority that required [the Los Angeles Water Board] to consider imposing the inspection requirements."

Several of the permittees filed these test claims with the Commission on State Mandates. The Commission rejected the claims, basing its determination on Government Code section 17516, subdivision (c), which exempted Water Board permits from the requirements to reimburse state-mandated local funds. That action also resulted in a Court of Appeal decision finding that subdivision to be unconstitutional and remanding to the Commission to determine the test claims.[55] In its decision, the court stated that the Commission must address factual issues

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[50] SQMP, p. 28

[51] SQMP, App. D

[52] These include 18 of the cities that filed the Test Claims, and Bellflower, Claremont, Diamond Bar, Gardena, Hawaiian Gardens, Industry, Irwindale, La Mirada, Lawndale, Monrovia, Paramount, Rosemead, Santa Clarita, Santa Fe Springs, Torrance, Walnut, and Whittier.

[53] *County of Los Angeles, supra.* Some of the determinations of the appellate court discussed here were not published and thus cannot be cited as precedent in other cases. They are binding on the claimants. A copy of the entire decision is attached.

[54] Unpublished decision, at p. 20.

[55] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898.

regarding the requirements to conduct inspections and to place and maintain trash receptacles constitute state or federal mandates.

Following *Commission on State Mandates*, each of the four test claims was re-filed without any revisions.[56] All of the test claims are based upon requirements in the permit. Test Claim 03-TC-04 was filed by the County of Los Angeles, and challenges the requirement to place trash receptacles at transit stops.[57] Test Claim 03-TC-19 was filed by the County of Los Angeles, and challenges the requirements to inspect industrial and commercial businesses.[58] Test Claim 03-TC-20 was filed by nine cities[59] and challenges the requirements for trash receptacles and inspections, and the general requirements for a construction program.[60] Test Claim 03-TC-21 was re-filed by ten cities[61] and challenges the following permit requirements: discharge prohibitions, receiving water limitations, industrial program, construction program, storm drain program, and street and road maintenance[62]. While Test Claims 03-TC-20 and 03-TC-21 appear to assert broader requests for reimbursement, they address in detail only the requirements for inspections and trash receptacles, and these are the only requirements that the court in *Commission on State Mandates* stated were subject to the test claims.[63] In light of the absence of the necessary information for such claims and the court's remand, we assume that any claims additional to the inspections and trash receptacles are not valid claims.

In addition to the litigation over this permit, cities made similar arguments against an MS4 permit adopted by the Santa Ana Regional Water Quality Control Board. In a published decision, an appellate court in that case made additional findings applicable to the arguments in this matter[64]. It found that there was no evidence to support an argument that the permit "exceeded federal requirements." This finding is important because the cities in *Rancho Cucamonga* had argued that a ground for overturning that permit was that it used the same provisions as had

[56] The State Water Board and Los Angeles Water Board received several Notices of Complete Test Filing: a letter dated October 16, 2007, stated 03-TC-21 was complete; a letter dated October 29, 2007, stated that 03-TC-04 was complete; a letter dated October 29, 2007, stated that 03-TC-19 was complete; and a letter dated December 12, 2007, stated 03-TC-20 was complete. On December 21, 2007, the Commission extended time to respond to all four test claims until April 21, 2008.

[57] 03-TC-04 challenges Permit Part 4.F.5.c.3.

[58] 03-TC-19 challenges Permit Part 4.C.2.a. and b.

[59] The cities that filed the test claim are Artesia, Azusa, Beverly Hills, Carson, Commerce, Norwalk, Rancho Palos Verdes, Westlake Village, and Vernon.

[60] 03-TC-20 challenges Permit Part 4.C.2.a. and b., 4.E, and 4.F.5.C.3.

[61] The cities that filed the test claim are Arcadia, Baldwin Park, Bellflower, Cerritos, Covina, Downey, Monterey Park, Pico Rivera, Signal Hill, South Pasadena, and West Covina.

[62] 03-TC-21 challenges Permit Parts 1, 2, 4.C, 4.E, 4.F.5 and 6. In a letter dated January 18, 2008, sent to the Commission from Howard Gest, he states that the cities he represents, which include five of the cities that filed the claim, "do not currently intend to pursue a claim" as to Parts 1 and 2, but that the limitation is "without prejudice." In light of the fact that Mr. Gest apparently does not represent all of the cities that filed the claim and the limited nature of this limitation, we will address Parts 1 and 2 and ask the Commission to determine that these parts do not create a reimbursable mandate.

[63] 150 Cal.App.4th 898, 903.

[64] *City of Rancho Cucamonga v. Regional Water Quality Control Board*, 135 Cal.App.4th 1377.

been crafted for other permittees, including the Los Angeles MS4 permit. The *Rancho Cucamonga* court specifically addressed inspection requirements, holding that federal law, either expressly or by implication, required NPDES permittees to perform inspections for illicit discharge prevention and detection, including inspection of industrial facilities and construction sites. Because the Los Angeles MS4 permit is based on BMPs and courts have determined that it is consistent with MEP, it is necessarily no more stringent than required by federal law.

State Mandate Law

Article XIIIB, Section 6 of the California Constitution requires subvention of funds to reimburse local governments for state-mandated programs in specified situations. There are several exceptions and limitations to the subvention requirements that provide bases for the Commission to determine that the Test Claims are not subject to subvention. Article XIIIB, 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 that local government for the costs of the program or increased level of service."

Implementing statutes clarify that no subvention of funds is required if: (1) the mandate imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation (Govt. Code, § 17556(c)); or (2) the local agency has the authority to levy service charges, fees, or assessments sufficient to pay (Govt. Code, § 17556(d)); or (3) the local agency proposed the mandate (Govt. Code, § 17556(a)). Each of these exceptions to subvention applies to these Test Claims. All of the mandates for which the Test Claims seek reimbursement are mandated by federal law or regulation. The County and cities can assess fees for all of the costs incurred. The claimants themselves, as part of the group of the County and 84 cities who applied for the permit, proposed most of the specific requirements challenged.

Numerous judicial decisions have further defined limitations on the requirements for subvention of funds. Specifically, subvention is only required if expenditure of tax monies is required, and not if the costs can be reallocated or paid for with fees.[65] In addition, reimbursement to local agencies is required only for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not entitled to subvention.[66] The fact that a requirement may single out local governments is not dispositive; where local agencies are required to perform the same functions as private industry, no subvention is required.[67]

[65] *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976.

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

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

The Permit is not subject to subvention; it meets each of these exceptions. The requirements that are the subject of the claims are part of permits that meet, but do not exceed, the minimum federal requirements. The federal mandate is specifically directed at the municipalities and not at the state in general. The costs for the programs can be paid for by levying service charges, including charges to companies for conducting their businesses, fees for collection of refuse, fees for transit services, and fees especially enacted for storm water programs.[68] Compliance with NPDES permits, and specifically with storm water permits, is required by private industry also. In fact, the requirements for industrial and construction entities are more stringent than for government dischargers. In addition, the government requirements apply to all governmental entities that operate MS4s, including state and federal facilities; local government is not singled out. The local agencies can assess fees to perform the required tasks; tax monies are not required. Finally, to the extent that any portion of the claims would otherwise qualify for subvention, they are *de minimis* and therefore do not qualify.

In its remand, the court stated that the most significant issue is "whether the two obligations in question constitute federal or state mandates" and that these present factual issues for the Commission to decide.[69] The court pointed to four cases that the Commission stated would apply in making this determination.[70] Each case is discussed below:

City of Sacramento v. State of California (1990) 50 Cal.3d 51: The court held that application of unemployment insurance law to state and local agencies was not subject to subvention. In discussing whether the requirement was a federal mandate, the court held that the issue is whether compliance with the federal law was "mandatory" or "optional," which is based on the following factors: "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."[71]

Hayes v. Commission on State Mandates (1992) 11 Cal.App.4th 1564: The court considered claims for subvention for a special education mandate. It concluded that, although the program was a federal mandate, the state had freely chosen to shift the costs to local governments and that subvention was proper. The court held that the test for whether there is a federal mandate is whether compliance with federal requirements is "a matter of true choice," in other words whether participation in the federal program is "truly voluntary."[72] The court listed the significant factual determinations: "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

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[68] The claimants refer to limitations on assessing services fees under California law. The referenced law concerns only the percent of voters who must approve the assessment. In fact, the largest entity subject to the permit, the City of Los Angeles, has successfully adopted such an assessment.

[69] *Commission on State Mandates*, 150 Cal.App.4th 898, 918.

[70] *Id.*, at 919.

[71] 50 Cal.3d 51, 76.

[72] 11 Cal.App.4th 1564, 1582.

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."[73]

Long Beach Unified School District v. State of California (1990) 225 Cal.App.3rd 155: The court held that subvention does apply where actions are mandated by the state, which go beyond the federal constitution or case law. Because federal law clearly would not have required steps for de-segregation where there was no finding of segregation, subvention applied.

San Diego Unified School District v. Commission on State Mandates (2004) 33 Cal.4th 859: A school district sought subvention of funds to conduct expulsion hearings. The federal law made expulsions discretionary, but where expulsions occurred, the federal law mandated certain hearing procedures. The state law mandated expulsions whenever firearms were involved, and made all other expulsions discretionary. It also mandated some hearing procedures in addition to the federal requirements. The Supreme Court held that for firearms expulsions, the state mandated a higher level of service, and that all hearing costs for these expulsions were reimbursable, even those attributable to procedures mandated by federal law. It also held that no hearing costs are reimbursable for expulsions that are discretionary under state law. Even if the hearing procedures are mandated by state law, the court found they are incidental to federal due process requirements and are *de minimis* and therefore not reimbursable. In determining that any additional state-mandated hearing costs were *de minimis*, the court found that the state reasonably set forth requirements that were intended to implement the federal hearing requirements: "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."[74]

The Claims do not Qualify for Subvention

The Programs are Federal Mandates that Apply Directly to Local Governments; the State has not Shifted the Burden; and the Mandates do not Exceed Federal Law

The challenged provisions are mandated by federal law. Two appellate courts have determined that the provisions in this permit constitute MEP—the minimum requirements mandated by federal law. The court in *Los Angeles* has determined that the Permit is cost-effective and based on the MEP standard. The court in *Rancho Cucamonga* found that a very similar permit met the MEP standard and did not exceed the minimum federal standard. That case specifically stated that the requirement to conduct inspections reflected MEP. The federal law specifically requires that permits be issued to the local governments that operate MS4s and that permits must require programs and actions that will result in reducing the pollutants that discharge from the MS4 to waters of the United States to the maximum extent practicable. The permit is a federal mandate on the local governments. It is the local governments that must apply for and obtain a permit. Without the permit, the cities are discharging pollutants in violation of federal

[73] *Id.* at 1593-4.

[74] 33 Cal.4th 859, 889.

law.[75] If the Water Boards had not been authorized to issue the permit in lieu of U.S. EPA, that federal agency would have issued a similar permit directly to the local governments.

The claimants contend that the Los Angeles Water Board exercised discretion to impose requirements beyond those required by federal law because the Los Angeles Water Board had a choice in establishing the mandated programs and "[t]he [Water Boards] cannot point to any provisions of the Clean Water Act or related regulations that require the programs at issue in this claim."[76] The fact that some discretion is exercised in implementing a federal program does not mean that subvention is required. The court in *Hayes* explained that, where the state has some discretion in mandating the program but ultimately the factual situation requires some type of mandate, there is a federal mandate:

> "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."[77]

The central issue before the Commission is whether the requirements to conduct inspections and to place trash receptacles at bus and train stops exceed the federal mandate for MS4 permits. As to the inspections, the claimants appear to concede that federal law specifically requires MS4s to conduct inspections of industrial facilities and construction sites, but claim that the Los Angeles Water Board could have conducted all of the inspections and instead exercised its discretion to "shift" the responsibility to the claimants. They base this contention on a permit issued by the State Water Board to industrial facilities[78] and contend that permit obligates the Regional Water Boards, including Los Angeles, to conduct inspections. Therefore, they claim, the Los Angeles Water Board has shifted that responsibility to the municipalities. They also contend that the federal law does not specify that restaurants and automobile-related businesses must be inspected. As to the trash receptacles, they claim that the federal law does not specify this particular BMP.

In order to evaluate these contentions, some more detailed discussion of the storm water permitting scheme established by U.S. EPA is necessary. Of particular importance are: the process of selecting BMPs that are included in MS4 permits; the obligation of MS4s to regulate discharges from businesses into their systems, including discharges that are simultaneously regulated by separate NPDES permits; the process for selecting which businesses to regulate; and the requirement for MS4s to conduct inspections.

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[75] CWA §§ 301(a), 402(p)(3)(B).

[76] Test Claim 03-TC-21, at page 10.

[77] 11 Cal.App.4th 1584, 1593.

[78] Order No. 97-03-DWQ; http://www.waterboards.ca.gov/stormwtr/docs/induspmt.pdf

The Process for Selecting BMPs

The chief argument regarding trash receptacles is that the federal law does not specify this particular BMP and that, therefore, it exceeds federal law. The claimants appear to rely on *Hayes* to argue that the exercise of any discretion in selecting requirements automatically results in a reimbursable state mandate. As discussed above, however, the federal law specifically requires that the Water Boards prescribe the BMPs that the MS4 must implement. This issue was addressed succinctly in *Rancho Cucamonga*:

> In creating a permit system for dischargers from municipal storm sewers, Congress intended to implement actual programs. [Cite to *NRDC, supra.*] The Clean Water Act authorizes the imposition of permit conditions, including: "management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." [Cite to CWA § 402(p)(3)(B)(iii).] The Act authorizes states to issue permits with conditions necessary to carry out its provisions. [Cite to § 402(a)(1).] The permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants. [Cite to *NRDC.*] That is what the Regional Board has created in the 2002 permit."[79]

Because the federal mandate requires the Water Boards to choose specific BMPs 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 standard. "The [Water Board] must comply with federal law requiring detailed conditions for NPDES permits."[80] This is completely different from the state discretion exercised in *San Diego*, where the state law compelled expulsions for bringing firearms to school, while the federal law clearly did not mandate such expulsions. Therefore, it is clear that the mere exercise of discretion in selecting BMPs, does not create a reimbursable mandate.

It is conceivable that an MS4 permit issued in California could require practices that exceed the federal requirement of MEP. It is clear, however, that inspection requirements do not exceed MEP. That issue has been specifically ruled on by *Rancho Cucamonga* and there are federal regulations, discussed below, that require these inspections. The claimants allege, however, that there is no similar requirement for the placement of trash receptacles at transit stops. The trash receptacle requirements in the Permit are different for those cities subject to a "trash TMDL" than for other cities. The Los Angeles Water Board has adopted TMDLs for some of the water bodies that receive discharges from MS4s subject to the permit. As required by the TMDL and federal law, the permit contains specific provisions for permittees that are subject to the trash TMDLs. The claimants do not seek subvention for those requirements. For

[79] *Rancho Cucamonga, supra,* at 1389.

[80] *Ibid.*

permittees not subject to a trash TMDL, the permit requires they implement BMPs to reduce trash entering the MS4s, including placing trash receptacles at all transit stops that have shelters by August 1, 2002, and at all other transit stops by February 3, 2003, and that they maintain trash receptacles as necessary. (Permit, Part 4.F.5.c.3.)

The requirements regarding trash receptacles are found in the section of the Permit concerning public agency activities. (Part 4.F.) This section imposes BMPs concerning sewage treatment overflows, construction by public agencies, storm drain maintenance and operation, and municipal construction projects. In other words, these are BMPs concerning the municipalities' own activities, as opposed to its regulation of discharges into its system by others. U.S. EPA storm water regulations address BMP requirements for the MS4s' maintenance and operation of the storm sewer system. Specifically, the MS4s' plan must include maintenance activities and schedules, including 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. . ."[81] As early as 1993, the Executive Officer of the Los Angeles Water Board directed all of the cities regulated by the permit to "increase cleaning frequency of and number of roadside trash receptacles in areas where needed."[82]

The requirements to control the release of trash into MS4s and surface waters are at the heart of the storm water program. "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."[83] In carrying out the federal mandate to select BMPs, the decision to require trash receptacles at transit stops is a reasonable, practicable, and cost-effective method to reduce trash in storm water runoff. The claimants have not, and cannot, explain how such a requirement exceeds the federal standard of actions that reflect the "maximum extent practicable." The Permit also allows individual permittees to substitute BMPs for specific requirements in the Permit.[84]

At bottom, the trash receptacle 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 Role of MS4s in Regulating Discharges from Industrial and Commercial Activities

The claimants allege that because the Water Boards have a role in directly regulating businesses within the jurisdiction of MS4s, and therefore conduct inspections at such sites, that the requirements in the Permit for the MS4s to conduct inspections reflect a decision to shift the costs of a federal mandate from the state to local government. The court in *Hayes* discussed

[81] 40 C.F.R. § 122.26(d)(2)(iv)(A)(3).

[82] Letter dated June 17, 1993, from Robert P. Ghirelli to Thomas A. Tidemanson. Attachment 34.

[83] *Environmental Defense Center v. U.S. EPA* (9th Cir. 2003) 344 F.3d 832, 841; emphasis added.

[84] Permit, Part 4.A.1.

this issue. There, the mandate was to the state generally, and the state government decided to shift the cost for implementing special education to local school districts. Here, there is no general mandate addressed to the entire state. Instead, the federal law clearly required that municipalities that operate MS4s must obtain and comply with a permit. The state does not operate the MS4; the mandate is directed to the municipalities.

In addition to the requirements for permits issued to municipalities, the Water Boards are also mandated to issue permits to entities that discharge storm water "associated with industrial activity."[85] As part of its responsibilities for its in lieu program, the State Boards must administer and enforce all of its permits.[86] The State Water Board has issued permits for industrial and construction discharges of storm water, 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 storm water practices, was specifically envisioned and required by U.S. EPA in adopting its storm water regulations.[87]

In promulgating its regulations for MS4s and industrial dischargers, U.S. EPA made clear its intent to require industrial facilities that discharge into municipal storm sewers to obtain their own NPDES permits and *also* to require MS4s to regulate and be liable for these same discharges. In 1990, U.S. EPA adopted the regulations that spell out the federal mandates for MS4s to develop and implement plans for regulation of industrial facilities. In its Preamble to the regulations, it explained that MS4 permits "are expected to require that controls be placed on storm water discharges associated with industrial activity which discharge through the municipal system." It presented the rationale for this dual regulatory approach:

> "[U.S. EPA] 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 [MEP]. 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."[88]

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[85] CWA § 402(p)(2)(B).

[86] CWA § 402(b).

[87] In fact, the Los Angeles Water Board acted to lessen any duplication of effort and costs to the municipal permittees by exempting them from inspection requirements if the same facility has been inspected by the Board.

[88] Vol. 55, Federal Register (Fed.Reg.), at 48009.

Thus, U.S. EPA specifically mandated that industrial facilities were to be subject to permits issued directly to them by the Water Boards and also through MS4 permits, where municipalities must regulate the facilities: "Dischargers of storm water associated with industrial activity through municipal separate storm sewer systems will be subject to municipal management programs that address such discharges as well as to an individual or general NPDES permit for those discharges."[89]

Requirements for MS4s to Conduct Inspections

The federal regulations also specifically require local storm water agencies, as part of their responsibilities under NPDES permits, to conduct inspections.[90] 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.[91] The claimants are the dischargers of pollutants into surface waters; as part of their permit allowing these dischargers, they must conduct inspections. The Los Angeles Water Board is charged with administering and enforcing the permit. Its policing responsibilities may also include inspecting the facilities and waters it regulates, but that does not mean it is shifting its responsibilities when it properly mandates inspections by MS4s.

The Process of Selecting Which Businesses MS4s Must Regulate

The claimants contend that federally mandated inspections do not include restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships. Instead, they claim that the federal mandate is limited to municipal landfills, hazardous waste sites, industrial facilities listed under the federal Superfund law, and industrial facilities that the permittees themselves determined are contributing substantial pollutants to their systems.

They base this contention on the U.S. EPA's regulations for MS4 applications. The federal regulation states that the storm water management plan that MS4s must submit must address the municipalities' enforcement against pollutants from "municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of [the federal Superfund law], and *industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system.*"[92] The claim is essentially that, after MS4s submitted their first application for a permit, which was required by the U.S. EPA regulations in 1990,[93] and listed any industrial facilities they deemed to be contributors of substantial pollutant loading, the federal law did not mandate any further actions, regardless of whether new information or monitoring might reveal such

[89] *Id.* at 48058.

[90] 40 C.F.R. § 122.26(d)(2)(iv)(C). While the U.S. EPA regulations are phrased as "application requirements," wherein the MS4 must propose the various BMPs that will achieve MEP, these requirements must be included in the mandatory storm water management program. (*Los Angeles, supra,* 143 Cal.App.4th 985, 993.)

[91] See, e.g. CWA § 402(b)(2)(B); 40 C.F.R. § 122.44(i).

[92] 40 C.F.R. § 122.26(d)(2)(iv)(C); emphasis added.

[93] Vol. 55, Fed.Reg. 47990.

contributors. This is not a reasonable reading of the federal regulation. In adopting this regulation, U.S. EPA acknowledged that this initial selection by MS4s was only a starting point and that the mandate was to follow where information and monitoring led:

> "The object of [the requirements in 122.26(d)(2)(iv)(C)] is initially to set priorities for monitoring requirements. Then, if the situation requires controls can be developed and instituted. . . . the selection of facilities is only a means of setting priorities for facilities for the development of municipal plans. ¶ EPA agrees. . . that there will be other facilities that are significant sources of pollutants and should be addressed by municipalities as soon as possible under management programs."

As early as 1993, the Executive Officer of the Los Angeles Water Board directed all of the cities regulated by the permit to implement facility inspections of "auto repair shops, auto body shops, auto parts and accessory shops, gasoline stations, and restaurants."[94] The letter noted that the BMPs listed therein constitute the minimum required for area-wide implementation, and that the list "is not an additional requirement, but incorporates BMPs already proposed by some permittees." Thus, it appears that the inspection requirements were, in fact, proposed by permittees.[95] In any event, MEP is not limited to the sources and controls proposed by the permittees. U.S. EPA Guidance documents make clear that MEP requires an iterative process, where municipalities assess sources, conduct investigations, and improve their programs.[96]

The Local Governments have the Authority to Levy Service Charges, Fees, or Assessments to Pay for the Programs

The County and cities need not spend tax monies to comply with the Permit. They can and do adopt fees from their residents and businesses that fund their storm water programs. The City of Los Angeles (the largest entity covered by the permit, and which has not filed any test claims) adopted a fee ordinance, based on property assessments, for implementation of the program. All of the municipalities have the ability to charge fees to businesses to cover inspection costs. The cities' trash collection responsibilities, which include placement of trash receptacles, are also paid for through existing fees. Moreover, the trash receptacle requirements that are the subject of the Test Claims are limited to public transit stops. Any additional costs associated with trash removal at these transit stops, a service cities already provide, could be borne by transit users through higher transit fees.

The cities and the County have failed to show that they must use tax monies to pay for these requirements. It is also clear that any "additional" costs that could conceivably be considered additional to the federal mandate would be *de minimis* and would not require payment from tax monies. For example, it is assumed that most cities routinely place trash receptacles at bus stops. In fact, the claimants make no allegation of any increased costs from this requirement;

[94] Letter dated June 17, 1993, from Robert P. Ghirelli to Thomas A. Tidemanson. Attachment 34.

[95] The issue of proposals by the permittees is discussed below.

[96] See, e.g. U.S. EPA document on Evaluating the Effectiveness of Municipal Storm Water Programs.

instead, they conflate any costs by listing "estimated trash receptacles, catch basin, and/or other treatment devices – capital and installation costs."[97]

The Local Governments Applied for the Permit and Proposed the Programs

The County and cities bound by the permit requested the mandate and the Permit allows alternatives in the manner of compliance. The County and cities jointly applied for the permit and proposed a management plan that is consistent with many of the requirements in the permit. Relevant portions of the Report of Waste Discharge that the County submitted are attached. The entire Report of Waste Discharge is available upon request. It is clear from these attachments, which include not only proposed programs but a draft permit, that many of the programs subject to the claims—including regulation of industrial and commercial sites, and specifically restaurants and automobile-service businesses—were proposed in the permittees' original plan submitted in February 2001. For example, the permittees proposed that the permit prohibit discharge of wash waters from gas stations, auto repair garages, and other automotive service facilities.[98] In addition, the permittees proposed a requirement that they "visit" automotive service and food service facilities every two years, and that they "revisit" facilities and take enforcement action if there is evidence of continuing illicit discharges.[99] The permittees submitted a lengthy list of proposed BMPs that site inspectors should look for during site visits.[100] Whether the term is "site visit" or "inspection," it is clear that the permittees proposed the mandate. The permittees also proposed that the permit mandate trash collection alongside, or in improved open channels.[101]

The permit was issued upon the joint request of all of the petitioners, with the County acting as the lead. Where the County and 84 cities apply for a single area-wide permit, the permit writer obviously is not required to write separate requirements for each entity and the County may be presumed to speak for the whole.

The Programs are not Mandates Peculiar to Government

Finally, the NPDES permit program, and the storm water requirements specifically, are not peculiar to local government. Industrial and construction facilities must also obtain NPDES storm water permits. These permits, however, are more stringent than municipal permits because the federal law requires that they meet more stringent technology-based standards and that they attain strict compliance with water quality standards in receiving waters.[102] As such, the only difference between the municipal storm water program and other storm water requirements is that federal law provides separate, more lax requirements for the municipalities.

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[97] Claim 03-TC-21, at p.2.

[98] Report of Waste Discharge at R0000026.

[99] *Id.* at R0000031.

[100] *Id.* at R0000273 – R0000360.

[101] *Id.* at R0000036.

[102] *Defenders of Wildlife v. Browner, supra.*

The Water Boards' implementation of federal law reflects this dichotomy and the fact that the municipalities receive their own permit, as required by CWA section 402(p)(3)(B) does not change the fact that storm water permit requirements are not peculiar to local government.

It is the municipalities who operate MS4s and who discharge pollutants to surface waters. It is the municipalities who must obtain permits and comply with those permits. Similarly, industrial dischargers who discharge storm water runoff to waters of the United States must also obtain and comply with permits. The state is not the discharger (except in those situations where state agencies operate MS4s, such as the Department of Transportation, where they are themselves subject to permits), and the state is not uniquely shifting a new program or higher level of service onto municipalities.[103]

Discussion of Test Claims that were not Substantiated

Development Construction Program (Part 4.E)

Test claim 03-TC-21 claims subvention of costs for the development construction program. It did not, however, include any substantiation of this claim.

Public Agency Activities Program (Part 4.F.5 and 6)

Test claims 03-TC-04, 03-TC-20, and 03-TC-21 claim subvention for portions of the public agency activities program. Test claim 03-TC-21 claims subvention for the all requirements concerning storm drain operation and streets and roads maintenance, while test claims 03-TC-04 and 03-TC-20 are limited to the requirements to place trash receptacles at transit stops and to maintain these receptacles. Test claim 03-TC-21, however, did not include any substantiation of this claim, apart from the discussion of trash receptacles, above.

Discharge Prohibitions and Receiving Water Limitations (Parts 1 and 2)

Test claim 03-TC-21 challenges the discharges prohibitions and receiving water limitations in the Permit. Parts 1 and 2 contain the basic prohibitions and requirements for attaining compliance with water quality standards through an iterative process. The whole of the claim is that, "if enforced and read to literarily [*sic*] to require the City to prevent any and all exceedances from urban runoff of all water quality standards or water quality objectives" the costs would be excessive. The court in *County of Los Angeles, supra*, rejected this exaggeration of the permit's terms and found the requirements to be entirely reasonable. In addition, the *Rancho Cucamonga* and *Building Industry Association* both upheld identical provisions and found them to be reasonable and to be consistent with the minimum federal standard of MEP.

[103] The State Water Board issues a separate permit to the Department of Transportation, for both its municipal activities (roads and freeways) and its industrial facilities (construction and maintenance yards). The permit is available at http://www.waterboards.ca.gov/stormwtr/docs/caltrans/caltranspmt.pdf.

Conclusion

For all the reasons set forth above, the Test Claims must be dismissed. The Permit requirements have already been upheld by the courts as reflecting the federal Clean Water Act's requirements for municipal storm water permitting. The permit in its entirety, including the Test Claim provisions, reflects the federally mandated, federal minimum standard of reducing pollutants to the "maximum extent practicable." Further, the cities can pay for any costs associated with the requirements by levying service charges or fees. Finally, to the extent that any portion of the claims would otherwise qualify for subvention, they are *de minimis* and therefore do not warrant subvention.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on April 18, 2008, at Sacramento, California.

Sincerely,

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Continued on next page

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PROOF OF SERVICE

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

LETTER TO COMMISSION ON STATE MANDATES DATED APRIL 18, 2008, REGARDING STORM WATER POLLUTION CONTROL REQUIREMENTS, FILES 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21: RESPONSE TO TEST CLAIMS 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21

	BY FACSIMILE: I caused a true and correct copy of the document to be transmitted by a facsimile machine compliant with rule 2003 of the California Rules of Court to the offices of the addresses at the telephone numbers shown on the service list.
X	**BY 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.
X	**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.

By placing a true copy thereof in separate, sealed envelopes addressed to:

See Exhibit A attached hereto and made a part hereof.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on April 18, 2008, at Sacramento, California.

Jeannette L. Bashaw

JEANNETTE L. BASHAW

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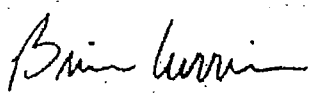
EXHIBIT "12"

Storm Water Panel Recommendations to the
California State Water Resources Control Board

The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities

June 19, 2006

Panelists:



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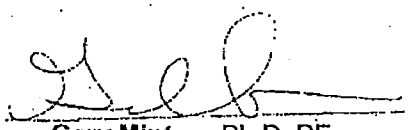

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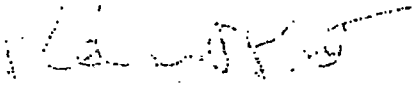

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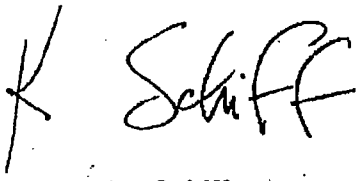

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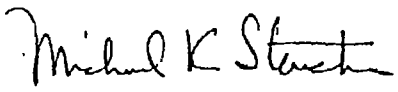

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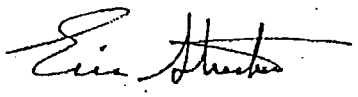
"The opinions I express are my own and do not represent official US EPA policy."

Eric Strassler
Senior Policy Analyst, Office of Water,
US USEPA
Washington, District of Columbia



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Background

The NPDES storm water permit program came into being as a result of the 1987 amendments to the federal Clean Water Act and its implementing regulations. In California, the State Water Resources Control Board (State Water Board) and the nine Regional Water Quality Control Boards (Regional Water Boards) implement the NPDES storm water program.

The Clean Water Act amendments, Section 402(p) require that discharges of storm water from large and medium municipal separate storm sewer systems (MS4s) and discharges of storm water associated with industrial activities be in compliance with NPDES permits. MS4 permits require that the discharge of pollutants be reduced to the maximum extent practicable (MEP). Discharges associated with industrial activities, were required to meet the technology based standards of best available technology economically achievable (BAT) or best conventional pollutant control technology (BCT), and to meet water quality standards.

In 1990, USEPA promulgated regulations (40 CFR Part 122.26) for the NPDES storm water program. These regulations clarified what industrial activities were subject to storm water permit. Construction that resulted in a land disturbance of five or more acres was included as an industrial activity subject to NPDES storm water permit. The regulations also delineated what was to be included in permit applications and the programmatic elements that were to be in a permit and storm water management program for MS4s or storm water pollution prevention plan for industrial activities.

California's Permits

In 1990, MS4 permits were issued to Santa Clara County by the San Francisco Bay Regional Water Board and to Los Angeles County by the Los Angeles Regional Water Board. These permits were appealed to the State Water Board. The primary basis of the appeals was the lack of numeric limits in the permits. The entities that brought the appeals argued that the permits needed to include numeric limits, as the discharges of pollutants must not only be reduced to the MEP, but they must also meet water quality standards. The State Water Board, in hearing these appeals, determined that it was not feasible at the time to develop numeric limits for MS4 permits, and that water quality standards could and should be achieved through the implementation of best management practices (BMPs). Since this ruling, the Regional Water Boards have typically not included numeric limits in storm water permits.

The State Water Board has adopted NPDES General Permits for the Discharge of Storm Water Associated with Industrial Activities and for the Discharge of Storm Water Associated with Construction Activities. Both of these permits contain language stating that developing numeric limitations is infeasible.

Court Decisions

In addition to these actions on MS4 permits at the State level, there have been a number of rulings from the federal courts regarding the NPDES Storm Water program.

One of the most significant is from the federal court, 9th District Court of Appeals from 1999. In its published opinion on Defenders of Wildlife vs. Browner, the Court held that MS4 permits need not require strict compliance with water quality standards. Rather, compliance was to be based upon the MEP standard. However, the permitting authority (the State Water Board/Regional Water Boards for California) could at their option require compliance with standards. The State Water Board through the permit and appeals process has in fact required that the discharges from MS4s meet water quality standards, but has stated that compliance with numeric standards can be achieved through the implementation of BMPs in an iterative fashion.

The Browner decision also found that discharges of storm water associated with industrial activities must be in strict compliance with water quality standards.

In 2004 the State Water Board conducted a public hearing on a draft General Industrial Storm Water permit. This draft permit met with significant opposition from non-government or non-industrial organizations (NGOs) due to the absence of numeric limits. Staff revised the draft permit to include the benchmarks contained in the USEPA multi-sector general permit. This change resulted in strong opposition from the regulated community.

The concerns that have been raised by the NGOs and the regulated community are similar, though they do not necessarily agree on the best way to address them. Both believe that permitting has become overly complex, and that it is extremely difficult, if not impossible to objectively determine if a facility, operation or municipality is in compliance with its permit requirements. The NGOs argue that requiring storm water permittees to comply with numeric effluent limits will result in an easier way to measure compliance. The regulated community agrees, to a degree, but they argue that it is not simply a matter of selecting a number that is suitable for a POTW or industrial waste discharge. Due to the unique nature of storm events and storm water discharges, any numeric limit that is placed in a storm water permit must take into consideration the episodic nature of storm events and be truly representative of storm water discharges. In addition, the regulated community has argued that there are going to be pollutants in storm water discharges that did not originate in the MS4 (run on) or that they do not have the means to control, and therefore should be given special consideration.

In response to these arguments, State Water Board directed staff to convene a panel of storm water experts to examine the feasibility of developing numeric

limits for storm water permits. Specifically, this panel of experts was asked to consider the following:

> "Is it technically feasible to establish numeric effluent limitations, or some other quantifiable limit, for inclusion in storm water permits? How would such limitations or criteria be established, and what information and data would be required?"
>
> "The answers should address industrial general permits, construction general permits, and area-wide municipal permits. The answers should also address both technology-based limitations or criteria and water quality-based limitations or criteria. In evaluating establishment of any objective criteria, the panel should address all of the following:
>
> (1) The ability of the State Water Board to establish appropriate objective limitations or criteria; (2) how compliance determinations would be made; (3) the ability of dischargers and inspectors to monitor for compliance; and (4) the technical and financial ability of dischargers to comply with the limitations or criteria."

Staff invited 10 individuals from the academic and scientific community to participate on the panel. Of the 10, eight agreed to participate. These eight met in a public session on September 14, 2005 and heard presentations from the regulated and NGO communities. They also heard comments from the public at large. They met again on September 15, 2005 to discuss the public comments and to begin to formulate a response. It was also decided at this meeting that they would form sub-committees to address municipal (MS4), industrial and construction discharges separately. These sub-committees worked on drafts statements for each of these, circulating them over the course of a number of months.

The panel met again in private session on April 3 and 4, 2006. The purpose of these meetings was to address unresolved issues and to develop the final response to the State Water Board. It was also decided to combine the three working statements into one Statement of Findings. The following discussion is the panel's findings and is broken into three program element areas: municipal, construction, and industrial.

Panel's Findings on Feasibility of Numeric Effluent Limits Applicable to Municipal Activities

Municipal Observations

1. The current practice for permitting, designing, and maintaining municipal stormwater treatment facilities (called BMPs herein) on the urban landscape does not lend itself to reliable and efficient performance of the BMPs because:

   - Permitting agencies, including EPA, States, and local governments, have rarely developed BMP design requirements that consider the pollutants and/or parameters of concern, the form(s) that the pollutants or parameters are in, the hydrologic and hydraulic nature of how they pollutants and flow arrive, and then the resulting unit processes (treatment and/or flow management processes) that would be required to address these pollutants or parameters.
   - The permitting agencies generally are not accountable for the performance of the BMP, and thus give much leeway to the developer with respect to the type of BMPs to be constructed, and to the details of the design, although some states do have detailed design standards and have conducted performance tests to identify acceptable devices for their area.
   - The developer is not responsible in most all cases for the performance of the BMP, so the treatment facilities are designed to minimize the cost and/or area of the facility and/or ease of permitting, not maximize the pollutant removal efficiency and/or flow management of the BMP
   - Because BMPs are not held to any, or very few, long-term performance criteria, they are typically not maintained except for aesthetic purposes. Very few stormwater agencies are responsible for BMP maintenance on private property, and public facilities are maintained mostly in response to clogging and/or resultant drainage or aesthetic problems. Even for stormwater agency facilities, maintenance is often limited.

2. The principal reasons for the failure of BMP performance is improper BMP selection, design and/or lack of maintenance.

   - The California BMP Handbooks and other local requirements leave too much of the BMP selection and design to the discretion of the designer, and thus do not address many if not all of the receiving water quality issues

- BMPs need to be *designed to facilitate maintenance*; this is rarely done because it costs the developer money and the BMP designer is rarely responsible for the maintenance.

- Given the amount of debris in urban runoff, and the fact that the hydraulic capacity of many BMPs may be exceeded several to many times per year, BMPs require more maintenance than other types of stormwater control facilities. Since urban BMP maintenance is generally left to untrained homeowner associations and maintenance personnel for commercial properties, inadequate maintenance is a near certainty. Even stormwater agencies often do not have and/or apply the resources necessary to maintain agency owned BMPs.

3. Improvements in the design of municipal BMPs, including residential and commercial as well as municipally owned facilities are necessary to ensure better performance (i.e. sizing, geometry, inlet and outlet design, etc.) and to specifically target receiving water quality issues.

<u>The Problem with Existing Effluent Limit Approaches</u>

Effluent limit approaches usually focus only on conventional water quality constituents that may not be solely or at all responsible for the receiving water beneficial use impairments in urban receiving waters. The important stressors that affect many use impairments can include one or more of the following and may vary in importance from system to system:

- The effect of increased flows and/or volumes (i.e. hydromodification) that can lead to stream channel erosion/sedimentation with resulting habitat destruction

- Sediment contamination (such as enrichment of urban stream sediments with fine-grained heavily polluted particulates; large organic debris masses causing low sediment DO; settled bacteria causing large bacteria gradients with sediment depth etc.)

- Impaired aesthetic value (caused by gross floatables, noxious sediments, etc.)

- Unsafe conditions (caused by dangerous debris, highly fluctuating stream flows and stages, etc.)

- Dissolved and suspended pollutants that are bioavailable in the water column and/or result in downstream sediment contamination

- Elevated temperatures from urban heating effects on runoff and on open conveyances and permanent pool BMPs

It is very difficult to determine specific causative agents or the level of control needed, for a specific beneficial use impairment in a receiving water body. The *Stormwater Effects Handbook: A Tool Box for Watershed Managers, Scientists, and Engineers* (Burton, G.A. Jr., and R. Pitt, ISBN 0-87371-924-7. CRC Press, Inc., Boca Raton, FL. 2002. 911 pages) was written to be used as a guide for stormwater managers to identify their local receiving water problems and to assist in identifying the causative factors. The methods described would need to be applied to a specific area or region to obtain an understanding of local conditions and problems. Although expensive, comprehensive investigations such as these should be considered an investment to help minimize wasteful expenditures due to the application of inappropriate control practices in a watershed.

Monitoring for enforcement of numeric effluent limits would also be challenging. While spot checks could be made at some of the many outfalls in an area, there is wide variation in stormwater quality from place to place, facility to facility, and storm to storm. Coefficients of variation approaching 1 or higher are not uncommon and there are few factors that can be used to significantly reduce this variation. Analysis of the National Stormwater Quality Database indicates that geographical location and land use are the most important factors affecting stormwater quality for most constituents. Some are also affected by the antecedent dry period before the rain and more highly developed watersheds (containing large fractions of impervious areas) often show elevated "first-flush" concentrations in the first portion of the storms for some, but not all pollutants. Since the storm-to-storm variation at any outfall can be high, it may be unreasonable to expect all events to be below a numeric value. In a similar circumstance, there are a number of storms each year that are sufficiently large in volume and/or intensity, to exceed the design capacity volume or flow rates of most BMPs. Assessing compliance during these larger events represents yet another challenge to regulators and the regulated community.

Technical Issues

Even for conventional pollutants, there presently is no protocol that enables an engineer to design with certainty a BMP that will produce a desired outflow concentration for a constituent of concern. A possible exception is removal of Total Suspended Solids in extended detention basins, and some types of media filters. The typical approach for evaluating BMP pollutant removal efficiency has been *percent removal*; but observed removal efficiencies vary greatly from facility to facility and it has been demonstrated that percent removal varies directly with the inflow concentration.

Few, if any, BMPs are designed using the first principles laws of physics, chemistry and/or biology for pollutant removal and/or flow-duration control. It will

take a substantial research effort, including data gathering on well-designed BMPs, to develop design criteria for the removal of pollutants with confidence intervals that enable us to make reliable estimates of the median and variance of the effluent concentrations to be expected from the various types of BMPs. Until this is done, it will be very difficult to assign legally enforceable numerical effluent limitations to any particular BMP.

Drawing upon the body of knowledge that currently exists regarding pollutant removal efficiency, it is possible to estimate mean effluent concentrations and variances for a number of constituents for different types of BMPs, albeit not in a legally enforceable sense. Effluent concentration distributions for a number of BMPs are available in the International BMP Database (www.bmpdatabase.org) from more then 250 studies throughout the US. The following outlines key issues that have been identified regarding the technical feasibility of setting objective criteria for both existing areas and new or redeveloping areas:

- Effluent concentration estimates could be made for a given constituent and a particular BMP from a larger number of BMPs than available in the BMP Database using literature values of percent removal and local or national data on stormwater runoff EMC data. However, the results from this work would be significantly less reliable then the BMP Database data as it could be biased if the influent concentrations for the studied BMP types did not match general urban runoff.
- Designing the facility more rigorously with respect to the physical, chemical and biological processes (e.g. unit processes) that are active in the BMP would give confidence that the BMP would perform at least as well, if not better than the average performance determined from the literature. A WEF/ASCE task force is currently updating their Urban Runoff Quality Management Manual of Practice; design guidance of BMPS will make better use of the physical, chemical, and biologic processes taking place in the BMP before, during and after a storm event. This manual will build upon recent research efforts employing a unit process based approach for BMP design and selection. These research efforts were supported by the Water Environment Research Foundation (WERF) and the National Cooperative Highway Research Program (NCHRP).
- A BMP *designed* and *constructed* according to a set of criteria described above, could be ***presumed*** to deliver an effluent with a mean constituent concentration and variance similar to the performance numbers developed from the literature ***if it is properly maintained***. Enforcement would comprise periodic inspection of the facility using a checklist of items to be inspected. While not an effluent limit, this seems practical and quantifiable.

- Most all existing development rely on non-structural control measures, making it difficult, if not impossible to set numeric effluent limits for these areas because little is known about the quantity and quality performance of non-structural controls. However, certain development characteristics in some existing development areas that minimize the amounts of impervious areas in a drainage area have been shown to be quite effective in reducing adverse hydromodifications in the receiving waters, and should be encouraged.

Municipal Recommendations

It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges. However, it is possible to select and design them much more rigorously with respect to the physical, chemical and/or biological processes that take place within them, providing more confidence that the estimated mean concentrations of constituents in the effluents will be close to the design target. Moreover, with this more rigorous design and an enforceable maintenance program, it can be presumed that these facilities will continue to deliver effluent qualities that are reasonably close to the design effluent concentrations over the life of the facility. And if proper maintenance is performed (enforced), the facilities can be expected to perform throughout their design life at the same or better efficiency as when newly constructed. Depending on the pollutants and parameters of concern and BMP choices, it is very likely that treatment trains of structural BMPs will be required in many cases.

For catchments not treated by a structural or treatment BMP, setting a numeric effluent limit is basically not possible. However, the approach of setting an "upset" value, which is clearly above the normal observed variability, may be an interim approach that would allow "bad actor" catchments to receive additional attention. For the purposes of this document, we are calling this "upset" value an ***Action Level*** because the water quality discharged from such locations are enough of a concern that most all could agree that some action should be taken. Action Levels could be developed using at least three different approaches. These approaches include: 1) consensus based approach; 2) ranked percentile distributions; 3) statistically-based population parameters.

The consensus-based approach would be to agree upon effluent concentrations that all parties feel are not acceptable. For example, most parties would likely agree that an average concentration of dissolved copper above 100 ug/l from an urban catchment would not be acceptable. This would be an Action Level value that would trigger an appropriate management response. This approach may not directly address the issue of establishing numeric effluent criteria and achieving desired effluent quality, but the consensus-based approach would ensure that the "bad actor" watersheds received needed attention.

The ranked percentile approach (also a statistical approach) relies on the average cumulative distribution of water quality data for each constituent developed from many water quality samples taken for many events at many locations. The Action Level would then be defined as those concentrations that consistently exceed some percentage of all water quality events (i.e. the 90th percentile). In this case, action would be required at those locations that were consistently in the outer limit (i.e. uppermost 10th percentile) of the distribution of observed effluent qualities from urban runoff.

The statistically based population approach would once again rely on the average distribution of measured water quality values developed from many water quality samples taken for many events at many locations. In this case, however, the Action Level would be defined by the central tendency and variance estimates from the population of data. For example, the Action Level could be set as two standard deviations above the mean, i.e. if measured concentrations are consistently higher than two standard deviations above the mean, an Action situation would be triggered. Other population based estimators of central tendency could be used (i.e. geomean, median, etc.) or estimates of variance (i.e. prediction intervals, etc.). Regardless of which population-based estimators are used (or percentile from above), the idea would be to identify the [statistically-derived] point at which managers feel concentrations are significantly beyond the norm.

The ranked percentile and population-based estimators are highly dependent upon the data sets used to calculate them. There are a number of options that were considered by the Panel, but ultimately they were broken into two distinct categories. The first category was for new development/redevelopment and the second was for built out urban environments. For new development/redevelopment, the panel recommends using the data set associated with the international BMP database (www.bmpdatabase.org). This data set represents the variety of water quality from the most up to date, best conducted and reported BMP studies. The database effort does not limit itself to BMPs types or designs; it focuses on technically sound monitoring studies and reporting information. Therefore there could be some screening of studies to those thought to be well designed BMPs to then develop effluent quality distributions and statistics on performance. Certainly, there is no expectation that urban stormwater managers could improve water quality beyond what would be reported in this dataset.

In built-out urbanized environments, there are greater opportunities to examine various data sets for setting Action Levels. For the Panel, these opportunities were a function of spatial scale. The first opportunity would be at the local scale. Some urban stormwater monitoring programs have been in existence for 10 years or longer. Examples include the Los Angeles County Department of Public Works, City of Sacramento, Orange County, San Diego County, amongst others. Using permit specific data sets may make sense if issues of climatic variability or

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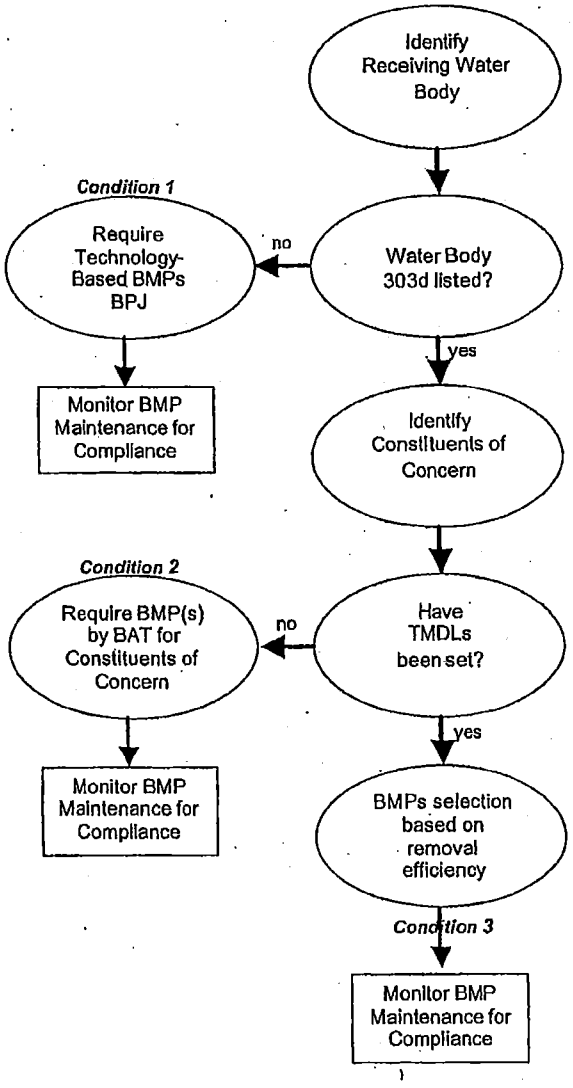
localized geomorphology are important. The next scale would be to combine these California municipal permit monitoring data sets, especially if lack of data for specific constituents of concern in any one location or region is an important issue. The largest scale would be the National Stormwater Quality Database (NSQD) from municipal monitoring programs across the nation (http://unix.eng.ua.edu/~rpitt/Research/ms4/Paper/Mainms4paper.html). This data set includes monitoring data from urban areas such as residential, commercial, industrial, freeway, institutional, and mixed use which is especially useful if small sample size limits the use of local data. One advantage of using smaller (and local), rather than larger, spatial scales is the ability to update data sets for revising Action Levels. The NSQD may not be updated for quite some time, but local data sets can be updated periodically (annual amendments, 10-year rolling averages, every permit cycle, etc). Ultimately, Action Levels would be expected to become lower as outliers are removed from data sets and as improved water quality data are collected through targeted management actions. It may be appropriate to eliminate older data sets as well over time.

One element to consider when comparing monitoring data to Action Levels is the concept of a design volume for water quality (also known as the Water Quality Capture Volume – WQCV, WEF #23 and ASCE publication #87, 1998) or a design flow rate. The WERF and NCHRP efforts mentioned above include recommendations regarding design sizing using continuous simulation techniques for both volume-based and rate-based BMPs. The Panel acknowledged that several to more times each year, the runoff volume or flow rate from a storm will exceed the design volume or rate capacity of the BMP. Stormwater agencies should not be held accountable for pollutant removal from storms beyond the size for which a BMP is designed.

A Technically Sound and Pragmatically Enforceable BMP Design and the Permit Process

The diagram below provides guidance for determining what BMPs are required in a newly developing watershed. Under ***Condition 1*** where the receiving water quality is not impaired, determination of the appropriate BMP would be by Best Professional Judgment (BPJ). Any of the "state approved" BMPs could be used. The permittee would be required to design the treatment facilities in accordance with the California BMP Handbook, ***which should be revised as a criteria manual***, rather than a guidance manual *and include more physiobiochemically based design criteria designed to address an agreed upon set of "Pollutants and Parameters of Concern" based upon knowledge of the pollutants and parameters that generally are of concern in urban runoff, with perhaps some differences on receiving water type.*



A detailed maintenance plan and schedule would be required that includes:

1. Actions to be taken and when,
2. Designation of the party legally accountable for the facility maintenance, and
3. A whole-life cost estimate for the facility that include maintenance.

Compliance with the design criteria and the maintenance plan and schedule would constitute achievement of the design effluent criteria. In the event of failure by the responsible party to perform the required maintenance and/or to perform it to the required level of quality, the whole-life cost schedule could be used to determine the consideration that the defaulting responsible party would pay to the new responsible party that takes over the maintenance.

Under ***Condition 2*** where water quality impairment exists but a TMDL has not yet been performed, BAT would be required, which means applying the BMPs that can practicably (to be defined) be employed to produce the lowest effluent concentrations (e.g. the lower grouping of BMP effluent quality) of the constituent(s) of concern. Several types of BMPs may fulfill the BAT standard if these BMPs have performance that is not statistically or practically differentiable. This case will allow flexibility in choosing among that sets of BMPs that demonstrate superior performance. As in the case of *Condition 1*, compliance with the maintenance plan and schedule would constitute compliance with the design effluent criteria.

Condition 3, which occurs when a TMDL has been specified for the BMP or for the tributary watershed, may (or may not be) actually be less stringent that *Condition 2* if the TMDL allows for a higher effluent concentration of the constituents of concern than that discharged by a BAT facility. The same requirements would apply for the design criteria, and the maintenance plan and schedule would constitute the guarantee of design effluent concentrations from the BMP.

Strategies for Stormwater Management to Protect Urban Water Environments

Stormwater effluent limits can become very complex if all the issues are to be directly addressed. If complex, they are not likely to be workable. However, too much simplification can also lead to ineffective programs. Therefore, a reasonable first step is needed, based on local data. Compliance monitoring (e.g. BMP inspections) is also needed to ensure that the goals are likely to be met. Most likely goals will have to be revised over time. The overall strategy should contain these objectives:

- Effectiveness
- Affordability
- Enforceability, and
- Flexibility

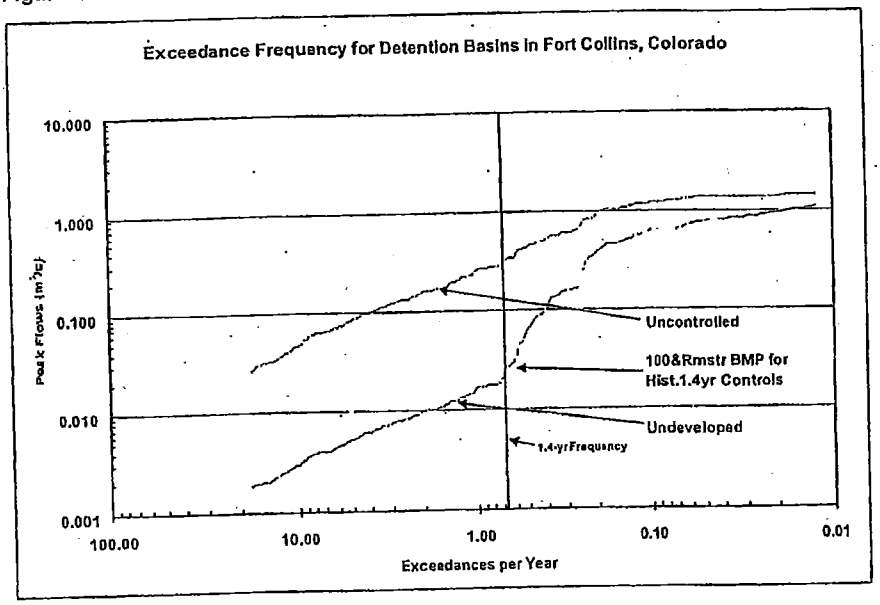
Table 1 - Effects of Urbanization on Hydrologic Regime in Colorado and Georgia

Location	Annual Precipitation	Mean Storm Depth*	Runoff Events per Year		Annual Runoff (mm)	
	Millimeters per Year	Millimeters	Undeveloped	Developed	Undeveloped	Developed
Fort Collins, CO	335	11	27	47	12	124
Atlanta, GA	1262	18	48	78	36	500

* Values obtained from Fig. 5.3 ASCE MOP (1998)

Runoff volume and peak flows have been recognized as two of the most important stormwater factors needing control. **Table 1** (Roesner and Nehrke) shows that urbanization dramatically changes the hydrologic regime of urban waterways. In both Atlanta (a higher rainfall area) and Fort Collins (a semiarid area), the number of runoff events per year on developed land increases by a factor of 2 times the number of runoff events that occur in the undeveloped state; and the runoff volume increases by a factor of ten! The peak flows also increase dramatically as shown in **Figure 1** below, but as also seen on the figure, the peak flow frequency curve can be adjusted back to its predevelopment character by the proper application of runoff controls. But while these controls restore the peak flow frequency to its natural regime, the duration of flows at the low end (but still channel "working") of the flow frequency curve is greatly increased, which raises potential for channel scour in stream channels with erosive soils.

Figure 1 - Exceedance Frequencies for Detention Basins in Fort Collins, Colorado



Since many of the stormwater pollutants are strongly associated with particulates, stormwater particulate control is also often a component of stormwater control programs. Therefore, an effective stormwater control strategy that could be encouraged is a combination of several practices, listed below in the order of increasing events:

- On-site stormwater reuse, evapotranspiration and infiltration for the smallest storms and up to specific targeted events, depending on site limitations (soil characteristics and groundwater contamination potential) (usually by conservation design emphasizing infiltration, disconnecting paved areas, etc.)
- Treatment of excess runoff that cannot be infiltrated, again, up to a specific targeted runoff volume (usually by sedimentation or filtration) For pollutants of concern, it should be demonstrated that the BMP(s) need to include the physical, biological, and/or chemical treatment processes that address the typical pollutants of concern and/or specific pollutants in the case of 303D listed water bodies or those with established TMDLs.
- Control of energy discharges for the channel forming events (such as through storage-release, focusing on flow-duration analyses and peak flow frequency analyses). To be most effective, this should to be completed under a watershed management plan and not site-by-site.
- Provide safe drainage for damaging events (conventional drainage, plus secondary drainage systems)
- In watersheds that are already experiencing damaging flow impacts to streams, it could be in many circumstances much more cost-effective (and effective period) to develop through a watershed plan a natural stream stabilization approach that could address both the existing development and the remaining smaller infill or otherwise smaller new development. In these cases, requiring the remaining new development to implement flow-duration control would not solve the issue in a measurable way and resources would be better spent restoring the functions of the creek with instream enhancements.

Panel's Findings on Feasibility of Numeric Effluent Limits Applicable to Construction Activities

Construction Observations

Regarding the question of the technical feasibility of Numeric Limits for stormwater discharges from construction activities, the Panel bases its recommendations on the following observations.

1. Limited field studies indicate that traditional erosion and sediment controls are highly variable in performance, resulting in highly variable turbidity levels in the site discharge.
2. Site-to-site variability in runoff turbidity from undeveloped sites can also be quite large in many areas of California, particularly in more arid regions with less natural vegetative cover and steep slopes.
3. Active treatment technologies involving the use of polymers with relatively large storage systems now exist that can provide much more consistent and very low discharge turbidity. However, these technologies have as yet only been applied to larger construction sites, generally five acres or greater. Furthermore, toxicity has been observed at some locations, although at the vast majority of sites, toxicity has not occurred. There is also the potential for an accidental large release of such chemicals with their use
4. To date most of the construction permits have focused on TSS and turbidity, but have not addressed other, potentially significant pollutants such as phosphorus and an assortment of chemicals used at construction sites.
5. Currently, there is no required training or certification program for contractors, preparers of soil erosion and sediment control Stormwater Pollution Prevention Plans, or field inspectors.
6. The quality of stormwater discharges from construction sites that effectively employ BMPs likely varies due to site conditions such as climate, soil, and topography.
7. The States of Oregon and Washington have recently adopted similar concepts to the Action Levels described earlier.

Construction Recommendations

It is the consensus of the Panel that active treatment technologies make Numeric Limits technically feasible for pollutants commonly associated with stormwater discharges from construction sites (e.g. TSS and turbidity) for larger construction sites. Technical practicalities and cost-effectiveness may make these technologies less feasible for smaller sites, including small drainages within a larger site, as these technologies have seen limited use at small construction sites. If chemical addition is not permitted, then Numeric Limits are not likely feasible. Whether the use of Numeric Limits is prudent, practical or necessary to more effectively achieve nonpoint pollution control is a separate question that

needs to be answered, but is outside the scope of this Panel. However, Action Levels are likely to be more commonly feasible. For small sites or smaller drainages within larger sites, or where chemicals cannot be used, the Panel recommends that Action Levels be specified.

Advanced systems lend themselves to Numeric Limits because of historically reliable treatment, while non-active controls are less predictable. Advanced systems have been in use in some form since the mid-1990s. At this time, there are two general types of systems. With each general system the stormwater is retained on-site, treated, and released more slowly. One system employs polymer coagulation and sedimentation. The second system employs polymer coagulation with direct filtration. Both types of systems are considered reliable, and can consistently produce a discharge less than 10 NTU. These systems have been used successfully at many sites in several states since 1995 to reduce turbidity to very low levels. Non-active erosion and sediment control BMPs, while effective when applied and adequately maintained, produce more highly variable in effluent quality, making setting Numeric Limits difficult, if not impossible.

An important consideration in setting Numeric Limits or Action Levels is that in many locations in California the natural background turbidity and/or TSS levels in stormwater runoff are quite high. This is particularly true in semi-arid or arid regions, which tend to have less vegetative cover. For example, natural runoff concentrations in Emerald Creek, on the Newport Coast, above any developed areas have been over 5,000 mg/l during runoff events. The Los Angeles County Monitoring Data sets included an open land use watershed that also showed TSS levels significantly above other types of urban land uses. Therefore, it is important to consider natural background levels of turbidity or TSS in setting Numerical Limits or Action Levels for construction activities. The difficulty in determining natural background concentrations/levels for all areas of the state could make the setting of Numeric Limits or Action Levels impractical from an agency resource perspective.

While the Panel concludes that Numeric Limits or Action Levels are technically feasible, the Panel has several reservations and concerns.

1. The active treatment systems have generally been employed on sites five acres or larger. While the systems are technically feasible for sites of any size, including sites or drainages as small as an acre or less, the cost may be prohibitive. The cost-effectiveness of active treatment systems is greatly enhanced for large drainage areas, at which construction occurs for an extended period of time, over one or more wet season. There is also a more "passive" active system that is employed in New Zealand that uses captured rainfall to release the chemical into flows entering a detention system that requires less instrumentation and flow measurement infrastructure. Even more passive systems such as the use of polymer

logs and filter bags are currently under development for small sites. Regardless, the Panel recommends that the Board give particular attention to improving the application of cost-effective source controls to small construction sites.

2. In considering widespread use of active treatment systems, full consideration must be given to whether issues related to toxicity or other environmental effects of the use of chemicals has been fully answered. Consideration should be given to longer-term effects of chemical use, including operational and equipment failures or other accidental excess releases.
3. Consideration should be given to the seasonality of applying Numerical Limits. There may be sites where summer only construction that complies with Action Levels may be preferred to year-round that sites that include winter construction that complies with Numeric Limits. In such cases, applying Numeric Limits to summer construction may be a disincentive to scheduling active grading during dry periods. Allowing summer only construction sites to comply with action levels would discourage winter construction activities.
4. Consideration should be given to whether Numeric Limits would apply to all construction sites or only those with significant disturbed soil areas (e.g. active grading, un-vegetated and/or un-stabilized soils). A site could meet certain conditions to be considered "Stabilized" for the runoff season.
5. Where Numeric Limits are not feasible or where they would not apply during designated seasons or site conditions, the Panel recommends that the Board consider the concept of Action Levels for sites where only traditional erosion and sediment controls are applied or construction sites that are considered "stabilized" for the runoff season. An Action Level indicates a failure of BMPs (within some storm size limits).
6. The Board should consider Numeric Limits or Action Levels for other pollutants of relevance to construction sites, but in particular pH. It is of particular concern where fresh concrete or wash water from cement mixers/equipment is exposed to stormwater.
7. The Board should consider the phased implementation of Numeric Limits and Action Levels, commensurate with the capacity of the dischargers and support industry to respond.
8. The Panel recommends that a Numeric Limit or Action Level should be compared to the average discharge concentration. The minimum number of individual samples required to represent the average discharge concentration for a storm will need to be defined.
9. The Board should set different Action Levels that consider the site's climate region, soil condition, and slopes, and natural background conditions (e.g. vegetative cover) as appropriate and as data is available. With active treatment systems, discharge quality is relatively independent of these conditions. In fact, active treatment systems could result in turbidity and TSS levels well below natural levels, which can also be a problem for receiving waters.

10. The Board should consider whether the Numeric Limits or Action Levels should differ between receiving waters that are water quality limited with respect to turbidity, sediment or other pollutants associated with construction, from those water bodies that are not water quality limited.
11. The Panel recommends that Numeric Limits and Action Levels not apply to storms of unusual event size and/or pattern (e.g. flood events). The determination of Water Quality Capture Volume should consider the differing climate regions to specify these events.
12. The Board should set Numeric Limits and Action Levels to encourage loading reductions as appropriate as opposed to only numeric concentrations. Examples include phased construction (e.g. limited exposed soil areas or their duration), infiltration, and spraying captured runoff in vegetated areas as means to reduce loading.
13. The Panel is concerned that the monitoring of discharges to meet either the Action Levels or Numeric Limits may be costly. The Panel recommends that the Board consider this aspect.

Panel's Findings on Feasibility of Numeric Effluent Limits Applicable to Industrial Activities

Industrial Observations

The Panel believes that Numeric Limits are feasible for some industrial categories. Industries have control over their facilities. They control access, construction practices, product substitution to affect pollution prevention and the types of treatment systems to be used to mitigate stormwater runoff. There are many treatment systems or prevention practices that have been in place for lengthy periods, extending back to the 1980s in many cases. For example, there is much known today about construction materials, such as roofing materials (roofing composition, gutters, paints and coatings, products that abrade or tend to create solids or litter, etc). Other examples include development of pervious surfaces, or infiltration methods.

The decision for the value of Numeric Limits should be made in one of two ways. When there is a TMDL that defines the permissible load for a watershed, the Numeric Limits should be set to meet the TMDL. Consideration must be given for both the pollutant concentration as well as the volume of runoff, since both contribute to the impacts that required the TMDL to be implemented.

When there is no TMDL, the Numeric Limits should be based upon sound and established practices for storm water pollution prevention and treatment, using an approach analogous to that used in the NPDES wastewater process in the 1970s. In this approach phased, Numeric Limits were first set that were based upon the use of best currently available technology, and permittees were given a defined period for compliance. Permits were established based upon industry types or categories, with the recognition that each industry has its own specific problems and financial viability.

To establish Numeric Limits for industrial sites requires a reliable database, describing current emissions by industry types or categories, and performance of existing BMPs. The current industrial permit has not produced such a database for most industrial categories because of inconsistencies in monitoring or compliance with monitoring requirements. The Board needs to reexamine the existing data sources, collect new data as required and for additional water quality parameters (the current permit requires only pH, conductivity, total suspended solids, and either total organic carbon or oil and grease) to establish practical and achievable Numeric Limits.

In cases where the industrial activity is similar to activities covered by the MS4 permit (roofs, parking lots, etc), the approach or limits for industries should be the same as for MS4 permittees. In cases where the industrial activity is similar to land disturbance activities (e.g. landfills, gravel mines, etc.), there exists data and design experience with runoff control, capture and advanced treatments systems (e.g. systems using polymer to enhance total suspended solids removal – see

the construction section) that may make Numeric Limits feasible for new facilities, and the approach and limits should be the same as for construction permittees. The same conditions and issues related to active treatment discussed in the construction section apply here.

In cases where there is less certainty in the data for both stormwater characterization or BMP performance to establish Numeric Limits, there maybe sufficient data to establish Action Levels. Action Levels set for industrial sites that discharge to MS4s should not exceed those set for MS4 permittees.

The Panel recognizes that existing and new facilities may have to be treated differently and recommends the approach in **Table 2.**

Table 2- Approach to Establish Numeric Limits or Action Levels at Existing or New Facilities

		Numeric Limits	Action Levels	Notes
Existing Facility	Indoor	No	Yes, similar to MS4	
	Outdoor	Yes if data are adequate for the specific industrial activity and BMP	Yes, using industrial database	Action Levels should approach MS4 action levels.
New Facility	Indoor	Yes – BMP Database		Technology based, similar to MS4 New Development
	Outdoor	No, unless sufficient data exist for the specific industrial activity and BMP	Yes when sufficient data are available	

Industrial Recommendations

The Panel has several reservations and concerns:

- The Panel recognizes the inadequacy of current monitoring data sets and recommends improved monitoring to collect data useful for establishing Numeric Limits and Action Levels.
- Required parameters for future monitoring should be consistent with the type of industrial activity instead of the current parameters (i.e., monitor for heavy metals when there is reasonable expectation that the industrial activity will cause greater heavy metals concentrations in the storm water).
- Insofar as possible, the Panel prefers the use of California data (or National data if it can be shown to be applicable to CA) in setting Numeric Limits and Action Levels.
- The Panel recognizes that economies of scale exist for large facilities and large groups of single facilities.
- Industrial facilities that do not discharge to MS4s should have to implement BMPs for their non-industrial exposure (e.g., parking lots, roof runoff) similar to commercial facilities in MS4 jurisdictions.
- Regardless of Action Levels or Numeric Limits, the permittees should implement a suite of minimum BMPs – good housekeeping, employee training, preventing materials from exposure to rain, etc.
- SIC categories are not a satisfactory way of identifying industrial activities at any given site. The Board should develop a better method of characterizing industrial activities that can impact storm water.
- The Panel recognizes this is a large task and recommends prioritizing the implementation of this approach to achieve the greatest reduction of pollutants statewide.
- Increasingly, a number of industries have moved industrial activities indoors, preventing storm water pollution. The Panel recognizes that these facilities should be granted some sort of regulatory relief from industrial Numeric Limits or action levels, but should still be required to comply with MS4 permit requirements.

The Panel recognizes the need to make progress in monitoring and reducing storm water discharge from industrial facilities, but urges the Board to consider the total economic impact and not unduly penalize California industries with respect to industries outside of California.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

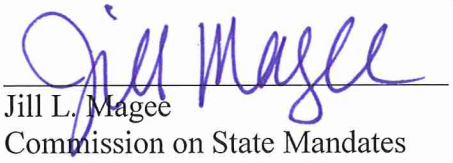
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On January 17, 2017, I served the:

> **Joint Test Claim Filing; Notice of Complete Joint Test Claim Filing and Schedule for Hearing**
> *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002*, 10-TC-11
> County of Orange, Orange County Flood Control District, Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, and San Juan Capistrano, Claimants

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 17, 2017 at Sacramento, California.



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Claim Number: 10-TC-11

Matter: California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002

Claimants: City of Dana Point
City of Laguna Hills
City of Laguna Niguel
City of Lake Forest
City of Mission Viejo
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